HEARTS AND FLOWERS

by

ROBERT M. KARTON

THE CHICAGO LITERARY CLUB
21 February 2000

Hearts and Flowers

As American jurists and politicians are fond of saying: "Ours is a nation of laws. We are ruled by laws, not men." What does this really mean?

The concept of laws developed by necessity thousands of years ago. The earliest laws were a blend of custom, morality, religion, and magic. Having spent the past thirty-five years of my life practicing law, I sometimes think religion and magic still play an important role. Be that as it may, wrongs against the tribe, such as sacrilege or breach of tribal custom, were met with ridicule and hostility by the group. Wrongs against individuals, such as murder, theft, or failure to repay a debt, were avenged by the family of the victim.

One of the most significant developments in the history of law was the Twelve Tables of Rome. These were engraved in the fifth century B.C. and were an attempt to write down or codify the existing customs concerning such matters as property, debt, compensation and other interpersonal matters. These tables led to civil law codes which provide the main source of law in much of the world today.

There is a distinction which must be drawn between "public" and "private" law. Public law can be generally referred to as a compendium of official rules and regulations which is used to govern a society and to control the behavior of its members. Private law involves the various relationships which people have with one another and the rules which determine their legal rights and duties among themselves. Public law dominates in government controlled societies. Democratic societies like the United States have a significant mix of public and private law.

Another feature of law which was quickly recognized was that it could be used by those in power, whether secular or religious, to control, not just to preserve, the peace of the society. As a result, many of the early laws were primarily concerned with preserving the prerogatives, wealth and power of the masters, whoever they might be.

About the same time as the Twelve Tables were being written, Draco wrote a code of law for Athens. Although we often refer to Athens as the "cradle of democracy," the only thing democratic about Draco's code was the uniform severity of the punishments. Draco's code established the death penalty for so many offenses, even trivial ones, that we remember Draco to this day by calling an unreasonably harsh law "draconian."

Societies throughout history have been notorious, or in some cases infamous, for applying seemingly benign laws to stifle thought in an attempt to maintain control of men's minds. An early example of this was the persecution and condemnation of Socrates. Another glaring example, of

course, was the persecution of Galileo during, of all periods, the Renaissance. We look back today and marvel at the incredible ignorance, prejudice and superstition of that time, and yet, have we really come so far?

Despite occasional attempts by emperors, despots and the like to seem beneficent by extending whatever "privileges" the laws might confer on all peoples, those progressive efforts were generally significant for their rarity and short lives. The Roman emperor Caracalla conferred rights of full Roman citizenship upon Jews in 212 A.D. This was a matter of enormous significance, particularly to the Jews, because Rome recognized only two classes of Roman people: citizens and slaves. That grant of rights, however, lasted barely one hundred years. In the fourth century A.D., Constantine the Great and his successors, influenced by the growing power of Christianity, slowly but surely took away the civil rights and liberties which had been so recently given. This is but one of scores of examples of horrendous laws frequently promulgated by good men in the name or for the glory of God.

In the sixth century A.D., Justinian I, called "the Great," had become the Byzantine emperor. Almost immediately upon his accession, Justinian set out to restore the Roman Empire, the western part of which had been lost in the barbarian invasions of the fifth century. By the end of his thirty-eight-year reign, Justinian had succeeded in restoring to the empire most of the former Roman territory around the Mediterranean Sea.

There was a need for a uniform legal system for Justinian's centralized empire. It took ten years for an imperial

commission, headed by the renowned jurist Trebonianus, to collect and systematize existing Roman law into an enormous *Corpus Juris Civilis* (Body of Civil Law), also called the Justinian Code. The Justinian Code was not a new law. It was a clarification and update of the Roman law that had come before. Previous acts that were not incorporated into the Code were declared invalid.

As anyone who has had to deal with the United States Code or the Illinois Compiled Statutes can attest, the tendency is to add laws to deal with new situations. Legislators, however, are as reluctant today to repeal previously enacted but no-longer-necessary laws as they were two thousand years ago. Justice Oliver Wendell Holmes observed: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."

