

State of the Judiciary
Chief Justice Rose E. Bird, California Supreme Court
Message to the California Bar Association Meeting
October 11, 1981, in San Diego, California

It is a pleasure to be with you this morning. Before I begin my formal remarks. I would like to thank the bar for its invaluable support of the judiciary during these difficult times.

In particular, I wish to commend your outgoing president, Robert Raven. He displayed courage in tackling the tough issue of crime and endeavoring to bring some light instead of heat to a subject that is sorely in need of rational discourse. In so doing, he follows in the high tradition of previous state bar presidents, such as Charles Clifford, who have not hesitated to speak out strongly when the times have called for it.

The role of the judge in the 1980s is both an intriguing and challenging topic. Intriguing, because from ancient times to the present, people have been fascinated by the prospect of foretelling the future through such diverse means as augury, oracular revelations, and scholarly extrapolations. Challenging, because the process is definitely an art and not a science.

Nevertheless, there are certain trends and occurrences which we can observe from our vantage point in 1981 that may well tell us something about the decade of the '80's. And those observations, in turn, may lead us to a better understanding of the role that our courts and judges will play during that period.

Some basic changes, for better or worse, are taking place. They should not be sanctioned by our silence. We should be scrutinizing these developments, talking seriously about them, and not allowing our carefully balanced system to be changed without considerable reflection.

I am not a prognosticator and make no claim to Delphic powers. However, California has long been a harbinger, for good or ill, of our national future. I would like to advance the thesis that the deliberative, thoughtful judicial process, which relies heavily on the precision of the written word, is in jeopardy, and with it our Constitution and our Bill of Rights. Before developing this thesis by outlining some things currently affecting the judicial system in California, I would like to provide some perspective by looking at the context of the larger society which the judiciary serves.

The media are a remarkable mirror of that society. They show us reflected images of who and what we are. They are also actors in the film of today, as well as screens upon which that film is projected. For those reasons, many of the following observations will touch upon the media's impact on our lives and our political system.

The most overwhelming impression that our culture conjures up is one of speed. It's life in the fast lane, characterized by a feeling of urgency borne of desperation and boredom rather than a sense of purpose. To paraphrase Herman Melville, it seems "that whatever swift, rushing thing [we stand] on [is] not so much bound to any haven ahead as rushing from all havens astern." Ours is an amphetamine society, without the stability of an anchor, hurtling from one idea to

another, momentarily clinging to them for support, and then discarding them to search for whatever else may float our way.

Things are happening so fast that we have no sense of what they mean. Our days become like changing channels on a television set. As art critic Robert Hughes has observed, the effect of this stream of images, this parade of interchangeable ghosts, has not been "to convey us towards the heart of reality, (...) but rather to insulate and estrange us from reality itself, turning everything into disposable spectacle.

Thus, our society, with its children exposed to some 16,000 hours of television by age 18, demands instant answers to the most complex of problems and is willing to implement startlingly radical ideas after little or no reflection. Yes, we are living in the fast lane, and we've had our foot on the accelerator for so long that we've forgotten what the brake is for.

We have truly become an instant society - instant communication over the telephone, instant entertainment by means of the television. Instant food in throw-away containers, our news is instant, too, and we treat it as a disposable commodity just as we do our convenience food. We are bombarded by a blitzkrieg of details on a dazzling array of subjects. These details are like the loose tiles of a mosaic -- interesting to look at, but incoherent fragments without the glue of correlation to hold them together in a recognizable pattern. And it is precisely that glue, that element of historical continuity, that our instant society lacks.

The TV news may be live and in color, but it comes across in flat, one-dimensional black and white. As Walter Cronkite recently remarked, "the emphasis is on crime, barn burnings and jackknifed trailer trucks, the deeper stories at city hall and the county court and the statehouse don't get the proper attention." The print media have similar problems. The editor of the St. Petersburg Times has observed that "[i]nstead of explaining issues whole, we simply cover fragments of them as they pop to the surface on a given day. This renders many complex national issues incomprehensible to many readers."

