Transcript of Remarks of

Judge Warren E. Burger
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I will not dwell on the predicament of one in my situation who is asked on literally a few hours notice to substitute for so distinguished a public figure as Senator Paul Douglas of Illinois except to ask you to bear this in mind in mitigation of judgment. Senator Douglas is one of the most erudite members of the Congress and surely its most sophisticated economist. I share your disappointment in not hearing him today at this 10th Anniversary of the Institute. I suspect that Senator Douglas would probably have discussed the work of this Institute in terms of its relationship to the economic aspects of post war Europe, to commerce and trade and its regulation, and the problems of the Common Market.

But I need not remind you that the purposes of this Institute are not confined to the problems of the market place, even though those subjects have occupied most of your attention in the first decade of your existence. Because of my own limitations in the area of economics and having in mind the broad objectives of the Institute's authority in fields of Comparative Law, I will occupy your time for this brief period with some of the other aspects of law which the Institute may well explore in its next ten years.

In the three years before I became a United States Judge nine years ago, I had my first exposure to the legal systems of Europe and my first dialogues with judges, lawyers and the law

professors of Europe and since then I have visited many courts and universities of the civil law countries. I was pleasantly surprised to find how much we had in common in terms of problem solving and how similar were our experiences, our questions and our responses. Even bearing in mind the narrower range of judicial discretion of the civil law judge, I found that in the difficult cases the European judge turned, as I had done instinctively, to asking himself WHAT IS THE PURPOSE? WHAT IS THE END SOUGHT? WHAT IS THE UTILITY IN TERMS OF THE VALUES WE ACCEPT?

Of course I quickly discovered as my reading took me back to Holmes, Cardozo, Grey and others, that they employed an analysis which related Laws to moral standards and social values. And as I talked with Professor Kronstein and his colleagues in Frankfurt last summer I learned that in your official Institute publications you frankly took into account the basic moral aspect and social values. Professor Helmut Coing's paper on the historical development of the function of the judge emphasizes the interrelationship and interdependence of the legal and moral order, especially as illustrated in English Equity Jurisprudence. That there is no conflict between the basis of law which this Institute accepts and

the genuine libertarian point of view is illustrated by the position of the late Professor Edmond Cahn of New York University. In the preface to his collected lectures published under the title of THE MORAL DECISION he said:

> It is realistic to look at the law not merely as a technical institution performing various political and economic functions but also as a rich repository of moral knowledge which is being continually reworked, revised and refined.

We in the Court of Appeals must deal in a great variety of litigation which includes trade regulation, administrative law, private civil litigation, international law, and the criminal law. In dealing with this wide range I have found, as I suggested, much in common with judges of the civil law countries whose systems and problems have been under comparative study by your Institute. This is not surprising when we recognize that the aspirations, the problems, the needs of men everywhere are fundamentally the same. It is inevitable that the remedial rules and processes will have common patterns. This has long been known to students of Comparative Law, but has unhappily been confined too much to a small circle of scholars in universities, and not widely known or accepted among practitioners or judges.

European scholars are startled to find that this is so in a country like ours which has 52 systems of law and in

which conflicts of laws are a daily problem. But perhaps it is because with 52 systems of our own to worry about we have not had time to concern ourselves with the solutions and systems of Europe. Fortunately our widened exposure to other countries in the course of two great wars and the international cooperation of the past 20 years, to say nothing of increasing foreign travel, have operated to make more and more American lawyers and judges aware of and curious about other legal systems.

In recent weeks we have had a mass education of the American people in what some might view as Comparative Law in terms of the laws of certain Southern States as compared with other states. I suspect one of my European friends will be writing to me any day with a tongue in cheek suggestion that we establish a Comparative Law Institute as between North and South in our country. There is of course, a ready answer to this, at least from a purely legal aspect, and that is that the fault lies not so much with Alabama Law as with its perversion. When irresponsible men hold the reins of government no system of laws is impervious. To its sorrow Europe found this true in the past generation.

It is in situations like the tragic events in Alabama that we can see the relationship of basic moral values and

the law, even as the laws are being flouted, because the vast majority of Americans, trained and untrained, have recognized that what has been going on in Alabama is not RIGHT and that on the contrary, no matter how much it may be cloaked in legal forms, it is WRONG. And it is in this protest of other Americans that the moral order is asserted even though it may not always be articulated in those terms. It recalls to me a conversation more than 25 years ago at a dinner table where as a young lawyer I was a guest in the home of a friend who was a judge in Minnesota. He was a Jew whose parents had brought him to this country in his youth. Another guest was a Catholic priest who was President of a fine college. His parents had come from Ireland in the time of the Potato Famine. We were discussing the atrocities inflicted on minority groups and dissenters in Germany, Italy and other countries, in the 1930's, and someone said that there was no real difference between what was being done then and what the British had for years done to the Irish. I disagreed in part, pointing out that the execution of British policy in Ireland however brutal regularly was denounced from hundreds of pulpits in England and criticized by members of Parliament and in every workingman's pub in England, without

reprisals on the dissenters. My friend the Irish priest said he agreed that there was indeed a difference even if--as he put it--the distinctions probably eluded the Irishmen in the streets of Dublin.

