

subscriptions? How do you increase your subscription list? What about advertising, and what about the possibility of getting Bar Association support? These are only some of the problems that came to mind.

In conclusion, I wish you well in your search for better ways for doing an extremely important job. The law review is one of the most vital forces in legal education today. You have a great responsibility and a great opportunity.

RESPONSIBILITY OF LAWYERS ON THE DILEMMA OF SECURITY AND LIBERTY

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The reference to Columbia in Professor Carnahan's kind words of introduction brought back two things to me. The first of these was this—we had an anniversary there a couple of years ago. I was selected to be the Director of the Bicentennial. My colleagues pointed out that it was most appropriate that they should select someone to run it who had been there most of the two hundred years! In the second place, Professor Carnahan made reference to the number of students who have been in my classrooms. It is a fact that I cannot walk the streets of any city in this country or in Western Europe without encountering on the street someone whom I have known in that capacity. That's a great pleasure, but it also entails some risks. One has to be rather careful of many things that might occur, especially on the streets of the cities of Western Europe.

When I am at a dinner of this sort, I am impressed by the difference between the subject matters studied in physics and the subject matters encountered at a dinner. In physics the natural sequence is solid, liquid, gas; at a dinner the normal sequence is liquid, solid, gas.

This is a conference of experts and I join you in that term if you will let me define the term of "expert"—in the old-fashioned way of a very ordinary person a long ways from home. On that basis we are all experts together.

In thinking what I would talk about tonight I decided not to give my Texas Longhorn Speech—that one, you know, which has two points, broadly separated, and nothing but bull between. Rather I thought this was an occasion which deserves a serious topic. I hope that you will bear with me for that purpose as I speak to you on the responsibility of lawyers to find a solution for the preservation of both liberty and security.

This dilemma is not a new one, ladies and gentlemen. Jesus and Paul met death because the liberty they preached challenged the

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security of those in the seats of power. Security won for a time. The Mohammedans swept through Turkey, Hungary, and Spain with the battle cry of the "Koran or death." The fact that there were survivors in Hungary, Turkey, and Spain indicates that security dominated the choices of substantial numbers. The Council of Sarum was held in 1086 just outside the present city of Salisbury in England. William the Conqueror was a leader of a small group in a hostile country. He utilized the fear of a Danish invasion to exact a direct pledge of loyalty from all the ranks of the feudal hierarchy; thereby tying on the tighter shackles of feudalism to England for several centuries longer than it lasted in the rest of Europe. The Puritans, anxious to worship as they chose, did not wish to extend similar freedoms to the Baptists and to the Quakers. Nathaniel Ward, one of the good old Puritans, said,

He that is willing to tolerate any Religion or discrepant way of Religion besides his own, unlesse it be in matters meerly indifferent, either doubts of his owne or is not sincere in it.¹

In the late eighteen-fifties Abraham Lincoln addressed himself to the problem of the free education of laborers. In a speech in 1859 he called attention to the fact that,

According to that theory the education of laborers is not only useless but pernicious and dangerous. . . . Those same heads are regarded as explosive materials, only to be safely kept in damp places, as far as possible from that peculiar sort of fire which ignites them. . . . But free labor says "no!" . . . Free labor insists on universal education.²

Liberty won. There is present in some of the Catholic thinking of today this thought. Bishop Connell, Dean of the School of Sacred Theology of the Catholic University of America, speaking about two years ago, said this:

Evidently, then, the guidance and limitation of man's right to acquire and to use knowledge are necessary, both for his own sake and for the sake of his fellow men, as is true in the case of all personal rights. This is the basis of the procedure followed by the Catholic Church in legislating about the type of literature its members may publish and read. The Church makes its laws in order that Catholics may be guided toward the knowledge of truth and the practice of virtue, the sole means through which man finds true freedom.³

Security for orthodoxy lessens liberty in order to assure real freedom. That is the substance of that statement.

I want to speak with you tonight about the contents of this liberty; the contents of this security; the recent threats to our security; the

1. MILLER & JOHNSON, *THE PURITANS* 230 (1938).

2. *Address by Abraham Lincoln, Wisconsin State Agricultural Society, Sept. 30, 1859*, in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 471, 479 (Basler ed. 1953).

3. Connell, *Censorship and the Prohibition of Books in Catholic Church Law*, 54 *COLUM. L. REV.* 699, 709 (1954).

recent threats to our liberty—and then face the problem of the appropriateness of the measures taken to assure adequate security and their consequences on liberty.

I'd like to speak of the content of liberty in three contexts—the context of religion, the context of government, and the context of economics. Religion is close to the hearts of human animals. If you view Judaism from a two-thousand-year perspective, you mark a steady growth in the clash of priests, of prophets, and of philosophers. The road up to a mature religious life is filled with the shedding of blood, with ostracisms, with prisons, and with persecutions. West of the Atlantic, in the period 1620-1800, there was an early stage in which the cry was “We must go so *we* can worship as *we* choose.” No tolerance of Baptists—Roger Williams had a hard time in Rhode Island. No toleration of Quakers—one of the chief reasons for William Penn in Pennsylvania. A later stage came, in which it was recognized that each should worship as his heart guides. A message of George Washington to the Hebrew Touro congregation in Newport, Rhode Island, in 1790 marks a great attainment in that line—said he:

[T]he government of the United States . . . gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens. . . . Everyone shall sit in safety under his own vine and fig tree *and there shall be none to make him afraid.*⁴

There had been real advance in liberty in the context of religion.

