PART IV

CONSTITUTIONAL UNTRUTH

·11·

"All Men Are Created Equal"

IF OUR LAST QUARTER-DECADE of war and confrontation has engendered untruth on the part of our government officials, there is one great untruth which was built into our system of government at its inception. Until that untruth could be excised from our Constitution, from the laws of the land and from the conduct of its people, America could never honestly make claim to being "the land of the free."

We had commenced the Declaration of Independence in 1776 with the words "We hold these truths to be self-evident, that all men are created equal . . ." Yet eleven years later, after the due deliberation of perhaps the finest group of Americans assembled in our history, we drafted a Constitution which treated a black man as three-fifths of a human being for the two purposes of taxation and representation. "Taxation without representation is tyranny" had been one of the great battle cries leading to our own Revolutionary War. Our first great political compromise, however, was to recognize and preserve the slavery which then furnished the basis for the economic wealth of the South—particularly the sovereign state of Virginia, which produced four of our first five Presidents, all of whom owned slaves.

At Jamestown, Virginia, in 1619, had been landed, in chains, the first slaves from Africa. Nearly two and a half centuries elapsed before black people were emancipated. It took one of the bloodiest wars in history, our Civil War,

to achieve an end to slavery and to bring the Constitution itself into accord with the shining promise of the Declaration of Independence.

In 1865, the Thirteenth Amendment abolished slavery. In 1868, the Fourteenth Amendment supposedly extended to the freed slaves the rights of due process and equal protection of the laws. In 1870, the Fifteenth Amendment specifically guaranteed to the black man the right to vote.

The promise of these new words in the Constitution, however, were again not matched by performance. For a full century after President Lincoln's Emancipation Proclamation, we remained untrue to the specific language of the constitutional amendments and untrue to ourselves in the process. No laws were passed by the Congress and faithfully executed by the President to insure that black people actually received what the Fourteenth and Fifteenth Amendments, now part of the "Supreme Law of the Land," provided—due process and equal protection of the laws, and the right to vote. For many years, our judicial system accepted the right of state governments to specifically permit discrimination based on race. So long as black people got "separate but equal" schools and public facilities, we closed our eyes to the reality that there was very little that was equal about the segregated schools and facilities themselves.

Individually and as a nation, we were guilty of clear hypocrisy on the issue of racial discrimination. We said one thing and did another. The Declaration of Independence's words, "that all men are created equal," were honored at Fourth of July celebrations all across the country; at the same time political candidates vied for public approval in many areas with words as violent as or more so than those of President Nixon's 1970 Supreme Court nominee G. Harrold Carswell: "I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the princi-

ples of white supremacy . . ." We recoiled in horror from Adolf Hitler's "master race" justification for the extermination of Jews in Nazi Germany, yet we universally accepted the concept that the white race in America was entitled to higher privileges and legal protections than the 10 percent of our people who were black.

During a middle-class suburban upbringing in Southern California, it had escaped my notice that my home town of San Marino had no black and few Jewish residents. I wasn't consciously aware of the quiet but ironclad rules of exclusion practiced by homeowners and real-estate brokers in those years, and it was only after graduating from high school, when I joined the Navy and was stationed in Norfolk, Virginia, that I got my first education in the reality of racial discrimination. I can well recall hitchhiking north up Highway 1 near Richmond one day and seeing a long, low restroom building at a roadside park. There were three doors, "Men," "Women" and "Colored." Even to a white Anglo-Saxon Protestant, this was a clear insult to human beings. But it wasn't until I entered law school in 1948 and studied our legal and constitutional history that I began to consciously understand the enormity of the difference between our principles and our practice in America.

Some years after the Civil War, federal laws in the civil-rights field were held unconstitutional by the Supreme Court. This meant that only state laws could help prevent racial discrimination in the areas of housing, education and employment—areas where state laws, both historically and by practice, were deemed to apply. Many years elapsed before we made any effort to bring our state laws into accord with the new constitutional guarantees, and nearly a century elapsed before we finally began to achieve a framework of federal and state laws which could cure the ancient grievance of insult and inequality. Even with changes in the

laws, however, the personal conduct of many individual Americans continues to make a mockery of what the laws provide. This point can perhaps best be illustrated by tracing the evolution of both civil-rights laws and individual conduct in my home state of California.

