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The Delicate Balance of Freedom*

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It is not difficult to state the classic goals and purposes of the American society. Probably we cannot improve on the definition offered by our Founding Fathers: "To promote a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty."

From this selected excerpt, we distill the essence of all rhetoric concerned with freedom, human rights and democratic self-govern-ment written and spoken during the past three centuries.

The true difficulty appears when we recognize that objectives in the abstract mean little without proper application. We each have our own special, personal definition for the American goal. We are inclined to equate its basic aspects from our personal vantage point in life, and all too often we fail to realize that the American ideal has as many meanings as there are people sheltered within its borders of influence. Additionally, Adlai Stevenson, in The National Purpose, 1960, noted that under study one can observe something of a rhythm in the nation's pulse, a swing from one definition almost to the opposite, recurring regularly throughout the almost two hundred years of our independent history.

While there may appear to be dangers with so many definitions of the American dream, they are not really in contradiction. Indeed, they are essential poles of energy for a vigorous social order. Without individual opinion and reason, and without widely divergent views concerning the larger issues, our social order would grow rigid, with the spontaneity of its life withering in a stagnating atmosphere of public conformity.

We of the present generation have seen what can happen when a single creed or a self-serving principle is forced upon other nations. Free societies disappear, and the people are reduced to slavery, physically or intellectually, or both, by totalitarians of both the right and the left.

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When we take the long look at our system it is recognized that the real danger to this system is the excesses it breeds—where the petty pursuit of personal interest often overrides the interest of others. While we proclaim our political system as the best man has ever devised—and it is—our history is tarnished with the indecencies and injustices our less socially conscious forefathers practiced in the name of "empire building." A few of the darker passages from our history are the long survival of human slavery . . . the resistance of industry to child labor laws . . . the repeated violations of our treaties with the Indians . . . the desecration of our forests, water and other natural resources under the thin veneer of economic progress. There are contemporary as well as historic occasions where one feels that freedom seems to be working against the very thing for which freedom was created and for which it stands.

The concept, in some quarters, of government as an evil to be reduced to the smallest possible denominator, gives rise in others to the idea that government is and should be a positive instrument designed to secure the well-being of all its citizens. It is frequently the ugly and intolerable consequences of unbridled private interest that has led to the reassertion of the primacy of public good. Sometimes the swing to public protection occurs because the evil has become so sustained that only a meaningful public action—a vigorous new assessment of the impact of the Bill of Rights—can curb that evil. In most areas of political choice, the responsibility for striking a proper balance between competing alternatives is given to the executive and legislative branches of our government. That is to say, it is for the Congress and the President to discern and implement the basic social policies of our Nation.

There are certain areas, however, where this responsibility rests with the courts, and in equal measure, with the lawyers who practice before them. Justice Holmes said that no court can ever rise above the quality of the advocates who formulate, research and argue the issues which are before the court.

Therefore, the obligation that each of the three branches of our government is required to recognize is the responsibility for striking the delicate balance between individual liberty and the needs of society, the inevitable conflict between the unalienable rights of man spoken of in the Declaration of Independence and the common welfare of the Constitution.
Contemporary generations may have forgotten the ancient evils that forced our ancestors to flee to the new country and to form a government stripped of oppressive powers. Our ancestors knew first hand the dangers of tyrannical government. They knew of the English prosecutions based on religious and political beliefs, out of tune with those of the crown. They personally knew those who had stood helpless to defend themselves before biased legislators and judges. In our own colonies we find ample reason for people to be afraid to lodge too much power in the government. Bills of attainer were not unknown on the North American continent. Women have been convicted and sentenced to death as witches. Quakers, Baptists, and other Protestant sects, have been prosecuted. Catholics have been barred from holding office. Test oaths were required in some of the colonies to bar any but Christians from holding office.

It is healthy for us to examine and maintain a daily working knowledge of the historical and psychological atmosphere that gave rise to the adoption of the Constitution and the Bill of Rights. In the light of history, it is not surprising that when our Constitution was adopted without specific provisions to safeguard cherished individual rights, a loud and irrepressible clamor went up from the citizens of the new world. These protests were so strong that the Constitution was ratified by the narrowest of votes in some of the states. Hugo F. Black in *One Man’s Stand for Freedom*, indicates that had there been no general agreement that a supplementary Bill of Rights would later be adopted, the Constitution would not have been ratified.

