

CAN THE SYSTEM WORK?

Commencement address by Archibald Cox, Williston Professor of Law, Harvard Law School, delivered at Stanford University June 16, 1974.

I am very greatly honored by the invitation to join in your Commencement. Pleased also, but a little taken aback. Taken aback because of uncertainty about the function of a commencement address by a professor. If four or more years of professorial lectures have failed to do the trick, what can one more professor—dare I say, “even a Harvard professor”—add in 20 minutes?

Let me explain the origins of my talk.

Last October during the press conference which preceded my departure from Washington I was asked why I accepted the post of Special Prosecutor. I gave my explanation and then observed:

Besides, I have a sort of naive belief that right will prevail in the end.

Later a young woman at Columbia demanded to know the ground for this belief.

A little later President Lyman's invitation arrived, and it occurred to me that this might be a good occasion to explain my confidence that the little bit one can do in his own time makes it worth persevering in the effort.

Let us begin with the immediate and then gradually broaden the focus.

The immediate is Watergate. If one's attention becomes transfixed by the seamy side, he is likely to conclude that passion, arrogant grasping for power, cynicism and distrust have eroded self-government, while obstructionism and the misdeeds of lawyers are destroying confidence in the administration of justice. I am one of those who also sees at stake two ancient principles of liberty: 1) that the law applies to all men equally, the judges as well as the judged, the governors no less than the governed; 2) that the Executive, which means the President, be under the law. But there is another side to Watergate. It proved that the nation has a conscience. It is more important that our idealism is a live and vital force than to learn once again that some men have proved untrustworthy.

I would also mention that there is another side to government. Hugh Sloan of the Committee to Re-Elect the President was entirely wrong when he said:

If you go into politics, . . . then sooner or later you have to compromise. You either compromise or get out. It just, sooner or later, takes the edge off your values.

Hugh Sloan was wrong because he could not distinguish—or did not distinguish—political aims and political opinions from judgments of right and wrong, from the moral limitations whose observance is essential in the long-run legitimacy of political power. In the realm of policy one must often take half-a-loaf or even a quarter-loaf with a view to coming back for more tomorrow. Compromise is unavoidable if conflicting goals and rival interests in any free society are to be merged. This kind of compromise in the interests of the whole society requires no surrender of moral values. Anyone who has been in government knows many men and women, in offices both high and low, who faithfully observe the line between policy and moral principle; and by their conduct they gain both respect and power. In Leland Stanford's time the widest scope for the exercise of a man's vital powers lay in taming the wilderness, in developing America's riches, and in building financial and industrial empires. Today without a doubt it lies in government, because government, in our kind of country, is simply all of us trying to live together.

Let us broaden the focus slightly.

This June brings my 40th reunion, and I cannot help making a few random comparisons which I think meaningful. In 1934 Hitler's storm troopers were moving toward their zenith with brutality and oppression for all but the master race. The scourge of infantile paralysis still killed tens of thousands of children and doomed more to lives with crippled limbs. The minimum factory wage was not yet 25 cents an hour. There was no social security, no medicare. Men were supposed to be independent and self-reliant, but 20% of the work force, one out of five, were unemployed.

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Next came the civil rights revolution—again within the rule of law. On May 17 this year we celebrated the 20th anniversary of *Brown v. Board of Education*. After that State laws enforcing a caste system based upon race were invalidated, and enforcement gradually stopped. New doctrines were developed to extend the reach of the Equal Protection Clause. New federal statutes were enacted curtailing practices restricting equal voting rights, denying equal accommodations, denying equal employment opportunities, and assuring equal housing.

The application of the equal protection clause to the black people led to revived concern with other inequalities in our national life, especially discrimination based upon sex.

Granted that the tasks are unfinished, granted too that resulting bureaucracy seems remote and hard to manage, still may we not have confidence in a system that can peacefully produce two great egalitarian revolutions within 40 years and also within a framework of constitutionalism?

Let us expand the focus still further for a moment. Thursday I asked a friend whether he could lend me a ready-made commencement address. He replied, "Can you think of a better time to be alive?" And I ask you—can you?

In the Elizabethan Age perhaps. Those were years of boisterous confidence and extraordinary creativity, but also of disease, poverty, ignorance and extraordinary cruelty. Men were hanged for scores of petty crimes. The populace turned out in joy to see men burned, spitted alive, or drawn and quartered. You may say that we kill more efficiently on a larger scale now, but at least we have grown squeamish and kill from a distance, and we do it only when we can call it war.