What I am trying to say is that even when the functioning of the law of a particular time and place loses sight of the moral values and of right and wrong, if the standards are asserted by someone, then the values are preserved, just as so many great values were kept intact during the Dark Ages in tiny pockets of Europe and by only a few men.

We who must struggle in the morass of the 20th Century social sciences cannot function as does the physical scientist, who can discover or establish a scientific truth, and then, for the most part, go on from there with some reasonable assurance that his support is solid and will be impervious to attack or change, because the speed of light is not likely to change nor is the movement of stars and planets likely to alter.

Last year when Professor Kronstein invited me to visit your Frankfurt Institute I went there prepared to discuss either some of the recent developments in American anti-trust law or the recent and important developments in the Act of State Doctrine. But the Professor said he wanted his students

to stretch their minds by going into a discussion of the Law of Criminal Responsibility which as you well know has had a stormy history in our court in the past ten years, and increasing attention everywhere. The questions and open discussion of your Frankfurt students after the lecture demonstrated that they understand that the process of comparing and contrasting legal concepts is a highly rational way to get at the basic issues. It also became plain to me that the interdependence of legal standards and moral values was accepted by your students as to all areas of the law. When you began the work of this Institute ten years ago it was probably too early to embark on comparisons of our criminal law or property law, for example, with the legal systems which had been disrupted and distorted during the War and in the pre-war period. Moreover the reconstruction of the economy of Europe called for high priority study of the problems of business regulation, of trade and of corporations; and the advent of the Common Market added a new dimension to the studies of law and economics. But from what I have been able to learn of the work of your Institute it seems clear that you have never lost sight of the basic postulates of all Western legal institutions and their foundations in the moral law.

The creation of seminars and institutes such as yours, here and abroad, to engage in research into the sources of all law has been one of the most important developments in the law in the past half century at the student as well as the graduate level. Many of the difficulties we have encountered in experimentation with new legal concepts arise from our trying to cut our ties with the past and ignore the experience of the past and forget the sources of legal institutions. We need not be bound by the past but we ignore it at our risk.

The fact that your Institute will in the future broaden its inquiries into other areas including comparative criminal law is a recognition of two important factors: The first is that the criminal law has been badly neglected for generations; it needs vast improvement in both procedural and substantive aspects. The second reason is that the breakdown of effective law enforcement is an almost universal malady of our time. In Washington as in Moscow, and London, indeed in all the capitals of Europe, there is a common complaint that the laws are flouted with impunity. There was a time when such a statement, such a "viewing with alarm," at once classified the complainer as a crusty reactionary. But in 1964, for the first

time in many years, law enforcement was an issue in a national presidential political campaign. We might dismiss this as campaign oratory and politics except that six months after the clamor of the campaign had subsided (two weeks ago, to be precise), President Johnson sent a Message to Congress--the first of its kind in this century--in which a central theme was the right of every person in society to be secure in his home, on the street, and in his person. No one can rationally suggest that President Johnson's Message was politically motivated. Chief Judge Lumbard of the United States Court of Appeals in New York capsulized the same concept in a notable speech to the American Bar Association one year ago; the title of the speech was "Due Process for Society."

This is highly relevant to the work of your Institute because the same needs, the same basic moral values, the same social values obtain in Stockholm, Frankfurt, Paris, London, Rome and Washington. Conditions may vary but the fundamentals are the same. And this is as true with the law of crime as with that of commerce and trade.

Let me cite a concrete example of the value of comparative study. For three quarters of a century the American legal system has struggled with a rule of law which is indigenous

to this country under which we exclude from a trial evidence secured by the error of the policeman, whether intentional or inadvertent, if his action violates constitutional or statutory limits. One explanation for this American contribution to jurisprudence is that we must punish Society in order to control the police. France was confronted with this problem after its new Criminal Code went into effect in 1957 because the new Code limits the period of legal detention before a charge to 24 hours but does not exclude a confession obtained in violation of the Code. Two police officers in the South of France took it upon themselves to hold a suspect 5 or 6 days beyond the permissible 24 hours. The logical French mind did not punish the whole of France by setting the prisoner free. On the contrary the defendant was convicted in due course but the police officers were promptly charged with violation of the Code, convicted, and sent to prison, I am told, for one year. Perhaps we could study the French system with profit.