It should be noted that the Bill of Rights, encompassing the concept that certain rights and privileges should be retained by the people, is itself a fairly novel concept. The history of the evolution of representative government has been, in large measure, the story of the absolute power of the monarch being transferred to an ever-expanding body of the population. As the proportion of the total population which had an effective voice in the policies of the government increased, the government, almost regardless of its form, has become more responsive to the needs of its citizens. And the commonweal—the interests of the majority—is almost assured of protection.

There is an increasingly apparent danger as the goal of representative democracy is achieved. This is the danger that the tyranny of the monarch might only be replaced by the tyranny of
the majority, an evil that the founding fathers took particular care to guard against. Even the English, from whom we have drawn so much of our governmental philosophy, have as their basic political principle, the supremacy of parliament, rather than limitation of governmental powers. The limitations referred to in this instance, are not the checks and balances of the three coordinate branches of the federal government, nor the division between state and federal authority, but rather the limitation of government power in areas directly related to our rights as free men. It was at the time of our first congress, with the more pressing concern of creating a viable government accomplished, that the founding fathers turned their attention to the preservation of the rights which they had struggled so tirelessly to obtain.

Reading the Constitution with its amendments, one is immediately impressed with its primary purpose, namely, to withdraw power from the government to act in certain areas. The provisions of the Bill of Rights that safeguard fair legal procedure came about largely to protect the weak and oppressed from punishment at the hands of the strong and powerful who would want to stifle the voice of discontent, raised in protest against injustices in public affairs.

Since earliest time, and this is true today, philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to inquiry and intellectual curiosity; where man would not be hampered in his probing of the unknown; where men of all stations and persuasions could challenge the most deeply rooted mores, principles and doctrines. Those who wrote the Bill of Rights knew, perhaps better than we today, the risks they were taking in writing the first Article. They knew that free speech might become the tool of revolution, but they also knew that it is the deadliest enemy of tyranny. With this knowledge, they believed that the ultimate strength of a nation lies in its ability to look at itself critically, to look at its institutions, to explore the darker thicket of man's mind, and to adapt itself without limitation to ideas born of inquiry and free from any kind of governmental control over the mind or the spirit of man.

Justice Black has said, "Loyalty comes from the love of good government, not the fear of a bad one."

As lawyers, and also as citizens of a free nation, we recognize in a vivid way that individual freedom is a two-way street—a main-
taining of the balances—with inherent responsibilities and duties. Free men must be quick to understand the kinds of effort and discipline required of them in keeping their society vital and strong. If they have the conscience and wisdom to demand the same of themselves as they demand of their government, our society will flourish and grow.

In making these observations we find in our time conditions that are not attractive to behold. We find this unattractiveness in the streets, at factory gates, and even on the campuses. America is in the grip of a rash of rapidly spreading lawlessness which in large measure is planned and wilful.

Some call this civil disobedience and encourage it, but it is not, by any stretch of the imagination, the civil disobedience practiced by Gandhi or other great men of like persuasion in earlier generations. Instead, what we are confronted with is active, overt, mass violations of the laws of our land; and any such actions, wilfully committed in violation of law, are criminal acts and cannot be classified as anything else.

When policemen attempt to stop disturbances and are cursed and jeered by mobs who attack them with bricks, bottles and jackhandles, this is lawlessness. When draft-age youths burn their draft cards or falsify records to remain beyond the military, this is lawlessness. When picketing at industrial plants ceases to be peaceful and property is damaged and people are injured, this is lawlessness. When racists commit atrocities to persons and to property, this is lawlessness. When a court joins with a community’s so-called leading citizens in a conspiracy to suppress freedom of expression by a newspaper or other publication, this is lawlessness. When the directors of a corporation conspire to defraud their customers or destroy their competitors, this is lawlessness. And when the giants of industry and commerce hold a secret meeting in a far-away place, and with the wink of an eye or nod of the head, create a monopoly, fix prices or otherwise act in restraint of free trade, this is lawlessness.

Viewing the devastating impact, as well as the secondary temptations, of such hostile acts, can we reasonably believe that a disorderly society can survive?

The paths of time are strewn with the ashes of fallen societies, some of which were once as great, in many ways, as is our own. A close examination of their history demonstrates that the first
evidence of decay appeared in citizen disrespect for their laws, accompanied by public apathy and non-involvement, and there is no valid reason to believe that such conditions will serve our nation differently.

The exemplary, ennobling virtue of our political system is that it is a "government of laws and not of men"—of laws made by the people through their elected representatives, which may be at any time changed or amended. Even our Constitution, recognized by scholars as the finest, most practical and enduring instrument of its kind, can be changed and amended.

