

ment; in the second of those cases he was sitting under special designation as an Associate Justice of the Appellate Division, First Department; and in the third of those cases he was the Presiding Justice at the Trial Term in Kings County where he submitted to a jury the evidence upon which rested the judgment we reviewed. My friends, that is hard work; that is a demonstration of judicial service at its best.

There are other instances of like demonstrations which bear out the statements by the Presiding Justices of each Appellate Division that the Trial Justices are willing to assume larger burdens; they are ready to extend themselves to do not only the work assigned to them in their own districts but to accept assignments elsewhere.

The members of the Court of Appeals are proud of their judicial kinship with those judges of the First and Second Departments and elsewhere who are cooperating so earnestly in the effort being made to meet this local problem.

Chairman Brown:

Two years ago this Association for the first time presented its medal award for distinguished service in the law. At that time the award was to the late Governor Nathan L. Miller.

Last year the award of this Association for distinguished service in the law was presented to Mr. John W. Davis.

This year the award is to Mr. Justice Robert H. Jackson.

We all know that Justice Jackson has deservedly received great honor from many personages. He has received the Medal of Merit from President Truman, and he has been honored in foreign countries. He was elected an Honorary Bencher of the Honorable Society of the Middle Temple of London, a great honor for an American.

So our Medal Award for Distinguished Service in the Law was just what it means.

Where else could we better find anyone more deserving of our recognition of his long, tireless efforts to the betterment of the law.

I now give you Mr. Justice Jackson.

Mr. Justice Robert H. Jackson:

Gentlemen, Chief Justice, Associate Judges of the Court of Appeals, fellow members and guests of the New York State Bar Association:

Words will hardly express my appreciation of this award. Its presentation evidences your fine generosity, whatever may be thought of the discrimination shown in your choice. You, and even I, must have reservations as to whether I deserve a place on the roll with the two extraordinary advocates on whom you have previously bestowed it. But I let no scruples stand in the way of eager and grateful acceptance.

I never have ceased to be thankful for whatever chance or choice it was that led me to law as a vocation, not only because of interest in the law itself, but because of the fellowship one finds in this contentious but tolerant profession. I have never sought to avoid the controversial in any legal matter about which I had convictions, even during my dozen years on the bench. You, among whom I have fought, debated and disagreed, have had to overlook or forgive many differences of opinion to extend this commendation.

Because of that, however, I treasure it, even above many political honors and offices which came to me far beyond the most ambitious dreams of youth. I am already beholden to this Association, because it received me as a beginning and unknown lawyer into companionship with brilliant leaders of our Bar and high-minded judges on our Bench. This occasion adds another reason for gratitude and affection for this Association and a new incentive to try to live up to your expectations.

This evening somehow recalls the question put and answered by Sir Patrick Hastings as he retired after his great career at the British Bar. He said:

"... All that remains is the inevitable query, has it all been worth while? Is advocacy merely a glorious way of earning a living or does it serve some useful purpose?"

"The lawyer has to face the question in a particularly concrete form. . . . Can advocacy ever win a case?"

Was it his unstinted efforts that brought about the much deserved result or did the case simply win itself? . . . I

have known so many advocates, good advocates and very good advocates, bad advocates and very bad advocates, and in the result I am satisfied that at least ninety per cent of all cases win or lose themselves. . . . But of the remaining ten per cent it is not so easy to speak with any certainty. . . . Can a brilliant advocate ever win a case which without his brilliant advocacy would have been lost? I know that he can; very seldom is it true, but just on those rare occasions which prove the exception to a general rule."

Sir Patrick closed with an observation about his experience at the British Bar which I adopt as my conclusion from experience at our Bar :

" . . . Each must decide his own method for himself and at the end he will remain uncertain as to whether his own method was good or bad. But at least he will be certain of one thing. If he has decided to practice at the English Bar, he will have lived his life amidst glorious surroundings; he will have fought bitter fights with gallant and generous opponents, all of whom will remain his dearest friends. He will have received sympathy in his disasters and ungrudging generosity in his successes; he will have toiled for days and nights at work that has never palled, and at the end he will know beyond any possibility of doubt that his work has been well worth while."

I might well rest my case here, but I have been instructed to make a speech, and those on the bench who endure a good deal of lawyerly boredom are easily tempted to turn the tables and make lawyers listen to us.

Our countrymen in all walks of life today are troubled, disillusioned and confused—even as you and I. We need not go far to seek for reasons. Americans have been reared in a period of national growth which instilled a firm confidence that our system of representative government and liberty under law was the best that men had devised. We saw that many of its basic principles had been adopted by other progressive peoples, and it seemed only a matter of time and education when they

would be universally accepted. Now, turbulent events show that our ideals are not acceptable to a large part of the world, that our system of government no longer is spreading but in important regions is in retreat. It all leaves us with a feeling of frustration and insecurity.