Perhaps you would wish to live with the Founding Fathers. That was another extraordinary age. A contemporary described Jefferson as "a gentleman of 32 [years], who could calculate an eclipse, survey an estate, tie an artery, plan an edifice, try a cause, break a horse, dance the minuet, and play the violin." Two years later, of course, he wrote the Declaration of Independence and built our faith in the common man. I think I would like to have lived in that age if I could have been Thomas Jefferson or John Adams or Alexander Hamilton.

But suppose that one were not Thomas Jefferson but a slave, or an indentured servant, or an impressed seaman, or a woman dying alone in childbirth in a sod hut in a remote forest clearing. I think I'd rather draw my lot today.

I think next of the Hellenes. They breathed freedom and had a nobler view of man than ours even though they also faced grief, death and sorrow without papering over the facts of their condition. But the facts are that citizens of Athens built their state upon the backs of slaves, and there was also Sparta as well as Athens.

I grant you that it is harder than it used to be to have confidence in the system. Time has destroyed many of our illusions. The quick conquest of a continent and the Horatio Alger story bred a folklore of endless resources and easy success. For all but the unfortunate, technology and industrial organization poured out a seemingly endless flow of material comforts. American might in two wars led us to suppose that our power extended to the farthest reaches of the globe. Now we see our cities become unlivable; the succession of cars, television sets and refrigerators proves a wasteland. Our power in the world is limited. We have lost our innocence and learned our capacity for evil; witness the bombs dropped on Southeast Asia and the discrepancy that still exists between our pretenses and practices in the treatment of blacks, chicanos and native Americans.

All this is true, and we should face up to it. But I do think in order to maintain our sense of proportion we may also recall that the speed of communication, the vivid frightening and sickening pictures on the television screen, and the social consciences of editors and newsmen make us aware of wrongs and suffering that in the past were simply beyond the individual's ken. That our awareness has expanded and our concern has increased puts us two steps ahead. Too much of the press seems obsessed with whatever is wrong, with the violent, the perverse and the abnormal, to give us a fair perspective.

Contemporary literature and the arts tell of men the absurd, the pervert, the drop-out, but rarely man the hero, or even the tragic—for the tragic requires a degree of nobility and few current authors see nobility in man. It is also harder to bear the wrongs and cruelties attributable to human shortcomings. In the past, misfortune and suffering were as inexorable as sowing and reaping, or birth and death.

Should the plague come, should the crops fail, still one could say with the Psalmist, "The judgments of the Lord are righteous altogether." The sense of inevitability is gone. Man feels that man is in charge. And he is in charge as never before in history. So we now have to face the perception simply expressed by Pogo: "We have met the enemy, and it is us."

Harder to face—yes. But also a moment in time for a burst of idealism and optimism—and for staying power. Never before has any substantial part of the world been freed from the pressures of unremitting struggle for food, clothing and shelter. In the U.S. and most of Europe three of the four forces of the apocalypse have retreated: ignorance, disease and poverty—all except war; and war is now as always within human control and only the result of human perversity.

So it is mostly in our own hands and the question becomes, what view of man will you take from here? Errant, stumbling, selfish, indifferent to cruelty, and often cruel himself; in all perhaps very little above the brute. Yes, but I say, still above the brute. As we read history, we can see individual men and women rise to just below the angels: Pericles, Michelangelo, St. Francis of Assisi, Abraham Lincoln, Martin Luther King. A true list would have no end. Consider too man's vision of man's potential: Prometheus of Greek mythology, for example, or the gentle spirit of the Sermon on the Mount. Such dreams and such individuals are part of us, I submit to you; they are our potential.

In what I am trying to say there are no "saving truths," no guarantees, no answers to the staggering problems that confront us and all the world. But perhaps one can take from the university not only a sense of perspective but an attachment to a way of life. Woodrow Wilson called it "the spirit of learning":

What we should seek to impart in our colleges, therefore, is not so much learning itself as the spirit of learning.

The physical scientist knows that to bow before the burning bush is no substitute for the patient exploration of observable data and the constant checking and rechecking of induced hypotheses. The historian and humanist know that the record of human experience is replete with proof that some of the greatest wrongs have been done and many of the most civilizing and liberalizing ideas have been suppressed in the names of Truth and Conscience. The "spirit of learning" is the way of freedom and reason, of mutual trust, civility and respect for one another.