In England there were bitter disputes between secular and religious authorities as well as between Saxons and the conquering Normans. A particularly notable episode was between Henry II of England and his chancellor, Thomas Beckett, whom he made archbishop of Canterbury. These disputes generally involved the educated and entitled, if not titled, people; the unwashed masses were of no real concern to them when it came to rights and privileges.

The dispute between "church" and "state" and contending nobles continued in England and throughout Europe, although its progress in England is of particular importance

to us in this part of the United States. The disputes, particularly between church and state, led to increased civil rights, although it took hundreds of years for the seeds planted by the warring church and state to bear fruit. It has been observed that the political liberty we enjoy today is the residuary legatee of this eleemosynary animosity. The various disputes, whether between church and state or one class of nobles and the reigning monarch, were, in reality, attempts to obtain or preserve power.

England's King John gained much of his notoriety from the tales of Robin Hood, but his historical significance is due to the Magna Carta. By 1215 A.D., John, faced with the prospect of revolt by his nobles, was forced to grant to them and to the Catholic Church certain rights purportedly in perpetuity, at least that is what the document says. In reality, each succeeding monarch did his best to dilute or negate the rights granted by John.

The Magna Carta did not create the majority of the rights it granted; it confirmed them. Many of those rights and principles have been incorporated into our Constitution. Although the language of the Magna Carta indicates that the benefits granted therein inured to "all freemen of our kingdom," "freemen" by no means meant the common man. Included among the principles and liberties were separation of church and state and guarantee to the nobles of trial by jury of their peers in certain specified instances.

Civil rights germinated for millennia before blossoming. In 1762, the French philosopher Jean-Jacques Rousseau said: "Man is born free, and everywhere he is in chains." By

"chains" he meant limitations imposed by government or other institutions on the exercise of one's rights and freedoms. Fourteen years later we stated our adherence to that concept in our Declaration of Independence when we declared "life, liberty and the pursuit of happiness" to be inalienable rights. Never before in human history prior to the separation of the United States from England in 1776 was a government formed whose chief purpose was to protect its people's liberties and civil rights.

The ideals were lofty; men had cause to be optimistic. However, as Mr. Justice Louis D. Brandeis said: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." As it has turned out, "life, liberty and the pursuit of happiness" were inalienable rights for some, but not for all. The significance of "all" men being created equal and being endowed by their Creator with those inalienable rights depends on what the definition of "all" is. Today, more than two hundred years later, the perfume of civil liberty is still not sweet to everyone.

"Civil rights," in the broadest sense, are different from "natural rights." The latter are those belonging to individuals by virtue of their humanity: the right to remain alive, to sustain life with food and shelter, and to follow the dictates of their own conscience. The former are based upon positive law. They are derived from laws. For example, if it is a natural law to follow the dictates of one's conscience, civil

law may regulate acceptable limits for the journey. Civil law also determines such things as who may vote, who may drive a car, the legal age for marriage, for alcohol consumption, and the like.

Natural and civil rights have become so intertwined as to be virtually indistinguishable in many respects. If we allow a government the power to abolish civil rights, the government will also have the power to abolish natural rights. An individual denied equality (a civil right) finds very little liberty (a natural right). And people without liberty find little enjoyment in equality.

For people to have civil rights, two preconditions must exist: justice and equality, the former being somewhat ephemeral. Clarence Darrow said: ". . . litigants and their lawyers are supposed to want justice, but in reality there is no such thing as justice either in or out of court. In fact, the word cannot be defined." Justice, of course, means different things to different people, depending on their individual prejudices. Justice is an abstract concept. When we agree with the outcome of a dispute, the outcome is just. When we disagree, then justice has not been served. Although we are a nation of laws, no matter how perfect laws may be, they can be imperfectly administered by men. Justice, however, cannot exist without equality of treatment under like conditions.

The principle of equality, the second essential ingredient of the mix, has often been misunderstood or misinterpreted. Equality was never asserted as applying to natural gifts like intelligence; aptitude for math, science, art or music; or

athletic ability. It was a moral, a political, and a legal principle. Equality in the political sense demands that everyone be treated under the law with the same consideration and respect. Mr. Chief Justice John Rutledge observed: "Poverty or wealth will make all the differences in securing the substance or only the shadow of constitutional protections." That observation, unfortunately, is often as true today as it was in the late sixteenth century.