The Twentieth Century has been one of counterrevolution against our whole American revolutionary philosophy. Mussolini, Hitler, Stalin and lesser imitators rejected the process of out-arguing and out-voting adversaries and have forcibly seized power, suppressed liberties and set up dictatorships supported by the dreadful apparatus of the police state. A distinguished French writer, Albert Camus, has reminded us that every revolution of our times has ended by putting more power in the state, removing restraint from officials, and leaving fewer rights and remedies to the individual. Paradoxical as it may seem, we are in an age of rebellion against liberty.

In our own country a few converts or hirelings of these alien movements have sought to press this country toward one or another totalitarianism, even by force or violence if it became expedient. Perhaps they are too few to cause serious concern, if they were not supported and encouraged by an aggressive and totalitarian movement abroad. The latter has drawn us into a policy of accumulating more military, air and naval force than the Communists can muster. Of course, we all agree that if the future world is to be ruled by arms, by all means let it be by our arms.

But Americans are not happy to rely on militarization as a long-range policy, not merely because it is burdensome, but because the triumphs of force are short-lived and are not a permanent solution of world problems. The futility of war is that one can never kill so many people that there are not survivors with whom he must come to terms.

A few weeks ago, President Eisenhower warned against placing too much reliance upon mere physical force because, he said, our ultimate strength must be in moral and spiritual forces. I think we all agree; but how are these forces to be given concrete and effective expression?

The only answer, it seems to me, is to translate these moral and spiritual values into legal ones insofar as it is practicable

to give them definition, application and sanction. Of course, law is something less, as well as something more, than a code of ethics. But I agree with Lord Macmillan that "the ultimate justification of the law is to be found, and can only be found, in moral considerations" and not in expediency or utility.

We know that it is not possible to defend every specific legislative act, judicial decision or custom as meeting these standards. But there can be little disagreement among law-trained men that no rational world can exist except under law that approximates justice as nearly as human skill can make it and binds both rulers and subjects, states and individuals.

I am one who believes that our prestige abroad, and our success at home, has been largely due to rugged adherence to practices we describe in the oversimplified phrase "government by laws and not by men." It has been validated by our own history and we have shown some genius to make it work in practice.

In the beginning, our American Revolution was not to overthrow law but to vindicate it. Our Declaration of Independence invoked not only "the laws of nature and of nature's God" but English constitutional law in violation of which it recited "a long train of abuses and usurpations" designed to reduce the Colonies under an "absolute despotism." We cannot claim that the Revolutionary era was free from lawlessness, of course. But we can say that it was not accomplished or followed by a reign of terror as were recent Nazi and Communist revolutions. There was neither blood bath nor purge. That distinguished it from nearly contemporary French Revolution in which, after killing off the old regime, the revolutionists fell upon each other until it ended in a new dictatorship. And that, perhaps, is why the world has looked more to our Revolution as an inspiration to freedom than to the French, which stirred fears that any movement toward liberty meant a reign of terror.

After our Revolution, when a Constitution was framed our forefathers adapted the philosophy of Eighteenth Century liberalism. It taught the essential unity of liberty and law; and its ultimate concern was to insure the fullest measure of freedom consistent with the good order on which a safe and free life must rest. It distrusted loose power and would only admit

government to the control of a small area of our total economic, social and political lives. It believed that dissent, opposition and grievances, real or fancied, were most dangerous to stability and good order when underground, unvoiced and hence unanswerable, and that freedom of speech, press and assembly would bring smouldering discontents and oppositions to the surface where they could be satisfied or reasoned with. They believed that the fittest ideas would survive in competition and that unfettered public discussion would provide an intellectual basis for resolving political contests.

However, we must never forget that it is implicit in this philosophy that the discontented have a duty as well as a right to voice *openly* their dissatisfactions and that the contented have the obligation to tolerate and answer overt opposition, however distasteful. We must also remember that this concept of liberty had no tolerance of any form of lawlessness, no belief that there could be freedom except under the law.

These philosophical generalities were easy to proclaim, but it was the genius of our forefathers to devise institutions that would actually put these principles into practice—not ideally but well.

The great lapse, of course, came with our Civil War. During and after the war, a good deal occurred that cannot be reconciled with our teachings. Notwithstanding this, as Stephen Vincent Benét has reminded us:

“Again, there was no blood purge. There were no mass executions. No heads rolled.

“The handful of fanatics who had plotted the assassination of Lincoln and other government leaders were executed. His actual murderer was tracked down and shot. The half-crazy officer who commanded a notorious southern prison camp was hanged. The former President of the Confederacy, Jefferson Davis, was kept for a while in prison with certain of his associates and then released.”

Meanwhile, citizens of the expanding nation were constantly taught what a rule of law requires, for each growing frontier community reached some point when it had to choose between rule by violence and rule by law. They learned that a society

governed by law can never recognize the legitimacy of force or violence except in self-defense or in overcoming resistance to law and that an attack on any member is an attack on the peace of all.