Subtleties are necessary casualties of the battle for ratings, and long-run consequences that cannot be explained in less than one minute are simply not explained at all. We crave the sensational as though it were knowledge, accept others' opinions as though they were facts, and focus on momentary trends as though they provided historical perspective. Increasingly, television news programs transmit emotions in lieu of real news. The process has become an empathic one, wherein the viewer is encouraged to identify with the newscaster, who becomes an entertaining friend rather than a well-informed source.

Almost imperceptibly, we are losing our sense of history and with it a measure of our humanity as well. History is the story of people. It is a chronicle of continuity, a cavalcade of the thoughts, the actions, the dreams, the ambitions of real men and women. Today, however, we increasingly associate the people who are shaping our world with images on a screen rather than with flesh-and-blood human beings.

The camera focuses its eye on them, captures their image in an instant, and then disperses it by microwave to the consuming public. The image is the salable item, and the people from whom it

has been wrested are merely disposable commodities. The technology that lies behind this achievement also makes possible a new type of lynch mob approach to unpopular figures in our society. Instead of hanging them from the nearest tree for the benefit of the assembled throng, we can assault them in every home throughout the country by putting them in television's public stocks, taunting and torturing them with the lash of adverse comment, and in the process murder their public image.

As part of this process of serving up images, Form often is exalted over substance, and oversimplification is mistaken for clarity of thought. The appearance of whatever is being packaged - be it food, news, or even our political leaders -- becomes far more important than the package's contents.

For example, our politicians today are inextricably caught up in the business of selling an image of themselves. That image has no room for genuine feelings and emotions or human weakness. Instead, the emphasis is on persona in the personality magazine sense of the word - whom do the politicians date, do they jog, have they taken est, how do they get along with their spouses or children?

A barrage of intrusive trivialities is substituted for any discussion of ideas about matters of public concern. Substantive issues are discarded in favor of one-line slogans couched in catchy prose. And so packaging becomes everything. And in the process the people to whom we entrust political office allow themselves to be stripped of their privacy and robbed of their humanity, all in the name of creating the instant image that sells.

However, this process of dehumanization is not without its appeal to the politician's instinct for survival. Should the package fail to sell, one simply changes the wrapping and tries again. Since the image and the real person are never the same, politicians who understand the relationship between image and media can come back from the depths of unpopularity again and again. The different images projected in this process may be jarringly inconsistent, but consistency is no prerequisite to success in a society so conditioned to focus on the moment.

The private sector is by no means insulated from similar pressures. For example, if the plot line is dramatic enough, if the details are plausible enough, and if the stakes are high enough -- in short, if the story is just too good to lose -- what passes as news may indeed be fiction. As was disclosed recently to be the case with the Washington Post's Pulitzer Prize-winning feature story. Similar charges have also been leveled against a segment of a well-known television news magazine.

Even the bar is not immune to such pressures. Throughout the country, many prominent law firms are hiring professional public relations firms to tout their courtroom successes in the media in an effort to attract new clients.

In all areas of our culture, the primary criteria for success seem to be "how fast can I tell it and how quickly can I sell it." Given such a context, it is difficult to overstate the importance of the media. As New York University professor Neil Postman has remarked, "in an environment in which non-linguistic information is moved at the speed of light, in non-logical patterns, in vast

and probably unassimilable quantities, the word and all it stands for loses prestige, power, and relevance." In light of this observation, is it any wonder that our appellate courts, which must speak through written opinions, are facing increasingly frequent challenges to their decisions' authority?

In a society easily seduced by fads and emotionally dependent on television, in a culture craving instant gratification and addicted to increasingly higher doses of visual stimuli, commentators -- especially those in the more permanent medium of the printed word -- are essential to maintaining a society that has a sense of where it has been and where it is going.