Equality also does not suggest sameness of social condition. There can be differences of social condition as long as the opportunities to reach any social level from any other social level are equal.

Although justice cannot exist without equality, equality can exist without justice. It would be unjust, for instance, in a capitalistic society, to mandate the same wages for all persons regardless of the job. Such forced equality is a denial of justice.

Of the sixty-three specific concessions made by King John in the Magna Carta, perhaps the most significant to us is the right to trial by jury in criminal cases. Indeed, the right to trial by jury of one's peers has become a cornerstone of the legal rights of the citizenry against action taken against it by the government, be it federal or state.

Judges, in both civil and criminal cases, routinely instruct juries that the judge is the sole judge of the law and the jury is the sole judge of the facts. The intent is that the jury, having determined the facts from the evidence it has been permitted to hear, must judge those facts within the context of the law as enunciated by the judge. Is the jury, however, limited to that role? Is the jury, as Robert Frost said, simply a

body which ". . . consists of twelve persons chosen to decide who has the better lawyer?" Does not the jury in criminal cases also have the right, the duty, to judge the intent of the accused and the justice of the law? Should not juries hold all laws invalid which are, in their opinion, unjust or oppressive, and all persons who violate or resist the execution of such unjust or oppressive laws guiltless?

In 1735, John Peter Zenger, owner and publisher of the *New-York Weekly Journal,* attacked the highhanded administration of New York Governor William Cosby by publishing satire and other "unacceptable" criticism. Zenger was brought to trial in the King's Court for criminal libel based upon his allegations that the liberties and property of the people of New York were in jeopardy, "men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature," trial by jury "taken away when a governor pleases," and men of property "denied the vote." Zenger's counsel, Andrew Hamilton, conceded that Zenger both printed and published the articles in question. The question then became the definition of libel. The court charged the jury with having to find Zenger guilty of criminal libel if the words published were "scandalous, and tend to sedition, and disquiet the minds of the people of this province." Hamilton, on the other hand, argued that the court's definition omitted one essential element. He argued that the works published also had to be "false," a concept not recognized by the king when dealing with criminal libel. To make a long, but interesting story short, the jury refused to accept the charge of an unjust law and found Zenger not

guilty. It took another fifty years, however, before the British government enacted into law the precedent established in the case that a jury had the right in seditious libel to judge the truth of the matter published.

If the government can dictate to a jury any law whatever in a criminal case, and if the jury has not the right to determine whether or not the law is reasonable and just, the government can require a jury to convict and punish on whatever pretext it wishes. The object of "trial by jury," that is, trial by the "people," as distinguished from a trial by the "government," is to guard against oppression by the government. It is indispensable, therefore, that the people judge and determine their own liberties against the government instead of the government's judging and determining its own powers over the people.

The difference, then, between trial by jury, that is, trial by the people, and trial by the government, is simply the difference between liberty and despotism. The authority to judge what are the powers of the government, and what are the liberties of the people, must necessarily be vested in one or the other of the parties themselves—the government, or the people. If the authority be vested in the government, the government is absolute, and the people have no liberties except as the government sees fit to allow. If, on the other hand, that authority be vested in the people, then the people have all liberties, except those that the whole people (through a jury) choose to disclaim.

Who leads the fight to preserve and improve the jury system? Who leads the fight to preserve our very civil rights? You

guessed it—lawyers. Legal specialists, as a class, came into being in the Greco-Roman civilization from the third century B.C. to the seventh century A.D. In the early stages of both Greece and Rome, there was a prejudice against the idea of specialists in the law being available for hire. The assumption was that citizens had knowledge of the customary law and would get advice from kinsmen if necessary. As the law became more complex, however, men of prominence, usually patricians, found the need to acquire legal knowledge, and some acquired a reputation as experts. These experts would often serve society as magistrates and, in Rome, as priests of the official religion, having special powers over family law.

