

## RIGHTS OF MINORITIES AND CHILDREN: THE LIMITS OF THE LEGAL PROCESS

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*The following address was delivered by Professor Emerson at the New York University School of Law on December 7, 1978, as part of a tribute to the Honorable Jane Bolin upon her retirement after forty years of service in the New York City Family Court and its predecessor courts. Judge Bolin, the first black woman to become a judge in the United States, has been widely respected during her long career for her continuing efforts on behalf of minority persons and of children. Professor Emerson reflects in his remarks on the perennial mistreatment of minorities and children by the legal system and, suggesting that the structures and goals of that system create and sustain the problem, points to the need for a social ethic focused less on personal gain and more on communal responsibility.*

I am most happy to be present this evening and to pay tribute to Judge Jane Bolin. We were classmates at Yale Law School together and I have followed her career since then with interest and admiration.

I approach with some trepidation this evening's task of discussing the rights of minorities and children in our present society. I have never really been a minority—I came out of the middle ranks of the establishment and in my first opportunity to vote, in the 1928 election, cast my ballot for Herbert Hoover rather than Al Smith. I have been a child, but that was long ago. In my studies and teaching I have never focused on the rights of children—they have been omitted from my system of freedom of expression—and I feel quite ignorant in this area. My comments, therefore, at least as to children, must be considered highly tentative. And I confine my remarks to the role of law in seeking to achieve our goals in these two crucial aspects of national life.

I think we must start by recognizing that we have indeed come a long way. Judge Higginbotham in his book, *In the Matter of Color*, has brilliantly described the point from which we began in colonial times. In my own lifetime I well remember the situation only a few decades ago. In my college class of 850 males there was not, to my

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recollection, a single black person. On the legal staff of the National Labor Relations Board, one of the most advanced of the New Deal agencies, there was not one black lawyer. Organizations which included black members could not find a hotel in Washington, D.C., the capital of our country, in which to hold a meeting. In fact, as late as the 1940's blacks could not eat in downtown Washington restaurants. As to children, the idea of their possessing any legal rights apart from their parents or guardians would have been viewed, if the question was raised at all, as preposterous.

It is important to recognize this forward movement over the years, not in order to feel smug or satisfied, but in order to keep in mind that progress is possible and indeed has occurred. The basic tradition of our society, thus far, has been to improve the status of minorities and children. The problem before us now is how we can continue that progress and what new directions may be necessary in order to do so.

In seeking to achieve equality for minorities and minimum rights for children we have relied heavily upon law and judicial institutions. Indeed we have constantly expanded legal doctrines, procedures, and methods until the legal structure has reached an unparalleled degree of elaboration and complexity. It is important at this stage, I think, to appraise the advantages and disadvantages of such an unprecedented commitment to the legal process as a way of solving social problems.

The positive values inherent in the legal process are many and well-known to us. The legal doctrines announced by our courts and the legal mandates enacted by our legislatures, even where reality falls short of promise, embody the higher ideals and principles to which society is officially committed. Since the law is inherently stated in terms of general principles it has a universal quality, which minorities as well as the establishment can, theoretically at least, invoke to their advantage. Judicial institutions can be structured, through such methods as tenure for judges, independence from other parts of government, training of personnel, and the like, to afford a degree of protection to minority rights not available by other means. The list could be greatly extended.

On the other hand, some negative features of the legal process have been given less attention, at least by us lawyers. The law is from the beginning and remains the instrument of the establishment, created and developed for the establishment; its concessions to minorities are often grudging and usually inadequate. Similarly, the law is administered by the establishment, so that the law on the books does not necessarily reflect the law in practice. Likewise, the legal process, as it inevitably tends toward increasing complexity, be-

comes costly, time-consuming, and burdensome, useful only to those who can afford it and can wait. Most important of all, the legal process, by virtue of the very fact that it is founded on general principles, tends to become impersonal, bureaucratic, not attuned to human needs. It comes to treat people as fungible things, not individual human beings. And over all hangs the prospect that laws and legal institutions can constitute a protective screen, put forward as embodying a just solution but actually concealing and diverting attention from the real injustices that persist.

If we seek to test the success of the legal process by examining the present status of minority rights we find that progress has stalled far short of our alleged goals. In economic terms—jobs, wages, and power—blacks and other minorities are far behind and making little further advance. In the political arena, where important gains have been scored, the increase in the number of minority officeholders seems to have come to a halt. In higher education, minority groups still represent far less than their share of student bodies and especially of faculties. Nowhere, even in athletics, has real equality been achieved.

To some degree this state of affairs is due to the failure of the courts and legislatures to exploit the advantages of the legal system to the full extent needed to meet resistance and solve the problems. The Supreme Court, for example, has issued a series of decisions narrowing the scope of the equal protection clause. It has refused to find discrimination in the absence of a showing of specific intent, has limited the legal consequences of discrimination to the narrowest possible area, has declined to enforce statewide responsibility for local discrimination, and has cast doubt upon affirmative action programs. State and federal legislatures have been reluctant to consider new approaches or to make funds available for old ones. In general we have not been willing to push the legal system beyond a commitment to formal, rather than actual, equality.

