Tulsa Law Review

Volume 35
Issue 2 *Legal Education*

Winter 1999

Law Day

Stephen Breyer

TULSA LAW JOURNAL

Volume 35 Winter 2000 Number 2

REMARKS

LAW DAY*

The Honorable Stephen Breyer†

In 1951, Justice William O. Douglas spoke here in Oklahoma at a Law Day Commemoration. That was seven years before President Eisenhower issued a formal proclamation officially creating a special, national Law Day. Oklahoma was ahead of its time.

Speaking soon after the Iron Curtain's descent, Justice Douglas stressed the differences between a democratic society based upon human liberty protected by law and a totalitarian society oblivious to freedom, based upon personal will. "We must," he said, "be true apostles of the democratic faith."

Today, almost half a century later, that "democratic faith" has swept the world. The Iron Curtain has lifted. Former Eastern Bloc nations, like so many others, have reached conclusions similar to those that this Nation accepted more than 200 years ago. They have embodied in written constitutions guarantees of democratic political institutions and protection for basic human liberties. They have entrusted to judges a portion of the task of protecting those guarantees in practice. And they have made efforts to make their judiciaries independent, so that the judges can enforce those guarantees without fear of retaliation.

This year's Law Day theme, "Celebrate Your Freedom," reflects this worldwide phenomenon. But the Tulsa Bar had added a cautionary note. "With freedom," it says, "comes responsibility." That cautionary note is important. I shall speak about that responsibility.

*. Remarks presented to the Tulsa County Bar Association Law Day Luncheon, May 4, 1999

†. Associate Justice, United States Supreme Court

Almost five years ago, I became a member of the United States Supreme Court. I confess to a few butterflies in my stomach the first year or two. Indeed, I kept thinking of a New Yorker cartoon that Andy Coats once told me about. A circus dog is about to set out, very gingerly, upon a tightrope, while a clown below unfolds a scroll. It says, "All Rex could think when he stepped out upon the high wire was that he was a very old dog and this was a brand new trick." Five years, however, has worked changes. It has made me less anxious. It has given me more experience interpreting the Constitution. It has enabled me to try to develop consistent approaches to its various parts and begin better to understand the document as an integrated whole.

One thing, however, has not changed, and it will never change. That is my sense of awe as I watch the parade of Americans who appear before our Court. They include every race, every religion, every ethnic origin, every possible point of view. They present the most contentious issues imaginable. My awe reflects the fact that so many differences among so many different people, which in other nations might have been settled in the streets with fists or guns, are settled in America in courts of law. That is the national treasure that this day celebrates.

Several years ago, a Russian paratroop general, visiting our Court, asked me to explain why that is so. How do we maintain our legal system – a system that guarantees freedom under law? "What is your secret?" he asked. A written constitution? Independent courts? Your organized Bar? The U.S. Marshal Service? I replied that I know of no secret, but I am certain a set of written documents is not sufficient – not even documents so well written as the United States Constitution. I told him about the case of *Cooper v. Aaron* – the case in which nine Justices of the Supreme Court told the Governor of Arkansas that he had to let black school children enter a white school. I did so because I wanted to stress the fact that judges by themselves could not have enforced that decision. Rather, President Eisenhower sent federal paratroopers to Arkansas to force the Governor to withdraw the state police and let the children in. The President's decision to send troops made the difference. And that Presidential decision, like the judicial decision that prompted it, grew out of two hundred years of American history, a history that included a civil war and racial segregation that denied to black citizens the very equality that the Constitution itself had permitted.

My point was that our constitutional system consists not simply of legal writings; it consists of habits, customs, expectations, settled modes of behavior engaged in by lawyers, by judges, and by the general public, all developed gradually over time. It is that system, as actually practiced by millions of Americans, that protects our liberty. And it is our responsibility, particularly as lawyers, to preserve the traditions, habits, and expectations of behavior engaged in by lawyers, by judges, and by the general public, all developed gradually over time. It is that system, as actually practiced by millions of Americans, that protects our liberty. And it is our responsibility, particularly as lawyers, to preserve the traditions, habits, and expectations of behavior that underlie that system, that create the freedom we enjoy, not just on paper, but in reality. As John Marshall said, "The people made the

Constitution and the people can unmake it. It is the creature of their own will, and lives only by their will."

How then do we preserve those crucial traditions? We all know some of the answers. When I speak to lawyers and judges from other nations, I often say that strong free legal institutions require judicial independence (including adequate judicial resources and insulation, through protected tenure and pay, from political influence). They require a press free to discover and expose corruption. And they require an independent bar, a bar whose lawyers will not hesitate to look a judge in the eye and say, politely of course, "Judge, I am afraid you're wrong." That is our system, and as lawyers, we must work to preserve it.

We do so in part by avoiding pat answers to difficult questions. I learned very early as a judge to avoid labels – they often make the hard question too easy. (Justice Cardozo once received a letter that read, "Dear Justice Cardozo: I hear you're a liberal judge. Can you give me $10?"). It is not the answers to the questions that make our system special; it is the way we find those answers. And we work to preserve our traditions every time we enter a courtroom, advise a client, or open a law book.