The system of development of the early Roman law by annual edict and by extension of precedents gave the legal expert an influential position in society; he became the *jurisconsult,* the first nonofficial lawyer to be regarded with social approbation. Of course, part of the approval he enjoyed was due to the fact that he did not attempt to act as an advocate at trial and was prohibited from receiving fees for his services. Actually, advocacy at trial was performed by a separate class—orators, some of whom, like Cicero, became legal experts themselves. It was not until the later Roman Empire when legal professionals, that is, a legal expert earning his living by fee-paid legal services, first became visible.

The late Roman pattern of legal organization greatly influenced the Europe that began to arise after the barbarian invasions from 1000 A.D. on. The Christian Church, which became the official Roman imperial church after 381 A.D., developed its own canon law, courts, and practitioners; how-

ever, it, too, followed the general outline of the later Roman legal organization. After the revival of learning in the twelfth century, the influence of the Roman legal system was greatly strengthened.

The influence of the Roman legal system moved to England with the Norman Conquest in 1066. The clerics who staffed the Norman and Plantagenet monarchies and who provided the earliest of the judges enabled the idea of legal professionals and representation to be accepted. The native "common law," which became the basis of our laws, was developed by the growing specialized legal society, the Inns of Court in London. There, through apprenticeships and attending lectures, men acquired admission to practice before the royal courts.

There were several significant differences between the law in England and on the Continent. One of the most significant was that development of the law in England in the seventeenth and eighteenth centuries took place chiefly through precedent based on the reported judgments of the courts, rather than through legislation. Here began a practice condemned by many today—legislation by judicial decision. Jonathan Swift observed: "It is a maxim among these lawyers that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities. . . ."

The main patterns of both the law and the legal practice were exported by the continental European powers and

England to their overseas colonies and possessions. The English system provided the model for English-speaking North America. The original model has undergone considerable modification. In particular, the specialization of the solicitor-barrister has tended to be replaced by a "fused" profession of legal practitioners ostensibly qualified to perform both functions and usually doing so.

The legal profession in the distant past and in the present has had an ambiguous social position. Leading lawyers have usually been socially prominent and respected—the sections of the profession so favored varying with the general structure of the law in the particular community. Yet along with the high repute enjoyed by the profession over two millennia, lawyers have also been among the most hated and distrusted elements of society. In some cases this has been because people had need to deal with lawyers only when there was trouble and, as a result, associated lawyers with trouble. Trouble was bad enough, but having to pay the lawyer in addition only made the association more onerous. In other cases this antipathy for lawyers has been the consequence of a general hostility to the whole idea of law, China being an example. Confucian teaching, in the sixth century B.C., opposed the use of civil law as a major means of social control, and this influence remained powerful there and in Japan until the twentieth century.

More than sixty years ago, Mr. Justice Brandeis said: "It is true that at the present time the lawyer does not hold that position with the people that he held fifty years ago, but the reason is not, in my opinion, lack of opportunity. It is be-

cause, instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, the able lawyers have to a great extent allowed themselves to become an adjunct of the great corporations and have neglected their obligations to use their powers for the protection of the people."

Indeed, lawyer-bashing is not a new phenomenon. We have Oscar Wilde to thank for the quip that "lawyers have been known to wrest from reluctant juries triumphant verdicts of acquittal for their clients even when those clients, as often happens, were clearly and unmistakably innocent."

But, attempts at humor aside, all too often clients, even those clients who were clearly and unmistakably innocent, are not found innocent. In Massachusetts in the 1920s, at a time of rampant xenophobia, two Italian anarchists, Sacco and Vanzetti, were wrongfully charged with murder. In 1927, Mr. Justice Felix Frankfurter, one of the finer legal minds to enhance the United States Supreme Court, wrote a critical analysis of their trial. His critique was a scathing indictment of police, prosecutors, the initial defense attorney, and the judge who, in concert, committed "legal" murder by deliberately playing on and exciting the emotions of jurors still in the grip of war fever. A few short months after Justice Frankfurter's analysis of this grievous miscarriage, Sacco and Vanzetti, two innocent men, were executed.

