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CONSTITUTIONAL LAWYERING IN THE 21ST CENTURY

March 4, 2000

*Dean Robert C. Clark**

INTRODUCTION

I first want to welcome everyone to this conference on “Constitutional Lawyering in the 21st Century” and compliment the student organizers on their amazing work in bringing it together.

I believe that many of the best things that happen at Harvard Law School are bottoms-up initiatives of interested student groups, and this conference is a great example. I also wish to compliment those of you who have worked on the *Civil Rights, Civil Liberties Law Review*, and are now celebrating its thirty-fifth anniversary, for in my view you have done Harvard proud. It is clearly the leading journal on civil rights and civil liberties issues. In addition to welcoming you, I want to do two things. The first is just to place the Review and the activities here in a bit of local context. Harvard Law School has a long tradition of supporting work in this area, usually through the personalities of particular people. T h e y include Professor Felix Frankfurter, who fought for the progressive causes of his day; Dean Erwin Griswold, who not only authorized the creation of the journal, but also opposed McCarthyism and supported the civil rights movement in the 1950s and 1960s; Professor Archibald Cox, who stood up in the Nixon-era assault on civil liberties in the 1970s; and members of our current faculty, who have continued this good work through the 1980s and 1990s.

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Many of them are participating in this conference, such as Chris Edley, Martha Minow, Carol Steiker, Lucie White, and our newest professor, Bill Stuntz. I see also a number of the school's alumni here who are carrying on the tradition of past graduates such as Bill Brennan and Charles Hamilton Houston.

Secondly, I wish to talk briefly about the theme of the conference. The brochure says that one of the main purposes is to look forward and see how best to carry out the struggle for civil rights and civil liberties in the next century. Various panels will address what needs to be done in scholarship, in activism and in progressive lawyering. I have one major suggestion for what might be put on this agenda, but which might not be obvious. At the risk of sounding an initially somewhat odd note, I want to express my hope that, over the next century, some of you – or your descendants and proteges in the field of civil rights and civil liberties – will think global, that is, take a more international perspective in the relevant scholarship, lawyering, and movements for change.

I could develop this point abstractly. For example, this morning *The New York Times* had an article that discusses falling crime rates, which is relevant to our next panel.¹ It notes the interesting fact that crime rates, including murder rates, have dropped significantly since 1991 in several cities in the U.S., including San Diego, Boston, and New York, which have very different crime-control strategies. New York has a “get tough” approach; Boston has an approach of reaching out to sociological researchers and ministers of minority churches; and San Diego tried community policing – fewer police and more community involvement. All of these cities had a similar decrease in crime, but perhaps different reactions among their populations as to whether civil liberties were being respected and community harmony was being promoted. But what struck me about this article, and so many others that have dealt with the same phenomena, was the absence of any reference to the world beyond our borders. It seems glaringly obvious that we might learn something important and instructive about crime patterns, protection of civil rights, and community relations from

¹ Fox Butterfield, *Cities Reduce Crime and Conflict Without New York-Style Hardball*, N.Y. TIMES, Mar. 4, 2000, at A1.

the study of what happens in some other countries around the world.

One could make similar points about scholarship in other areas of civil rights law and policy. For example, ethnic conflict is a global phenomenon, as is minority mistreatment. Surely there should be some genuine cross-border connection among scholars and activists who deal with these subjects. The same is true of discrimination on the basis of gender or sexual orientation: it is a worldwide problem. So there ought to be some worldwide scholarship and activism!

Now, I realize that taking my suggestion seriously would give rise to problems that should not be discounted.

I will mention two and how I would react to them. First, there is the problem that any move to an international focus appears to be a diversion, or even a threat. The shift seems to imply a diversion of resources – whether intellectual, academic, governmental, or activist resources – from the solution of pressing civil rights problems. I see this concern not only in colleagues when we are talking about appointments, but also in people who are very interested in promoting civil rights in their communities. I understand the concern and do not discount its significance or legitimacy. My suggestion, however, is not a radical one, but a recommendation that, over the longer term, we repeatedly look beyond our borders to see what we can learn.

A second concern is about the practicality of hoping for a more international outlook: in most areas, an international focus only seems to come about when there is pressure, when there is an external force pushing a shift in focus. In the corporate area, for example, there has been a remarkable shift in scholarship because of events in the external world. Cross-border transactions and commerce are much greater than they used to be. Accordingly, cross-border mergers and acquisitions, securities offerings and corporate law practice have increased and eventually prodded the academic world and the world of policy analysts to shift focus. Instead of having the interminable old debates about whether competition among states for corporate charters is a good or a bad thing, we now have a line of positive and normative literature debating whether there should be or will be a convergence of

corporate-law governance systems, or whether such developments are mainly path-dependent and culturally specific.

In the field of civil rights and civil liberties, the apparent absence of really pressing reasons to pay attention to other countries is an issue. I think it has always been true that comparative study could help us understand things better and figure out what will actually work in our reform efforts, but this abstract point has not really generated much activity.

However, I do think that there are now factors driving toward more consideration of a global perspective and it would be wise for civil rights scholars to anticipate and build on them.

I will mention three such factors. One is that there has been important academic interest in the social thinking of intellectuals in other countries. With respect to the faculty here, for example, I think of the remarkable work done by Duncan Kennedy and Roberto Unger in digesting the thought of foreign scholars and using it in their scholarship. I certainly applaud such broad intellectual outreach. In the future, with developments like the Internet, connecting to foreign scholars in the civil rights area will be easier. U.S. scholars should take advantage of these developments - for example, by producing international paper series that are oriented to issues of common concern. A second factor is immigration, or more generally, the movement of people across borders. Right now in the United States, for example, there are millions of people who are from Muslim countries and who are influenced by the Muslim religion. Over time, this reality is likely to have a big impact on efforts to define and promote civil rights and civil liberties. (I look forward to a day when we have a joint conference with the *Law Review* here and with the Islamic Legal Studies Program to discuss the treatment of women in different cultures and the possible implications for reform movements.) A third factor is the rising academic interest in ethnic conflict.

For example, some of our faculty have been induced to go abroad and to work on issues involving truth commissions and other techniques for trying to resolve conflicts between minority and majority populations. Studies of this kind should be greatly encouraged and will bring together people who can learn from each other in entirely new ways.

I could go on, but I think you get my drift. I hope that in the next century, at least some resources are devoted by civil rights scholars and activists to expanding horizons and developing international contacts. It is important for some of us to think globally, because doing so will increase understanding and promote justice.