This observation holds particularly true at a time when the public mood purportedly can be measured as quickly and easily as a doctor can take a patient's pulse. In recent years, the emphasis on the moment has enhanced the stature of public opinion polls and surveys as means by which the "will of the people" on any given issue supposedly can be swiftly discerned. The perils inherent in this practice are great. Alexis de Tocqueville's words from a century and a half ago are directly on point: " by whatever political laws men are governed in the ages of equality, it may be foreseen that faith in public opinion will become for them a species of religion, and the majority its ministering prophet."

The combination of these two contemporary phenomena -- the emergence of the "cult of the instant" and the apotheosis of public opinion polls -- places an enormous burden on the media. This year marks the 50th and 10th anniversaries of two landmark Supreme Court decisions -- *Near v. Minnesota* and the *Pentagon papers* case -- that strongly affirmed the press's First Amendment right to be free from prior restraint. Today, it is vitally important that the press vigilantly assert that freedom by not shying away from commenting candidly on matters of public importance, regardless of how unpopular such comments may be.

We Americans like to think of ourselves as unusually tolerant of social criticism, but quite the opposite may be true. As Tocqueville perceived during his travels through the United States, "works have been published in the proudest nations of the old world expressly intended to censure the vices and the follies of the times (...)," He wrote, "but the ruling power in the United States is not to be made game of. The smallest reproach irritates its sensibility, and the slightest joke that has any foundation in truth renders it indignant: from the forms of its language up to the solid virtues of its character, everything must be made the subject of encomium. No writer, whatever be his eminence, can escape paying this tribute of adulation to his fellow citizens. The majority lives in the perpetual utterance of self-applause." Tocqueville concluded, "and there are certain truths which the Americans can learn only from strangers or from experience."

Our social commentators must give us the full measure of their experience and must be willing to risk estranging themselves from us if we are to benefit from their perspectives on our society. Those are no small demands to make at a time when there is a tremendous temptation simply to give people what they want, or at least what the polls say they want. At such a time, however, it is vitally important that these commentators serve as an antidote to the overdose of candy-coated hype and saccharine-sweet oversimplification that we are electronically fed on a daily basis.

From every television set, from every grocery store magazine rack, there spews cotton candy for the mind. It's like air, without substance, full of empty calories consumed in a moment, leaving us ultimately unnourished, unsatisfied, and constantly craving for more. We must have critics and commentators in the media who have the fortitude to tell us that our diets are killing us at precisely the same time when all we want are more sweets. Without such straightforward advice, our prospects for improvement are poor.

Just what impact will this brave new world called the instant society have on our nation's courts, judges, and legal institutions during the 1980s? If what has been happening recently in California is any indication, and historically that has been the case, the impact may be substantial.

One of the reasons I have spoken about the media in such detail is that throughout the country our courts are being opened up to regular television coverage for the first time. That represents a profound change, and the better the understanding that the courts and the media have of each other's procedures and processes, the better they will be able to minimize the detrimental effect that cameras in the courtroom may have on the right to a fair trial.

Before discussing some of the changes the near future is likely to bring, I would like to refer for a moment to one dominant constant of the past -- our Constitution. The Constitution and the Bill of Rights have been our national rudder for the past 200 years. They have given us the stability and continuity that we have needed to keep democracy strong. They have given us the ability to make changes in direction without capsizing the ship of state.

Today, however, there are those who wish to make radical changes in our society, and they view the Constitution as an impediment to their efforts. These new radicals -- and that is precisely what they are -- want either to make wholesale amendments to the Constitution or statutorily take away the jurisdiction of the Supreme Court to apply Constitutional principles to a variety of issues. Their allies in this attempted coup are the emphasis on image and the clamor for instant answers so prevalent in today's media-oriented society.

In California, the most definitive trend of this fledgling decade has been the headlong rush by legislators, the governor, the lieutenant governor, and other public officials at every level to declare themselves generals in the war against crime. It is true that we have a problem with crime among our young, but the proposed solutions are simplistic: put more people in jail and prison and keep them there for longer and longer terms.