The case of Alfred Dreyfus, more commonly known as the "Dreyfus Affair," was not a "legal murder," but it was a gross miscarriage of justice nonetheless. Dreyfus, a Jewish officer

in the French army, was convicted of treason in 1894. He had been accused of having written an anonymous document revealing French military secrets intended for the German embassy in Paris. He was reduced in rank and sentenced to life imprisonment. In 1896, Lt. Col. George Picquart, then head of French military intelligence, uncovered evidence indicating that a French infantry officer, Major Esterhazy, had actually written the treasonous document. Picquart's superiors silenced him and dismissed him from the service. About the same time, similar evidence was uncovered by relatives and friends of Dreyfus. The army court-martialed Esterhazy, but he was acquitted. Remember now, Dreyfus was convicted; Esterhazy was acquitted. The following year, the French Supreme Court of Appeal ordered a new trial for Dreyfus, but, even in light of the new evidence, he was again found guilty, only with a reduced sentence. Right-wing, anti-Semitic elements among the politicians and in the army, as well as the Roman Catholic Church, supported the verdicts of the courts-martial. To the credit of the populace, the second Dreyfus verdict was so unpopular that voters chose a liberal-oriented government in the 1899 national elections. The new government pardoned Dreyfus and restored him to the army. Esterhazy, by then in England, confessed to having been the German spy. Thanks to the likes of Emile Zola and his open letter *J'Accuse!,* this miscarriage of justice ended more happily for Dreyfus than for Sacco and Vanzetti.

What exactly is the role of the lawyer in society? We have discussed the rule of law; we have discussed lawyers as a pro-

fession; we have discussed the basic protection of trial by jury. The focus must be directed to the role of the lawyer in the minefield of law.

In 1820, King George IV of England was seeking for his wife, Queen Caroline, the combined fates of Catherine of Aragon and Anne Boleyn. He charged Queen Caroline with adultery, and a queen's adultery was grounds not only for divorce but for a conviction of high treason, the penalty for which was death. In the trial of Queen Caroline before the House of Lords, her attorney, Henry Brougham, having knowledge of facts that could secure the acquittal of his client but bring down the monarchy, stated the duty of an English advocate.

> . . . an advocate by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, "that client and none other". To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his part it should unhappily be to involve his country in confusion for his client's protection.

Have we learned anything about diminishment of freedom under the guise of religion, family values, or any other

extreme? It seems that, despite the sometimes heroic efforts of individuals and a few lonely organizations, we have really learned little.

As recently as seventy-five years ago, on March 21, 1925, the legislature of the state of Tennessee passed a statute making it "unlawful for any teacher in any of the universities, normals, and all other public schools in the state, . . . to teach the theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." John Scopes, a teacher of biology at the high school in Dayton, Tennessee, was persuaded to allow himself to be caught red-handed in the act of teaching evolution. Thus began the "Scopes Monkey Trial," starring William Jennings Bryan, the Great Commoner, and Chicago's own Clarence Darrow, pleader of unpopular causes. The trial provided all the show and entertainment the public wanted.

Unfortunately, the trial, like many before and after, demonstrated how justice suffers when the process is subverted by the zeal of the court to sustain a position. Although Darrow destroyed, perhaps literally, Bryan during cross-examination, Darrow was not allowed to get any scientific evidence before the jury. The jury, having had the evidence it heard managed by the court, and having no inclination to "judge" whether or not the law was reasonable and just, convicted Scopes. This miscarriage of justice has been thinly fictionalized in *Inherit the Wind.*

Laws exist today in many states which mandate that the story of divine creation be taught in the public schools. In

this area we have progressed little. But the responsibility for lack of progress in the area of civil liberties cannot be laid on the legal profession. As a matter of fact, lawyers like Darrow and other civil libertarians have had great success in both individual cases and in changing the concepts of Americans and, ultimately, the law itself.

Raymond Chandler said: "The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up on the answer. A mechanism is all the law was ever intended to be." But the law is all we have, and lawyers wear the mantle of protectors of the law, of the mechanism, of the process. It is the lawyer's right to advocate the unpopular cause; it is the lawyer's duty to advocate the unpopular cause for the preservation of the law, the mechanism, the process which protects us all.

The American Civil Liberties Union, in the face of attacks from middle-of-the-roaders as well as conservatives, has doggedly taken up the cudgel of taking cases involving harsh facts to challenge the application of unjust laws. The ACLU has achieved an enviable record over the past seventy-seven years. To cite but a few examples:

Gitlow v. New York (1925). The U.S. Supreme Court, although upholding the defendant's conviction for his call to overthrow the government, for the first time held that the Fourteenth Amendment incorporated the free speech clause of the First Amendment and is, therefore, applicable to the states.