Another interesting point of comparison of civil and common law systems is the role of the judge. I think we could agree that generally speaking the judge in the civil law country does not have the standing or the independence of his common

law counterpart. Functioning under a Code, as he does, the civil law judge is more circumscribed in the exercise of discretion in many respects. Yet the more I observe and study the subject, the less am I sure that our system is as much superior as we like to think. We pride ourselves, and quite properly, on the great tradition of English Equity Jurisprudence which we have inherited. Beside this the Civil Law sometimes seems too rigid and unyielding. Over the years however some students of American institutions have argued that our system allows for too much subjective justice, too much justice according to the judge, contrary to our boast that we render justice according to the law. There is much to be said for this. Justice according to the length of the Chancellor's foot may not always be an ideal. I would not go so far as the stubborn French peasant who upon buying a new pair of shoes insisted that the size be determined by measurement rather than by a fitting, because he said he trusted the measurements more than he trusted his feet, but measurements--standards--are important. The popular concept of the universal worth of the "humane" judge is not necessarily accurate. The "humane" judge who paints with a

broad brush and asserts the broadest powers can have an upset stomach at 10 in the morning or he can react sourly to a quarrel with his wife or his children or a traffic jam on the way to court. As I see it a good argument can be made for the limitations which rest on some civil law judges to insulate the litigant, so far as is possible, from judicial hangovers and the distempers of judges' families.

Thus it is that after 20 years as a common law practitioner and nine years as a common law judge I confess a growing respect for the Code Napoleon and all that has evolved from it. I wish that my judicial brethren in Europe had better salaries, better quarters, greater independence, but I am no longer sure that our system is superior on all counts.

It has an old fashioned ring, and I have no doubt some would scoff, but the reality of the Social Order of every Western country--and others as well--is that the Moral Law is the basis of all law. We cannot long defy it without consequences as grave, in the long run, as a sudden suspension everywhere of the powers of gravitation.

I have talked with students of almost every country of Europe and it interests me to find that the interrelationship and interdependence of the moral order and law has far more

general acceptance in civil law countries than in the USA. It seems generally accepted that the moral order and social values form the basis of law whether for cartels, kidnapping or homicide. For this reason I was much heartened within this month to receive an advance or preliminary outline of a new Institute also sponsored by Georgetown University. The scope of the new Institute is apparent from its title which is "The Institute for Law, Morals, and Social Values." Here we have the cement, the sand and the water which in proper portions will make a truly solid foundation for society. The outline indicates that this new Institute will have a broad base and that the moral theologian will be on at least a parity with the lawyer. For my part I am beginning to think we lawyers should be subordinated in some of these enterprises. It you will forgive a cliche, the administration of justice, like the conduct of war, is much too critical a matter to be left exclusively to technicians. The modern lawyer, as I see him from more than 20 years as one of them and nine years as a judge, is tending to become a technician fascinated with means and mechanisms at the expense of ends.

I admire and respect the lawyer who is willing to stand up in the courts of Alabama, for example, and assert what is

right and what is wrong, but I confess I cannot share the adulation sometimes heaped on the legal experts whose principal contribution to the law and the social order is to develop tricks to evade taxes, or tricks to win acquittals for the obviously guilty, or tricks to delay the functioning of justice until mootness overtakes rights. Litigation is not a sporting contest and I am deeply disturbed that in some circles, including law students, the standing of a lawyer rests not upon what he contributes to the end purposes of a legal system but upon his skill and devising "gimmicks" to defeat justice. Nowhere in the world is this professional illness so prevalent as in this country, although Sunday's Washington Star carries an article by Lord Shawcross complaining of this problem in England. Whether the responsibility for this rests with the courts, the profession or the law schools, I will not try to say. There is enough blame to go around and our start should be a re-examination of all our basic postulates and values.

When we speak of social justice or the social aspects of the criminal law, for example, we must remember there are two sets of values and that justice is not to be submerged by its adjectives. Today I cannot argue the case for this, but I

hope I have posed the issue. If there seems to be an astringent quality in my remarks, I feel quite secure in using that tone at a University which has sponsored the great institute we honor today and which is now launching another of comparable potentialities. With this fine record of contributions to the law it could hardly be thought that I am abusing my status as a guest by admonishing my host.

Benjamin Franklin in his inimitable way developed an aphorism which may be in some degree pertinent, and I will conclude with this: He said something to the effect that EXPERIENCE IS A GREAT TEACHER BUT SHE KEEPS A FOOL'S SCHOOL. This, of course, was an Americanized version of ancient wisdom and like the Russians we sometimes come to think that we were the first ones who thought of it. What this tells us is simply--and in the vernacular--that it is a foolish business to repeat the errors of the past and the errors of others when our neighbors and forbears have been over the same ground and can tell us something about the pitfalls.

In a nutshell Franklin's aphorism defines the scope of Comparative Law. For ten years now this Institute has been engaged in trying to help the human race, or part of it, at least, to learn from the mistakes and the experience of the

past and the experiences of our neighbors. It has tried to demonstrate to Europeans that there is something to be learned from the American experience in dealing with monopolistic practices, and restraint of trade, and it has tried to show that we in America have something to learn from the experience of Europe. In the crushing complexity of our lives and the myriad of activities going on in countless fields of human endeavor the work of this one Institute is not widely noticed. But we should pay tribute to Georgetown University and to Professor Heinrich Kronstein and his colleagues for their conception and their perseverance, and I am grateful for the fortuitous circumstance that gives me opportunity to salute this enterprise on its 10th Anniversary.