From the time of its admission to the Union in 1850, California has had large minority-race populations. First the Mexicans, who had originally settled the state, then the Chinese, brought in for cheap labor on the railroads, and the blacks, who migrated from the South in increasing numbers, particularly after World War II—all of these minority races have suffered discrimination. In California it was a *crime,* for example, for a white person to marry an Oriental or a Filipino until a California Supreme Court decision nullified the state's anti-miscegenation statute in 1948.

Not until 1893, thirty-five years after the adoption of the Fourteenth Amendment, was an anti-discrimination law enacted in California. In that year the California legislature enacted a law providing a civil remedy for damages to a person who was prevented from going into or using a public hotel, restaurant, or place of amusement. Unfortunately the law was ineffective, because the damages were limited to a few hundred dollars and because few self-respecting minority individuals wanted to go to court to seek remedy for an insult; it was easier to suffer the insult in silence—safer too, because threats and violence against "uppity niggers" were not unknown in California as well as the South, even in very recent times.

Over the years, however, California gradually strengthened its anti-discrimination laws. The California Supreme Court in 1944 gave a tremendous boost to lessening segregation, by enunciating in clear and unmistakable language that there was a statewide constitutional right against racial discrimination in employment. A labor union with closed-

shop contracts had denied membership to black men, thus effectively denying them the right to work in the industry, since such membership was necessary for employment. There was no statute on the books that provided for this right of a black to employment, but the court had no difficulty in reaching the decision that the right to job opportunity was so basic as to require protection against discrimination as a matter of public policy.

A few years later, the California legislature broadened the basic anti-discrimination law to apply to all business establishments, "of every kind whatsoever." The black, the Mexican American, the Oriental and the Jew obtained some assurance of a remedy for being refused service by a store, a bank, a real-estate office or any other type of business which offered services to the public. In 1963, the laws against discrimination in public places and employment were extended to include publicly financed housing units. Property owners thus were denied the right to refuse to sell or rent to minority-race applicants.

The California Supreme Court, in upholding the new laws, reiterated the traditional public policy against discrimination: "Discrimination in housing leads to a lack of adequate housing for minority groups . . . and inadequate housing conditions contribute to disease, crime and immorality . . . Under the police power reasonable restrictions may be placed upon the conduct of any business and the use of any property."

A furor developed, however, when a black legislator, Byron Rumford, successfully authored a law which gave blacks the right to seek administrative relief when they were prevented from buying or renting privately owned houses or apartments. To conservative groups such as the John Birch Society and the California Republican Assembly, the state's largest Republican volunteer group, this was

going too far. An effort was mounted to repeal the new law, and the ugly truth was bared for all to see: No matter what the Constitution or the law might say, Californians *wanted* to be able to discriminate on the basis of race alone. As the president of the Republican Assembly, Dr. Nolan Frizzelle, said on September 12, 1964, "The Rumford Act violates the right of the people to discriminate."

Dr. Frizzelle apparently spoke for the large majority of Californians, because within two months, by a vote of nearly two to one, the state's voters approved the infamous Proposition 14, which provided in part: "Neither the State nor any subdivision thereof shall deny, limit or abridge . . . the right of any person . . . to decline to sell, lease or rent . . . property to such person or persons as he, in his sole discretion, chooses." This, of course, sounds fine. Shouldn't anyone have this right concerning his own property? The answer is, of course, that he should unless in exercising this right he violates the constitutional right of every American not to be discriminated against on the basis of race.

The Supreme Courts of both California and the United States held Proposition 14 unconstitutional within a short time, proving one of the peculiar advantages of our system of government—that the Constitution can restrain the excessive abuse of power *by the people themselves* as well as by legislatures and chief executives.

The evolution of California's framework of anti-discrimination laws during the 1950s and 1960s was paralleled by tremendous strides forward by the federal government in the same period, first by Supreme Court decision and subsequently by congressional action.

In 1954, Chief Justice Earl Warren spoke for a unanimous court in *Brown v. Board of Education,* holding unconstitutional the "separate but equal" rule which had permitted dual school systems in the South—one school

for blacks and one for whites. Segregation was held unconstitutional as a violation of the black child's right to "equal protection of the laws," supposedly granted nearly one hundred years earlier by the Fourteenth Amendment.

A second *Brown* decision, in 1955, ordered that dual school systems be dismantled "with all deliberate speed." In some states, school districts voluntarily complied with the Supreme Court's ruling, even though there was as yet no action by either then President Eisenhower or the Congress implementing the court's decision.