The means are principally legislation and Constitutional amendment: for example, authorize preventive detention, eliminate the exclusionary rule, restrict the availability of the "great writ" of habeas corpus, discard the concept of mens rea in specific intent crimes, and lengthen the penalty provisions for a vast array of crimes and enhancement factors. In fact, one state senator even suggested, in all seriousness, that nine-year-old children be sent to state prison. The proponents of these radical proposals seem to believe somehow, as one commentator has pointed out, that society has to choose between civil liberties and effective law enforcement.

The results are predictable. California now has more people incarcerated on a per capita basis than any nation in the world with the exception of South Africa and the Soviet Union. The judges

in this state are sending more people to jail and prison than ever before in California's history. This year, our prison population has been increasing by a net figure of 100, sometimes 200, inmates a week. That translates into an annual increase of at least 5,000 inmates a year in a system that already contains some 28,000 individuals. According to the state youth and adult correctional agency, the annual operating budget of our prisons may well reach \$1 billion within the next five years. Those are astounding figures, and yet we still hear how soft the courts are on crime. But in a society of images, facts have little or no part to play in the perceived reality.

Throughout the United States, prisons are being filled beyond capacity. With double bunking of inmates now commonplace, the director of the national institute of corrections testified recently that two-thirds of the prisoners in state prisons are confined in cells that are below minimum standards. Chief justice burger spoke out strongly earlier this year about the immediate need for major improvements in antiquated prison facilities in the United States.

And yet the same legislators who unhesitatingly vote "aye" on stiffer sentencing bills are increasingly inclined to vote "no" when it comes to the construction and annual upkeep of expensive new prison facilities. The chairman of California's Senate Finance Committee has castigated his colleagues for "wanting to get on the bandwagon without considering the long-range cost and without any concern for the future fiscal implications." But his words have gone unheeded.

Several leading politicians have staked a claim for themselves on this subject. The governor has called for an increased sales tax to build more prisons so that the will of the voters may be "translate[d] (...) into the incarceration of more people." The lieutenant governor has proposed that vacant buildings be converted into prisons in lieu of the state constructing them. The attorney general has suggested that private enterprise build its own prisons and simply lease them to the state and the counselor to the president came to California recently to express the view that the ACLU and other organizations are part of an elaborate "criminals' lobby" working against law enforcement and effective criminal justice legislation. In the meantime, the prison population continues to grow without any noticeable effect on the crime rate.

At the federal level, a particularly disturbing development is taking shape. For the first time in a century, efforts are being made in congress by the executive branch to blur the distinction between our police and our military. Pursuant to this proposal, the military would undertake civilian police functions in enforcing drug smuggling laws. The Oakland Tribune observed in a recent editorial, "[t]he nation and the military have been well served by keeping the armed services out of politically sensitive domestic issues (...) the dangers of involving the armed forces in anti-drug operations are particularly serious." However, with the exception of a few voices of concern such as the Tribune's, this radical change is taking place with almost no public debate or discussion.

The difficulty with this political trend that I have been describing is that it represents a search for instant answers to complex problems. Its action substituted for thoughtful consideration, reflex instead of reflection. Until we are willing to face these problems in all of their complexity, we are fated to pursue the image of a solution rather than its substance.

In the criminal justice field as in health care, we seek the appealingly simplistic "magic bullet" cure while sadly neglecting the area of prevention. For example, one of the few characteristics that people on death row seem to have in common is the fact that most of them were abused children. If there is a correlation there, it certainly seems worthwhile to strive to eliminate such mistreatment for the next generation, yet public funds for such research are being cut at the same time we are spending more and more money to incarcerate people whose criminality may in part be related to the abuse they suffered as children.

The seriousness of crime should never be underestimated, but that is precisely what we do when we are unwilling to consider all aspects of the problem. Granted, it is not popular to acknowledge that we still have racial intolerance in this country. It is not popular to state that our large cities are essentially third-world enclaves where minorities are chronically impoverished both economically and educationally. Where vast numbers of young men and women cannot find jobs and have little or no hope for the future. It is not popular to admit that these things have an impact upon the problem of crime. No, it is not popular to say any of these things, but they are realities that will not disappear in the face of neglect, benign or otherwise.