These lessons were applied in our foreign relations. During the Nineteenth and into the Twentieth Century, this country consistently and successfully sought arbitration of its differences with other nations, some of which were of a nature the world had thought admitted of solution only by war.

Nineteen thirty-nine saw the most powerful alliance of counterrevolutionists, bent upon checking and destroying free institutions. Hitler, Mussolini, Togo and Stalin all ganged up. In a few months continental Europe was at their feet. It had long been a logical and practical weakness of international law to try to stand for a legal order among nations and at the same time to teach that it was a sovereign right of each state to go to war with any other, for any cause or for none, at any time, and that neutral states were bound not to distinguish or discriminate between a just and an unjust war. But this stupid and immoral doctrine could not survive the almost universal agreement of the nations to renounce war as an instrument of national policy, thus outlawing wars of aggression. The United States provided resources for defense to the surviving victims of aggression.

The close of the war brought a demand for immediate and indiscriminating vengeance. Stalin proposed to line up and shoot 50,000 German leaders. Others of our allies did not go so far but proposed to punish top leaders by political decision which would give them no chance to defend. In the United States many agreed with Secretary Hull, whose memoirs recite: "If I had my way, I would take Hitler and Mussolini and Togo and their arch accomplices and bring them before a drum-head court-martial. And at sunrise on the following day there would occur an historic incident." It was seriously proposed to turn over as many as a half million young Germans, regardless of personal guilt, to the Soviet Union for "labor reparations."

These indiscriminating retaliations were quite consistent with what was going on in Europe at the time. The French Minister

of Justice has reported that 8,348 collaborators were summarily executed without trial by members of the French Resistance and 1,325 were executed by decision of nonlegal committees.

This is not an occasion for argument of the merits of the Nürnberg trial. But at least in the trial of Goering, Ribbentrop and others, for which I had responsibility, and insofar as the pattern we set was followed in other trials, the record of the United States is that no man was punished until he was furnished detailed accusations, provided counsel, given full opportunity to present his defense, and on a permanent record pronounced guilty of specific acts in a reasoned opinion. Three of those the prosecution thought *prima facie* guilty were wholly acquitted and several others were found not guilty on some of the charges.

As we appraise the array of counterrevolutionary forces that are struggling against the American tradition today, we must not make the mistake of thinking their progress is from military force alone. The cold war is largely a war of ideas, a struggle for the minds of men. Popular representative government is held up to contempt by the totalitarians as a "cult of incompetence" and "government by chatter" which cannot deal effectively and in time with modern problems. We must not complacently assume that the currents of rebellion against our institutions and principles are wholly without cause of provocation. We cannot coast forever on the achievements of our ancestors. Conditions develop which, uncorrected, tend to confirm the critics of our institutions.

The expanding authority of government, its encroachment on the fields once left to individual choice, can be compatible with individual liberty only if our officials are as much bound by law as our private citizens. No individual should be subject to official condemnation, control or intrusion except at times and for reasons declared by law and applied to him by procedures which comport with our concept of due process of law.

But the Due Process Clause and other provisions of our Constitution must not be discredited by an interpretation to mean liberty without law. Nothing can do the cause of liberal government more harm in the long run than to give the American people the impression that our Bill of Rights is useful only

to our enemies or is a mere refuge for criminals. The impression that liberty had that result has helped totalitarianism to win support for the overthrow or suppression of liberty elsewhere.

Most importantly, perhaps, we must not fall into the error of accepting lawless action from the right as the solution of lawlessness from the left. That stalwart American judge, John Parker, has aptly called the Nürnberg trial a post mortem on a totalitarian state. The record teaches no lesson, to those who will read, more impressive than the manner in which fear of Communism led many moderate Germans to cast their lot with the Hitler cause, while fear of Naziism led a constantly increasing number to embrace the Communist Party. It became something of a race between right- and left-wing radicals to see which could first seize power and overthrow the republic to keep the other from doing so. Nothing would be more ominous for free government than growth of a similar negative and fatalistic attitude which embraces one extreme to counterbalance another, or leads us to think we must choose between arbitrary authority on the one hand or lawlessness on the other.

If we lawyers exert our leadership and hold to our faith in law, we can do more than any other group to keep the United States from being forced to choose between the two deadly horns of this false dilemma. Communism, most powerful of the present reactionary groups, depends upon military force only as an auxiliary to its chief reliance, which is the deterioration of free institutions, the indifference of the masses and revolt by well-organized and disciplined minority. It can never succeed among our people so long as they understand and appreciate the meaning, vitality and enduring character of the American tradition and what is involved in preserving it in all its integrity. No one can do more than the organized Bar to bring these truths home to our people by precept and example. We must firmly stand for liberty under law and join in the Kipling petition:

“From panic, pride and terror,
Revenge that knows no rein—
Light haste and lawless error,
Protect us yet again.”