Finally Congress enacted the Civil Rights Act of 1964, specifically providing for a cutoff of federal aid moneys to school districts which refused to move reasonably toward ending segregation. The law also provided for a cutoff of federal housing funds where discrimination occurred.

That same year, the Supreme Court found that there had been "entirely too much deliberation and not enough speed in enforcing the constitutional rights" of children in segregated school systems. The next year, 1965, the court said: "Delays in desegregating school systems are no longer tolerable." In 1968 it struck down a so-called "freedom of choice" plan in Virginia on the basis that freedom of choice had been used to preserve a dual school system. "The burden on a school district today," the court said, "is to come forward with a [desegregation] plan that promises realistically to work . . . now . . ." In April 1971 it laid out more specific guidelines to achieve desegregation, ruling that reasonable additional busing was one of the tools which could be used to end dual school systems in metropolitan areas.

These advances toward ending racial discrimination in schools were accompanied by similar advances in the laws and court decisions relating to voting rights, housing and employment.

The Voting Rights Act of 1965 for the first time provided for federal *enforcement* of the rights of blacks to register and vote. These rights had been frustrated for a hundred years by ingenious Southern legislatures which used a combination of burdensome laws and procedures to set up roadblocks that made it almost impossible for blacks to register for voting, let alone reach the ballot box itself. Under the 1965 Voting Rights Act, if less than 50 percent of the persons of voting age in a state were registered to vote or actually voted in the Presidential election of 1964, a suit by the United States Attorney General could require that the state election laws could not be changed without federal-court approval. If twenty people in a given area claimed they could not vote because of discrimination practices, the Attorney General could obtain a court order designating federal examiners who would register the residents in that area and enforce their right to vote. After one hundred years, the promise of the Fifteenth Amendment was finally fulfilled. Hundreds of thousands of blacks could and did at last register to vote in the Deep South.

The Fair Housing Act of 1968 provided for an end to discrimination in federally financed housing, and in the same year the Supreme Court clarified the constitutionality of such laws by upholding an ancient federal fair-housing statute enacted in 1866 but never enforced. Similar legislation and court decisions extended equal-opportunity protections in the field of employment.

Thus, by the early 1970s, federal law and court decisions were finally in accord with the constitutional provisions enacted over a century before, and with the premise of 1776—that all men are created equal.

But what of the reality? What was the performance of individual Americans?

In employment, there were unions in California—and

elsewhere—that still vigorously and successfully denied black participation twenty-five years after the Supreme Court had held such action to be a denial of a constitutional right. As late as 1969, Local 718 of the Glaziers Union in San Francisco had one black in its 350-man membership; Elevator Construction Local 8 had sixteen blacks out of a membership of six hundred.

In housing, I can best present the problem by describing two actual situations in my own home area, the San Francisco peninsula, one of the highest-per-capita-income areas in the world, the home of Stanford University, an area of unparalleled climate and beauty, the community where some of the leading businessmen, lawyers, Nobel Prize winners and scientists of Western civilization reside—but where many people still refuse to sell or rent their homes in all-white neighborhoods to black applicants.

Several years ago, the San Mateo City School District hired, in the spring, ten black teachers to go to work the following September. None did. Why? They couldn't find housing because of the refusal of local apartment-house owners, realtors and home owners to sell or rent to black people.

On one occasion, a young black All-America football player, an Air Force veteran holding a master's degree in psychology from one of America's leading universities, came to my law office in Palo Alto for help in locating an apartment. I assured him he would have no problem in that enlightened Stanford University community, particularly in view of the fact that the university's housing service required a written pledge of non-discrimination from owners who offered to rent rooms or apartments. He disagreed, saying that his first attempt at renting a room had been met with what he felt to be a thinly disguised racial rejection. To show him he was mistaken, I personally called six differ-

ent people who had listed rooms with the Stanford housing service. In each case, I made an appointment for my friend to call on them, being assured by them over the telephone that the vacancies listed still existed. When he called on the owners, however, and his black face was duly noted, five of the six made excuses like "I'm sorry, we've just rented the apartment" or "Oh, we decided not to rent it after all."

The inevitable result of this kind of conduct, no matter how politely it is expressed, is the deep resentment which is caused by any insult.