As the scholar does not know the truth he seeks, as he lacks assurance that there is a truth and knows only that by putting one foot before the other, despite false starts and blind alleys, he makes a little progress, so upon our joint human adventure we do not know the goal, we have no proof there is a goal but can catch glimpses of a bright potential and perhaps can see that by reason, mutual trust and forbearance, man can learn to walk a little straighter.

These qualities might not matter so much, I suppose, if we were content with authority, uniformity, and security of a sort for the conformist. But if men—and women too—are of equal dignity and worth, if though destined to live and work together our goal is the freedom of each to choose the best he can discern, if we seek to do what we can to move toward the realization of these beliefs, then authority will not suffice and some means must be found to mediate between the self-interested, passionate factions, each convinced of its righteousness and each demanding all for itself and the extinction of all opposition. Yet the only means consonant with freedom—so far as discovered—is to impart to the State and its citizens what Wilson called the "spirit of decency":

The spirit of learning is the way of freedom and of reason, of even-handed inquiry, of civility, and respect for one another. The spirit of learning is willing to reach conclusions, act upon them, until a better hypothesis appears, yet it is spirit that is not so sure that it is right.

I take your time for just one current example:

We are now shaping for future generations the instruments for dealing with wrongdoing by a President's close associates and the only instrument with which to deal with a President alleged to be fundamentally unfaithful to his trust.

We need to restore above all else our confidence in the honesty and integrity of our government, which in our country, of course, means our confidence in ourselves. The manner in which the further investigations of the impeachment proceedings is conducted, the role of reason, the degree of impartiality, the degree of effort to achieve justice, will affect our self-confidence more than the vote.

In the heyday of Joseph McCarthy 20-odd years ago, the intellectual world, including the press, was properly outspoken about the danger of *ex parte* accusation, about the unfairness of planting stories in the press without adequate opportunity for reply, and about the lack of true adversary proceedings.

Last Wednesday morning the newspapers told of an interview with a member of the House Judiciary Committee, in which he asserted that the Committee had "proof positive" that the Secretary of State ordered wire-taps upon the members of the staff of the National Security Council but when asked to reveal the proof, he replied that to give out the proof would be improper. Several weeks earlier someone on the staff or a member of the Ervin Committee gave the press proposed findings of guilt upon men under indictment and awaiting trial. The similar incidents have been too numerous to excuse them by careless slips of the tongue alone. Still we read no editorials condemning current *ex parte* accusations, "leaks" to the press, and judgment without true adversary proceedings.

Are they now any less unfair than they were 20 years ago? Do not misunderstand me—my brief is with the prosecution. I think that liberty was at stake and the kind of abuse that investigation has proven occurred in high places deserves only contempt and punishment of those found guilty.

Procedural fairness does not depend upon whose ox is gored.

So I hope that you will take from here a sense of the value of method and a long view. Youth measures in only one direction, we are told: from things as they are to an ideal of what things ought to be; while the old measure things as they are against the past they remember. The students of recent years belonged to an extraordinarily idealistic, honest and courageous generation: idealistic enough to see what can be, honest enough to face the gap between what is and what can be, and courageous enough to seek instant correction.

I hope that you will never become patient about the gap between what is and what ought to be.

But of course the "boob-tube" is misleading and the millennium cannot be achieved at once. As in the past, most men and women go blundering along, some inept, but doing the best they can; some selfish, power-hungry, and all of them possessing the capacity for evil. I have heard it said that today's classes, in their discouragement, retreated from idealism and commitment. Their style has changed, I think, but I doubt that there is a loss of underlying commitment.

But honesty and disappointment with failure to achieve the millennium should not lead to obsession with whatever is bad, and so to cynicism and despair, or to escape into the perverse and abnormal.

For those who take the long view of man's experience will find that from time to time there were other societies no less honest and courageous than ours in facing all the ugliness, cruelty and indifference that the mirror reveals, but which also held a brighter, nobler view of man, and had the greater courage to pursue the vision.

And perhaps, if you compare where we are with where we have been, as well as where we ought to be, you will conclude that even if you cannot bring about the millennium, still we can help each other to suffer a little less and learn to walk a little straighter.

I can give you no assurance even of that, but I can and do promise you joy in the endeavor.

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