The present cessation of progress is also attributable in part, however, to the limits of the legal process. The courts, perhaps the most prominent feature of the legal process, have never been able by themselves to guarantee minority rights against widespread, stubborn resistance. Thus, for ten years after *Brown v. Board of Education* the number of black children going to school with white children in the eleven southern states did not change by more than a few percentage points. Even in the case of assuring to minority groups the right of franchise, presumably one of the less difficult problems, litigation in the courts made remarkably little headway. It was not until measures such as cutting off federal funds to state school systems, or the ap-

pointment of federal registrars of voters, were invoked, or at least threatened, that segregation in education declined and the right to vote began to be achieved.

The courts are particularly ineffective, it should be noted, where the remedy called for is not a simple negative prohibition of conduct that abridges minority rights but affirmative measures that seek to go deeper into the roots of the problem. Especially where the appropriation of funds is necessary, the courts are ill-equipped to press into these new areas.

Nor has the law administered by the executive branch provided the path to real equality. The administrative process, once viewed as a simplified substitute for the complexities of the courts, has itself become enormously intricate and time-consuming. A charge of discrimination handled by administrative procedures becomes a major operation. The impersonal quality of the law emerges starkly in our welfare system, where the "servicing" of clients is carried out through a maze of rules and regulations with little regard for the human features of the human beings involved. Further, our basic view of the law as virtually the only restraint upon individual greed and ambition makes our whole social structure vulnerable to corruption, an outcome which is already far advanced.

The failure of law and legal institutions, as we have utilized them, to solve the problems of assuring minority rights has, it seems to me, become apparent. We are now in a position where the legal right to participate in the mainstream is formally guaranteed in most respects, but where, due to long-standing and deeply ingrained patterns, the conditions of participation remain heavily unequal.

With respect to the rights of children I must, for the reasons stated, be much more tentative. The extreme individualistic approach embodied in our legal system plainly raises some special problems when applied to children. Our law, as we have developed it, assumes the existence of an individual citizen who is mature, autonomous, responsible, and possessed of the capacity to make decisions. These conditions do not exist, or exist to a lesser degree, when children are involved. The law must therefore take a somewhat different approach. Indeed, the problems of children would seem to present a special challenge for our society to develop new methods of social control which go beyond traditional legal procedures but yet assure fairness and justice.

My distinct impression is that we have not been able to do this. Until the turn of the century the law made few, if any, concessions to the special status of children, except as to the very young. The new juvenile justice system did attempt to create a new approach, with

the establishment of juvenile courts, less emphasis on traditional punishment, more recognition of the social conditions that fostered juvenile delinquency, and greater attention to treatment of the individual child. In recent years, however, there has been a growing recognition that the juvenile system has developed some very serious defects. Jurisdiction of the juvenile courts has been extended to "status" offenses which involve no criminal conduct, proceedings in the juvenile courts have not always led to a fair result and, particularly, the institutions to which the children are committed are inadequate at best and cruel at worst. As Judge Polier has said, the children suffer from both over-control and neglect at the same time.

One reaction to this situation has been a call to abandon most of the basic features of the juvenile justice system and return to traditional legal methods for dealing with youthful offenders. Already the courts have moved far in the direction of requiring that juvenile courts adhere to the main elements of due process, including a right to notice of the charges, the right to counsel, the right to remain silent, and the right to confront and cross-examine adverse witnesses. In addition there have been proposals to abolish the juvenile courts altogether, to abandon the effort to deal with juvenile delinquents by treatment methods, to impose fixed sentences determined solely by the needs of punishment, to reduce the discretion of institutional authorities to modify original sentences, and otherwise to give up efforts at rehabilitation.

My reaction to these proposals is that, by and large, we would be going in the wrong direction. I would favor the introduction of a substantial amount of due process into the proceedings of juvenile courts, especially the right to counsel. We would be taking a long chance with the opportunities of juveniles to obtain justice were we to have no check upon the operation of juvenile court authorities. But I am dismayed at the prospect of placing all our hopes upon a reinstatement of the legal process as it has operated up to now. In particular, it would seem to me a sad commentary upon the ideals and imagination of our society were we to consider the main objective of dealing with juvenile delinquency to be that of imposing "punishment." We must be able to do better than that.

Thus, the treatment of children and also of minorities pose challenges that go to the heart of our social order. In essence we need both to direct our legal system toward more affirmative goals and to find additional methods of social control.

Law and legal institutions will always play a major role in a democratic society. There will always be a need for enforcing social decisions by procedures which embody the principle of generality.

The law must likewise play a vital part in supporting the rights of the individual and thereby maintaining the crucial line between individual freedom and collective responsibility. And law will always be an instrument for expressing the fundamental ideals and aspirations of the just society. But we must find ways of making it less inflexible, less impersonal, more closely tied to the objectives it seeks to achieve, and more attuned to the needs of the individual. In a sense we must try to incorporate into the legal process some of the consciousness-raising that marked the decade of the 1960's. And we must use it, not as an instrument for perpetuating patterns of individual material advantage, but as a means of achieving social justice.

At the same time we must seek new methods of social control through other institutions—the family, the educational system, the community, and others not now envisioned. There are, of course, obvious dangers here. Social institutions, freed from the discipline of the law, can easily become oppressive. But we are by now aware of these dangers and can hope to overcome them. In any event the alternatives are worse.

Finally, let me say that I am not at all sure that we can make much progress along these lines without far-reaching changes in our economic and political structure, and without developing a social ethic that places much less emphasis on personal gain and more on collective responsibility. Both movements, however, can advance together.

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