These methods of making, altering and modifying our laws assure that our society can be orderly, representative and forever enduring. Conversely, any mass flouting of law threatens destruction of our government, our institutions, our society, and ultimately ourselves. No end, however good it may seem at the moment, can justify the use of force in all its violent forms, to bring about changes in our laws or our Constitution. The first Article of the Constitution, "peaceably to assemble and petition the government for a redress of grievances" does not authorize disobedience of either our civil or criminal laws. Indeed, it does not authorize disobedience of any kind. Rather, by guaranteeing the right of groups to petition for a redress of wrongs, it plainly negates taking the law into one's own hands.

There can be no escaping the inevitable. History shows that lawlessness feeds on lawlessness, and any such sanctions, either voluntary or involuntary, erode and destroy a nation's standards, with the tragic result that society loses its moral rudder. This can and will happen here, unless we reassess our values and take a new look at our collective responsibilities. The society which respects its laws is still the exceptional society, and the world is yet full of people who worship the thesis that man needs a master. The survival of the ideal on which this nation was founded is not unassailable. It will survive only if the American people care enough. It would be easier to grasp this truth if we were not so comfortable. Our problem is how to stay awake on a full stomach.

Free men must be quick to understand the kinds of effort that are required to keep our society strong. If they have the good grace and fortitude to demand responsible citizenship of themselves, our society will have durability. When they refuse to become partners
in the pursuit of public good, the institutions which make up our society will not last. Freedom alone will not save freedom, nor the institutions that comprise a free society; and without freedom, a free society and free institutions, the individual becomes a slave, intellectually as well as physically.

There is something very satisfying and comforting about working for the common good, rather than wallowing smugly in one's personal comforts. As Justice Holmes said some years ago, to an imagination of any scope the most far-reaching satisfaction is not money and means, but the command of ideas. We all want happiness and a feeling of having contributed something worthwhile. It is only through giving a portion of oneself to the perpetuation of the brotherhood of man — and taking a stand against those who would destroy our society and its free institutions — that man reaches the fullness of his stature.

As lawyers and judges, we have a much larger responsibility in every area of human existence than most any other profession or group of people. Because of our training, our education and our understanding of the law, we are better able to understand the consequences of wrongdoing, when the laws of our land are violated. In real measure, we are the first line of defense, and as such we have a duty to take the lead in seeing that the laws and their meaning are not distorted. These words do not imply that all laws are just, simply because they are laws. As imperfect as our system of jurisprudence may seem, it is all we have, and it is our primary responsibility to see that it is put to the best possible use.

In our daily pursuits we operate in a constant crossfire of rights and obligations, but if we, as the guardians of the legal machinery of our land, are to chart a course for tomorrow's America — and indeed, the world — we must keep constantly alert to the changes in the law, take care in the preparation of our cases, dedicate ourselves fully and irrevocably to the cause of justice, and maintain a fulltime interest in the improvement of the judicial machinery. Without a strong and vibrant legal profession, that seeks the highest cause of justice, there is no prolonged hope in America — or for free people anywhere.

A free society cannot thrive in an atmosphere of individuals and groups who commit themselves to self-serving or criminal goals. A
free society wants only one kind of devotion, and that is the devotion of rational and responsible citizens.

Through the ages man has reached toward the most exalted ideas conceivable, and with dedication to the higher disciplines he has produced great religious breakthroughs, created marvelous art forms, unlocked the secrets of the universe, and set standards of conduct which give dignity and purpose to human existence. But additionally, in every period of history, there have been men who, reacting to the baser manifestations, have stripped life of its meaning, its substance and its goals.

It is necessary, perhaps vital, for us today, to view the guarantees of our Bill or Rights and the Constitution as something more than an archaic phraseology of another time. Reduced to the commonest denominator, they assure us that the government, in the enactment and enforcement of its laws, must remain responsible to the least of its citizens while responsive to the majority. It is up to us, as judges and lawyers, teachers and students, hopefully as scholars constantly seeking light, to maintain the proper balance — in the courtroom and in the law schools.

The keeping of the third branch of our government — the judiciary — has been given to us almost exclusively. It is for us, therefore, to reconcile the competing interests in this area. We must always be mindful of the balance that has already been struck. It takes more than dedication and hard work to preserve the legal system in an atmosphere of free enterprise — it takes leadership.

In this day of sophisticated judgments, on man and on society, we can best serve the cause of freedom and the dignity of man by seeking competence in our day to day activities. The monuments of legal creativity will not stand unattended.