The focus on crime is certainly not the only trend of the '80's affecting the courts. At the Federal level, the elimination of funds for the legal services corporation and the cutbacks in various governmental benefit programs for the indigent undoubtedly will have a great impact on access to the legal system. At the same that indigents' access to the courts is being curtailed, a quasi-private judicial system for the wealthy is being set up in California pursuant to an obscure 19th-century statute.

Litigants who can afford to do so are renting the services of retired judges, at the rate of \$100 to \$200 per hour, to try their cases privately. Not only do the parties avoid the often lengthy delay between at-issue memorandum and trial, they also get to the appellate courts faster, thus advancing the resolution of their case by perhaps several years.

At first blush, this procedure may seem an attractive alternative to the problem of civil backlogs. In fact, it represents a long step backward to the days when litigants paid for the judge who heard their cases. Our courts perform the public's business, and they should be open to the public they serve, but the rent-a-judge system allows those who can afford it to play by different rules. To paraphrase Billie Holiday, "god bless the child that's got his own."

This new private system sanctions closed trials in law offices or courtrooms. It draws upon the imprimatur of our public judicial system for its legitimacy. But in reality, it is a system apart. Such a process flies in the ace of our credo of "equal justice for all," for it provides that some people are more equal than others.

The increasing popularity of the rent-a-judge program represents another basic change in our legal system that is occurring in the absence of public dialogue. There is no question that we need to take action to reduce civil backlogs, but is the answer really to be found in a private system catering to those who are wealthy enough to pay for advance reservations in the appellate courts?

Using the same statutory authority as rent-a-judge, Ralph Edwards of "This is Your Life" fame has constructed a courtroom in a television studio and pays small claims litigants to try their disputes before a "rented" judge for a syndicated TV audience.

Expediting the resolution of cases is certainly a desirable goal, but fashioning a speedy alternative available only to those able to pay raises some serious public policy questions. These questions become all the more relevant when one takes into account the fact that the amount of public money and grant funds devoted to experiments in improving the courts has greatly diminished in the last few years.

The scarcity of public funds has contributed to another example of the sort of basic change that is almost imperceptibly beginning to shape the legal system of the 1980's. The legislature has just passed a bill that permits and even encourages private donations to be used to fund part of the costs of the new appellate court in Orange County.

In the past, our appellate courts have always been supported by public funds, but now the legislature has declared that money from private individuals and businesses should be actively sought to fund those courts. This is a remarkably important shift in public policy, and it has been accomplished with virtually no discussion of the issue. In fact, the legislature has expressed its intent in a so-called "plus section" of the bill, which means that the language will not be printed in the government code. Thus, there is little likelihood that more than a few people will ever know about this change in policy, or have the opportunity to debate its merits.

Another related example of major change is a proposal that was being readied for legislative introduction at the close of this year's session. The idea was to substantially increase the fines and forfeitures in the trial courts of individual counties, earmark large portions of those revenues for a building fund, and thereby shift onto the backs of the litigants the cost of constructing new court facilities. Though touted as progressive, this proposal is really retrogressive. It revives the discredited practice of yesteryear whereby justices of the peace were directly dependent on the fines they imposed and collected for their salaries and their courts' operating expenses.

Once again, there is a disturbing lack of focus on the underlying public policy considerations raised by such a proposal. Our judicial institutions should belong to the public and be supported by public funds. They should not be paid for by stiff fines levied on a small segment of the public or subsidized by private businesses that want to buy a piece of the action.

There seem to be many developments that are subtly changing our legal system. Even the judges themselves are reassessing their perceptions of their role as it impacts on their self-interest. The instant society has taught us all that image prevails over substance and that the speed and style of a response prevail over its merits. Thus, we have seen the emergence of a new type of activist judge. In the past, an activist judge was defined as one who was essentially a civil libertarian, although the term has acquired some pejorative connotations. The active protection of civil liberties has historically been the highest calling of those who have sat on the bench.

