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COMMENTS

Neither Pollyanna nor Cassandra, But Positive Commitment to Human Values

*Jefferson B. Fordham**

To me the positive message of the paper is that we should view our condition with a sense of history and a sense of humor and, in that perspective, dwell more upon the good that we perceive in ourselves, our institutions, and our performance. That is fine, but it does not tell us enough. We know that in all ages man has been in no wise more conspicuous than in his inhumanity to man. The record of torture and slaughter during the Crusades and the Inquisition, movements associated with religion, darkens the pages of history.

What must be noted is that the contemporary period is strikingly different. I do not condemn a disposition to be optimistic and to look for the good in society but we must, if we are to survive, confront the realities of our times. The condition of the whole community of man is one of extraordinary interdependence. There are at least three grim factors which threaten the race. The first is a combination of nuclear armament and the continued commitment of this nation and others to military force as an instrument of policy in external affairs. The second is largely uncontrolled population growth. The third, to which the second is related, is almost pervasive damage by man to the natural order.

As I look more particularly at the condition of this country, what is most appalling is the damage to the very soul of the American people done by our military venture in Indochina. If one is to address himself to "The Future of America and The Role of Law," the first order of business is to promote the return of the United States to lawful, peaceful, orderly processes in external relations. I find no reference to this overriding concern in Dean Forrester's paper. Our military commitment

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in Southeast Asia has not only done us great spiritual harm but also has cost us heavily in American lives and injuries as well as diverted both tangible and intangible resources needed in the attack upon domestic problems. Dean Forrester makes but brief reference to the challenge that domestic problems present to the law as a positive force for individual fulfillment and social betterment. I find these problems of staggering dimensions and difficulty, whether they relate to ghetto conditions, the adequacy of housing opportunities, equality of opportunity generally, equality before the law, the state of penal and correctional institutions, organized crime, narcotic traffic and use, alcoholism, our unbalanced and inefficient system of movement of persons and things (social circulatory system) to mention but a few problem areas.

It is true, as Dean Forrester notes with grave concern, that there are people in institutions of higher learning and others who are calling for revolution and will resort to violence. We have been witness to violence and nihilism on and off campuses. And there are Cassandras, of one sex or the other, such as the two from whose writings he quotes, who prophesy doom or worse. But I have a notion that he overestimates the strength and influence of those of the left and of the gloomy "prophets." They are greatly outnumbered, I suggest, by the far right combined with the countless number of people of very modest economic circumstances in the great silent majority, who are beset by inflation and greatly troubled by the voices of unrest and change. Of this group, Mr. Forrester says nothing yet, as I see it, the greater potential for a major breakdown of the social order lies on that side.

I am compelled to challenge the following Forrester felicities: "As human beings go, the great mass of Americans are doing very well. They are relatively stable and possessed of good intentions toward their fellows." Recently in Philadelphia I was asked by an enthusiastic proponent what I thought of marking the bicentennial of the Declaration of Independence by having a constitutional convention looking to revision of the Constitution of the United States. I gave him cold comfort for two reasons. First, constitutional revision is a very, very serious business not to be pursued on motivation any stronger than celebration of an anniversary. In the second place, while there are features of the Constitution, which, in my judgment, should be critically re-examined. I am frankly fearful of subjecting the basic constitutional safeguards of human liberty to the popular thinking of his day. (One hopes that this can be squared with long-time ardent advocacy of state constitutional revision!). In any event, as I see it, the great mass of Americans are not doing so well as Mr. Forrester would have us believe.

The quantum of bigotry, prejudice and exploitation (of people and nature) is too great to enable me to feel comfortable.

We in this country are in need of powerfully inspiring moral leadership. Certainly it bears repeating that in the basic maintenance of a framework of freedom and social progress law is the primary instrument of organized society. But I stress with all possible emphasis that underlying law, as the societal foundation, is the presence of the shared values and interests which are the stuff of communal commitment. The vital sanction for law in any society—especially in one that claims to be free—is prevailing commitment of the citizenry to conform to established legal norms. Such a commitment can be seriously weakened when self-indulgence relaxes social discipline, when the law is not enforced evenhandedly without regard to group characteristics, and when the political ideal of equality of opportunity is not fully supported by the law and its processes.

I find no moral force, no idea content, no whit of inspiration in the “big tent” evangelism, which appears to appeal to our President. There is no hope of providing moral leadership by such associations. Not even polished “philistinism” is a fair substitute for ideas and values validated by experience and the thought of the greatest minds.

Institutionally, we are failing in the democratic—the representative—process of public decision-making. Our traditional disposition to place heavy reliance on the courts, not only in the regular administration of justice but also in policy-making and law reform, has a good deal to commend it. I must say, however, that such recourse can be overdone. I do not believe you can make up for serious deficiencies in the legislative institution and process that way. I am convinced that a front-rank problem of these times is that of rendering decision-making through popular action or representatives highly responsible and effective. People of the law should be the first to recognize this and take the lead in reform. Our success or failure in this will bear strongly upon America’s future.

The Forrester paper criticizes American legal education for what he finds to be its destructively negative character. I view the case method differently; severe critical analysis in case study and discussion affords intellectual discipline. It facilitates learning in context by the student while gaining intellectual skills. This is not cynicism. From it the student is likely to gain an appreciation of the capacity of the law for adaptation and reform, if you will. What is more, the law schools are alive these days with intellectual ferment as to substance and method in legal education in the larger context of human values, interests, and needs in a troubled society.