But that is not enough. Contrary to popular myth, ours is not a system of, by, or for judges and lawyers. It is of, by, and for "We the People." Our democratic system of government cannot work without the understanding, active support, and participation of millions of ordinary Americans. And here there is cause for concern.

There is cause in the indifference towards public life revealed in the rather familiar quasi-comic statistics. It does not bother me when I read that the public is less aware of the names of Supreme Court Justices than of the Three Stooges. But it does bother me when I read that more teenagers can name the Three Stooges than can name the three branches of the federal government; or that three times as many know that "90210" stands for Beverly Hills than that "the birthplace of the Constitution" stands for Philadelphia. More worrying are the statistics that show whether the public has confidence in Government, whether it trusts the Government all or most of the time. Those statistics, despite swings, have headed rather consistently downward since 1964 – with close to 80% of the public trusting the government then, compared with about 35% today. And it bothers me when I too easily detect in the media or in conversation a cynical note, an edge that appears more often than it used to. I listen for the word "just," as in "its just politics," or similar words that put the speaker above the fray, avoiding the need to address the merits of an argument. The merits matter. Will Rogers liked to ask, "If I don't see things your way, well, why should I?" That's a question that asks for answers, not a "put down."

I worry about indifference and cynicism because indifference means non-participation, and cynicism means a withdrawal of trust. I worry because our system of government, our way of life, depends upon both trust and participation. Let me add one more reason why this is so: the Constitution, however marvelous a document, does not dictate the substantive decisions that make up the content of our communal life. It is an enabling document. It creates democratic governmental institutions.; it avoids concentration of governmental authority through separation and

division of power; it provides certain guarantees of equal treatment; and it protects basic human liberty. In a word, it provides a framework for democratic decision-making. It sets a few basic limits, related to freedom and to fairness. But within that framework and those limits, it says nothing about the content of the decisions that "We the People will produce. It creates a method for making decisions; it then leaves decision-making to the democracy that it creates. For this reason too, the Constitution cannot work.

What then can we lawyers do to build and to maintain the necessary trust, to encourage the necessary participation? For one thing, as I need not tell you who are here today, we can participate ourselves, for example, in the work of bar association. Bob Meserve, a former ABA president, once told me lawyers love meetings. And Libby Hall, a professor at the law school where I taught, told me long ago, "Go to ABA meeting." I do. And I enjoy them. why do I enjoy professional associations, like the ABA, with its 400,000 members and 600,000 committees? Not because all those meetings are fascinating. But because it is through those meetings that we change, improve, reform the law and our legal institutions. Legal reform in America is not dictated by judges or even by legislatures. It arises, more often than not, from a consensus of the Bar and the public whom the Bar serves. Those meetings help create that consensus, by identifying where change is needed, by discussing proposals, by identifying and overcoming problems and disagreements. They are a critical element of helping the law work better for the public it is meant to serve.

We can participate broadly within our communities. Roscoe Pound described an indispensable element of our profession as "a spirit of public service." As we grow older we more fully understand that personal and professional satisfaction lie solely in what we obtain from our profession, whether bank account or title, but, perhaps more importantly, in what that profession helps us to contribute to the lives of others. This element is embodied in your decision this week to support, for example, the Blood Bank, the Food Bank, the Cancer Society, and most importantly to help provide legal services for those who need, but cannot afford them. How can we possibly build confidence in our legal system if barriers created by costs, delay, or complexity stop millions of Americans from using it? In London's High Court on the Strand, I noticed an office called "Citizens Advice Bureau." In that office anyone can ask about a problem. He cannot expect to receive full legal advice, but he will find out where to go next, how to get started. The need to provide legal advice is great; the ways of doing so are many.

Perhaps most importantly, we can teach what we have learned – about our institutions and about the need for participation – to others. There are many ways to do so. A decade ago, one of my former law clerks, Michael Brown, began a volunteer organization seeking to teach inner city youth, and, by doing so, to bring them into the community's life. Today, that organization, City Year, has programs in ten cities. This very week, your own Association sen lawyers into the classrooms of Tulsa to lead discussions with students about the law. Students can return the visit, abolishing the rigid distinction between courtroom and classroom. We have more teaching tools today than ever before. But, to return to those troubling

statistics, although almost 70% of the new, technologically adept generation can tell you that the first three letters following "http:" are "www", only half as many know that the first three words of the Constitution are "We the People." We hear a lot about a generation gap – perhaps we can try to close the "civics gap."

Still, the best way to teach is through example. Every time we represent a client, we argue in a courtroom, we participate in a professional or public meeting, we take on pro bono work, we set an example. And every time we fail to act in response to an opportunity, we also set an example. With every action, and inaction, we send a message to our peers, and, more importantly, to the next generation. That message can say, it should say, that standards matter, that law matters, that civic life matters, that participation matters.

May I close by quoting a memorial to Tulsa's founder, J.M. Hall: "It is our duty," says the memorial, "to pass on what we have received, not only unimpaired, but enlarged and enriched by our handling." This Law Day, we celebrate the free democratic institutions that we have inherited. More importantly, we acknowledge our responsibility to pass on those institutions, intact at the least, improved if possible.