Whitney v. California (1927). Although the Supreme Court upheld a conviction for membership in a group that advo-

cated the overthrow of a state, Justice Brandeis wrote a separate opinion which explained that the "clear and present danger test" must include the presumption in favor of "more speech, not enforced silence." That view ultimately prevailed and laid the groundwork for modern First Amendment law.

Powell v. Alabama (1932). The Supreme Court held that eight African Americans accused of raping two white women lacked effective counsel at their trial and, therefore, were denied due process. This was the first time federal constitutional standards were applied to state criminal proceedings.

Smith v. Allwright (1944). An early civil rights victory which invalidated, under the Fifteenth Amendment, the intentional exclusion of black Americans from Texas's "white primary" on the ground that primaries are central to the electoral process even though the Democratic Party is a private organization.

Hannegan v. Esquire (1946). A major blow against censorship. The Court severely limited the postmaster general's power to withhold mailing privileges for allegedly "offensive" material.

Everson v. Board of Education (1947). Justice Black said: "In the words of Jefferson, the clause . . . was intended to erect a 'wall of separation between church and State'. . . ." This was the Supreme Court's first major utterance of the meaning of the Establishment Clause.

Terminiello v. Chicago (1949). The Supreme Court expanded the protection for offensive free speech by exonerating an ex-priest convicted of disorderly conduct for giving a

racist, anti-Semitic speech that "invited dispute." Justice William O. Douglas, for the Court, noted that "the function of free speech under our system of government is to invite dispute." As an aside, I grew up hearing about this case. It originated in Chicago and was argued in the Supreme Court on behalf of the City of Chicago by my father.

Brown v. Board of Education (1954). Perhaps the most far-reaching decision of the century, the Supreme Court overturned the "separate but equal" doctrine it had announced in 1896 by finding that racially segregated schools are "inherently unequal" and are unconstitutional.

Escobedo v. Illinois (1964). The Court threw out the confession of a man whose repeated requests to see his lawyer throughout many hours of police interrogation were ignored, which violated his Sixth Amendment right to counsel. This case has special meaning to me. I had an occasion to prosecute Escobedo when I was an assistant state's attorney here in Cook County in 1965. This was after the Supreme Court case had been decided. Escobedo had been arrested and charged with unlawful use of weapons, that is, having a gun concealed in a vehicle he was driving. It turned out that there was considerable evidence that the gun, which was in fact in the car, was wrapped in a rag and stuffed under the front seat of the car. We had an opportunity to talk to the jurors after they found him "not guilty." They told me that they all knew who Danny Escobedo was; he was that confessed murderer who got off on a technicality. They said they wanted to find him guilty, but they just couldn't get past the fact that they believed that the gun was

"not readily accessible," which was a defense to the charge. The jury system worked. Reasonable laws are for the protection of everyone, even confessed murderers.

I am reminded of an episode portrayed in *A Man for All Seasons.* In 1536, Henry VIII forced a jury of her peers to convict Anne Boleyn, his queen, of adultery and send her to her death. Henry's lord chancellor, Thomas Moore, an attorney of profound integrity, gave his life for the proposition that the law and the due process thereof were sacrosanct, even as to the king. In the story, Moore is entreated by his wife to have Richie Rich, the man who later betrayed him, arrested because he was dangerous. Moore asks what he has done. His daughter says: "That man's bad." Moore replies: "There's no law against that." Robert, the young man who loves Moore's daughter, asserts: "There is. God's law." Moore says: "Then God can arrest him." Moore's wife says: "While you talk he's gone." Moore says: "And go he should if he were the Devil himself until he broke the law." Robert says: "So, now you would give the Devil benefit of law?" Moore: "Yes, what would you do, cut a great road through the law to get after the Devil?" Robert: "Yes, I'd cut down every law in England to do that." Moore: "Oh, and when the last law was down and the Devil turned round on you, where would you hide, Robert, the laws all being flat? This country is planted thick with laws from coast to coast. Man's laws, not God's. And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I give the Devil benefit of law for my own safety's sake."