Today, however, the term must be redefined. Now the real activist judges are those who understand how to best serve their own self-interest. They are the judges who hold press

conferences to publicize how effective their county's courts are in sending people to prison. They are the judges who hold joint news briefings with legislators to complement each other's "tough-on-crime" sentencing practices and proposed legislation. They are the judges who sentence individual defendants to hundreds of years in prison to "send a message" to the streets. They are the judges who publicly criticize their colleagues for not sending enough people to death fast enough. They are the judges who are politicians in black robes. These, then, are the new activist judges, and I expect there will be many more examples to add to this list before the decade of the '80s is over.

In part, this trend is a reflection of the fact that courts in the past few years have been forced to resolve issues that politicians in the executive and legislative branches do not want to face. The instant society teaches our politicians to be chameleon-like -- to follow the polls, find an instant answer, and package it so they can sell it to the voters. "Don't like busing, abortion, prayer in the schools, state court rulings?" the politicians ask, "all right, we'll fix that, we'll change the Constitution or pass a statute to keep the courts from interpreting it."

A very simple proposal, indeed, and appealingly conservative as well. But in truth, the notion is a radical one that would stand concepts such as the separation of powers and federalism on their heads. For example, the idea of prohibiting states from interpreting their own constitutions and forcing them to rely solely on the United States Constitution is in fact an attempt to narrow the rights of citizens rather than to protect them. In that context, it is interesting to note that at last count the approval of only four more states is needed to trigger a Constitutional convention.

As the other two branches throw more and more political issues to the judiciary, they also pass along all of the political pressures related to those issues. Unfortunately, the temptation for judges to react to these pressures in the same manner as do politicians is likely only to increase in the coming years. Judicial elections for state court judges have become highly politicized. Specialized public relations firms, in conjunction with the gun lobby and law and order political lobbying groups, now run expensive and elaborate seminars for prosecutors and other would-be jurists to teach them how to use the media to defeat incumbent judges at the polls. The code of judicial conduct, for good reason, places limits on the political activities and comments of sitting judges. But it also puts those judges at a disadvantage in responding to unfair election campaign criticism from attorney challengers who are not similarly constrained.

Faced with such formidable obstacles, judges may well come to view any potentially unpopular decisions by them involving the Constitution and the bill of rights as threats to their careers. This is particularly so when the social issues being brought before our judges are increasingly of a type traditionally foreign to judicial resolution. Courts are not the ideal place to solve the problems of loss of goodwill and community harmony, the problems of inflation and economic inequities, the problems of racism and the social causes of crime. To be sure, courts can and should play a part in these solutions, but the legislative and executive branches must be willing to face these problems in all of their complexity if more than instant answers are ultimately to be found.

It is my hope that judges will be able to withstand these enormous pressures in the years ahead, however, that will not be a simple task. It is easy to be popular, it is difficult to be just. As San

Francisco newspaper columnist Arthur Hoppe recently remarked, "I'm afraid that we are swiftly reaching the point where defending the Constitution (...) will require an act of courage." Unfortunately, courage has become a devalued currency in the instant society. The coin of that realm is image and speed, and those who would place principle above expediency often must pay dearly for that choice.

That is why it is so important for the bench and the bar to maintain the strong relationship that they have long enjoyed both in this state and throughout the nation. Together, the bench and the bar must work to construct a safety net for civil liberties and individual freedoms. A democratic society poised on the swaying tightrope of public opinion has to have such protection if it is to survive. Together, judges and lawyers must work to encourage our society to stop and think before moving with the moment, before lightly undertaking fundamental changes that in the long run may serve us ill.

Finally, we must be willing to make a commitment to courage, a commitment to facing the problems of our society and making the hard choices that lasting solutions require.

Thank you.