Laws are drawn—perhaps it is the basic purpose of law itself—to reduce the ordinary frictions of human relationships which lead to resentment, bitterness, fear, anger and their inevitable product, violence.

I am of Irish extraction and proud of it. The Irish are traditionally feisty, quick to rise to challenge and combat, and particularly to respond to insult. We should be the first to understand anger, rage and violent reaction of people who are learning to be proud of their race and to become angry at insults which are repeated daily in public restaurants, public conveyances, schoolyards, elevators and offices.

Actions and conduct calculated to cause anger have long been defined as civil wrongs under the law. We know that provoking a person to anger—insulting him—can lead to violence, feuds and destruction. Thus we make libel and slander actionable in court, knowing that society is served if people are not permitted to libel and slander one another.

Centuries ago our common law adopted the concept that putting a person in fear was a civil wrong. Assault is *defined* as the action of putting a person in fear; the uplifted knife or fist, the raised pistol—these alone constitute a crime if they serve to cause another to feel fear.

Fear is perhaps the worst of all the emotions mankind

can suffer. Who among the white community has gone into a room filled with people, fearing there are some people who hate whites because of their race? The black American knows the feeling, for this kind of thing happens to him often. It would happen to me and to the most privileged whites were we to walk into similar rooms in most black communities.

If freedom from fear is a basic goal of our society, then we *must* end the fear that a black may feel when he is among whites, and that a white feels when he is alone among blacks. Call it kindness or courtesy, the conduct of one person toward another must be such as to end the fear in that person that he is hated or despised because of his race.

With all our progress in civil-rights laws in the past two decades, many of us are still practicing discrimination in our personal and private conduct toward others. The insults continue, the anger grows, the fear deepens. Racial hate, I believe, is our greatest national shame and our most persistent sickness. Aside from the not inconsiderable fact that racism prevents our Constitution from delivering on its ancient promises, it is potentially the most wrenching of our domestic problems. Time and again one hears such outpourings of hate and frustration on both sides of the color line that we reach the reluctant and fearful conclusion that should Americans ever again break out into open civil warfare, the cause will be our stubborn racist prejudices.

We have a curious national blindness in these matters. The Administration cites statistics supposedly showing that the lot of America's black people has markedly improved over the last decade or so. Theoretically, a case can be made for that viewpoint: Blacks are no longer prohibited by law from living, working, eating, voting, or going to school in places where they were formerly denied access.

Again, however, the reality has not matched the promise. Consider these facts:

In the late summer of 1971, when the national unemployment figure was approximately 6 percent of the total work force, the figure for black men in the eighteen-to-thirty age bracket who could not find work was *almost 30 percent.*

Though black earnings have shown an increase in the last decade, blacks actually lost ground in this respect in comparison with whites. The gap now is about three hundred dollars per year per person *more* than it was a decade ago.

The working white with a high-school education may count on earning several hundred dollars more annually than the black with a college education. Whites who failed to finish high school continue to earn more than do blacks who did graduate.

De facto school segregation (caused by whites fleeing the cities for the suburbs) is more prevalent in most sections of the nation than it was a decade ago.

Clashes between blacks and whites—confrontations, acts of violence and so on—have actually increased in the past decade.

Where ten years ago only white politicians in the South appealed to racial prejudices in their campaign utterances or when faced with racial incidents, now many in other sections of the country—both white and black—respond to racial matters with tougher and more inflammatory rhetoric.

In all branches of the U.S. military service, including our troops in Vietnam, there are more racial disturbances and incidents than formerly.

Where five or six years ago there appeared to be more progress among young, college-age whites and blacks than among their elders, that alliance too is coming apart and

the nation's campuses are reflecting an increasing suspicion among students of different races.

It is time in our history for national leadership to clearly and precisely point out the need, moral as well as legal and practical, for a final end to racial discrimination in all its devious and hidden forms—in our conduct, our words and our hearts. As a candidate Mr. Nixon said, "The next President must unite America. He must calm its angers, ease its terrific frictions, and bring its people together once again in peace and mutual respect." If his performance had matched his words, I believe America would be in less difficulty today. The November 1971 Report of Father Theodore Hesburgh, Chairman of the U.S. Civil Rights Commission, put it plainly: "The President's posture . . . has not been such as to provide the clear affirmative policy direction necessary to assure that the full weight of the federal government will be behind the fight to secure equal rights for all minorities."

The failure of leadership is again linked to political rhetoric and a failure of truth.