There is one other of the many significant ACLU victories which bears mention at this point. In *U.S. v. Nixon* (1974), the Supreme Court was considering whether or not the president could withhold crucial Watergate tapes from Special Prosecutor Leon Jaworski. The Court adopted the argument of the ACLU in its *amicus* brief that "[T]here is no proposition more dangerous to the health of a constitutional democracy than the notion that an elected head of state is above the law and beyond the reach of judicial review." The United States Supreme Court had finally, officially, agreed with Thomas Moore; not even the president could subvert the integrity of the law.

One might think the number of miscarriages of justice would have declined; however, we have recently seen a rash of capital convictions being overturned, some on the very eve of the defendants' executions, because of misinterpretation of evidence, or because of technical errors in analysis of evidence, or because of the precision of DNA testing, or, unfortunately, in too large a number of cases, because of prosecutorial misconduct. When I prosecuted in the mid-1960s, the attitude which came from the state's attorney and was adopted by all of us was that we represented the "People of the State of Illinois." That meant all of the people, not only the victims of crimes, but the accused. Even though we did our best as zealous advocates for the People, we felt a keen responsibility to protect the rights of the accused. The decline in professional ethics is appalling, but, in my opinion, it is but a reflection of the decline in ethics rampant in our society at large.

Nevertheless, the legal profession all across the country has taken a hard look at itself. Instead of simply bemoaning the sorry state of ethics generally and in the legal profession in particular, bar associations are requiring attorneys to do *pro bono* work, to represent unpopular people and to advocate unpopular causes. In short, the legal profession is once again showing concern for the integrity of the process.

Dr. Martin Luther King, Jr., said: "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." The concept is not a new one. It is a concept handed down for thousands of years by persecuted peoples everywhere, for no one can understand the truth and validity of the concept like a people who has been the victim of injustice. It is difficult to understand, however, why so often peoples who have suffered injustice are the very ones who systematically inflict it on others when they become the majority.

James Donovan, a prominent attorney, had been appointed to defend Soviet-spy Rudolf Abel, who had been charged in 1957 with espionage. Donovan was a strongly patriotic man and felt deep conflict from his sense of duty to defend an enemy of the United States. Nevertheless, Donovan, with his commitment to professional responsibility, was determined to uphold the integrity of the judicial process. After a particularly successful day in court, Abel told Donovan that there seemed to be a chance that Donovan's defense might succeed and Abel might be acquitted. Donovan told Abel that he agreed, that such a result looked possible. Abel

asked Donovan what he would do in that eventuality. Donovan, separating his duty as an advocate for this unpopular man from his duty as a patriot, told Abel that, if he were successful in obtaining an acquittal, he would just have to kill Abel himself. As a side note: Donovan did not have to take matters into his own hands. Abel was convicted. He was exchanged for captured American U-2 spy-plane pilot Francis Gary Powers in 1962.

Ultimately, a lawyer is an advocate, an advocate knowledgeable of the law. There is no room in the profession for one who does not conduct himself in accordance with the letter and spirit of the ethics of the profession. It is the lawyer's role, his right, his duty, to advocate unpopular causes to preserve the integrity of the law, of the mechanism, of the process, and to strive toward justice. A lawyer representing a defendant in a criminal case must insist that the prosecution prove that the law the accused is charged with violating is a reasonable, just law. Of course, a lawyer prosecuting a defendant in a criminal case has the same responsibility. The defense attorney must do all things in his power and skill to force the prosecution to prove, beyond a reasonable doubt, that the accused in fact violated the law as charged. If the prosecution fails in its burden, then the accused must be set free, for even the Devil is entitled to benefit of law, for our own safety's sake. As long as we have a reasonable, just legal system protected by responsible lawyers who are dedicated to the advocacy of unpopular causes, we will continue to enjoy freedom and liberty under the rule of law.

This paper was written for The Chicago
Literary Club and read before the Club on Monday
evening, the twenty-first of February, Two Thousand.
This edition of three hundred copies
was printed for the Club in the month of
November, Two Thousand and One.

PRINTED
IN THE U.S.A.