In the field of government the stress upon fair play is old stuff to those of us who are students of the law. We remember the trial by peers; the loosening of the constrictions of the past through the courts of equity beginning in 1300 and continuing thereafter; the squelching of the Star Chamber; the development of constitutional democracy in place of the divine right of kings; the growth of the ability of people to say what they desired. Too often there is understress on the concurrent need for growth in access to knowledge, and to the wisdom of experience, to a free exchange of ideas for the elimination of the chaff. Thomas Erskine, defending Thomas Paine on trial for seditious libel said:

Other liberties are held *under* governments, but the liberty of opinion keeps governments themselves in due subjection to their duties.

When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy

4. MONAGHAN, HERITAGE OF FREEDOM 44 (1947).

everything in their course.—Let reason be opposed to reason, and argument to argument, and every good government will be safe.⁵

In the context of economics, liberty has been the genius of American history—the liberty to try anything. The explorers moved westward across the Atlantic, across the Alleghenies, across the plains, across the Rockies. It was not safe! Surely not! So what? The steamboat of Robert Livingston bumped and the bumps threw terror into the hearts of many onlookers, but the power to go upstream was that which opened the Mississippi, the Missouri, and the central part of this great country. The iron horses which opened up the West, the laboratory tinkering of men like Thomas Edison, the work on fissionable materials, illustrated the liberty to try anything. Of course, there were accompanying losses—there were deaths, there was time unprofitably spent, there were assets destroyed in the course of these attempts. But offset those losses, ladies and gentlemen, against the earned gains and you have the net gain of liberty in economics. You have the free enterprise of this country.

Truly a very precious thing is the heritage of liberty in the field of economics; truly a very precious thing is this working of liberty, this heritage of liberty in religion, in government, and in the life of business and of science.

Let us then examine the content of this concept of security. The blessings of this country in the past have been very great. These blessings consist in part of physical location, oceans east and west, Canada north, Mexico south, rather constantly absorbed in its own internal problems. Two world wars have been fought with no hostile gun fired within our boundaries; no physical destruction of our farms or cities. It is true there have been lives, and many of them, lost in service abroad. It is true that a great portion of our wealth has been used in the waging of wars. There is, of course, a normal craving for safeguards against the horrors of war, a normal craving for the progress promised by the paths of peace. A very precious thing is this heritage of security in life, in property, and in the manner of living which we choose.

Sir Hartley Shawcross was in this country in January of 1954. The name is perhaps known to all of you—he was Attorney General in the Labor Government in England; he is Chairman of the Council of the Bar of England; he is probably the highest paid lawyer in England. In speaking at that time he said:

How then are the free democracies to protect themselves? Are we to resort—albeit as we may try to think, exceptionally—to the devices of secrecy and of rigid conformity which are the very

5. Howell, *Proceedings on the Trial of an Informaton Against Thomas Paine*, in 22 A COMPLETE COLLECTION OF STATE TRIALS 357, 437-38 (1792).

weapons of those who seek to destroy us? Or, should we—and *can* we with safety—be true to our tradition and proudly proclaim our faith in our *own* bright weapons and in the shining shield of truth? That is the dilemma—easily stated, but by no means so easily resolved. Or, is it a dilemma? Is it not perhaps rather a challenge? . . . [I]n the course of the centuries we have built up both a body of law and a tradition of respect for the great number of individual liberties which in their sum have made our people perhaps peculiarly tolerant of others—and themselves free. At all events that is our aim: freedom and toleration. But we believe that it is only realizable as an aim if it is also practiced as a means. Indeed I would think our experience has suggested that while it is possible to buy a little temporary safety by giving up some liberty, the transaction is often one which in the end leaves neither safety nor liberty.⁶

There is a vital importance, ladies and gentlemen, of devoting each his best thought to the handling of this conflict. Oliver Wendell Holmes, speaking in 1911 to the fifty-year class of Harvard College, pointed out the program of his life:

[T]he best service that we can do our country and ourselves is to see as far as one may, and to feel, the great forces that are behind every detail—for that makes the difference between philosophy and gossip, between great action and small.

What are then the recent and current threats to security? I suppose the first is the shrinking size of the world. Air travel—when you contrast the flight of the Spirit of St. Louis to Paris by Lindbergh with the commercial airline travel of today you get the point. In 1951 I left New York at five o'clock in the afternoon and I was at a conference at Geneva, Switzerland, at four the next day. Subtracting five hours—the difference of time—it took me eighteen hours. In 1953 I had lunch in New York City, and taking a plane at two I was in Los Angeles at six. Adding the three hours of change of time, it was seven. Next Thursday I shall leave St. Louis at 11:15 in the morning and be in New York at 3:24. Subtracting the hour of difference, three hours and nine minutes. Turbo jets and true jets are still ahead. Intercontinental missiles are probably available, although the publicity on them is of course slight. The shrinking size of the world is perhaps the first and foremost of the recent and current threats to security.

Couple these facts with the existence of powerful challenges to our dominance; the numerical greatness of the Russians and of the Chinese; the resource richness of their lands; the divergent views and beliefs as to basic questions. Two nights ago Eisenhower stressed the basic difference between the generally religious attitude of the West and the generally atheistic attitude of the others. There is no question that the Russian society stresses the State to the exclusion of

6. Shawcross, *The Experience of Nation States*, 54 COLUM. L. REV. 734, 735-36 (1954).

the sanctity of the individual. There is no question that planned economy plays a larger part in their society than in ours, where free enterprise is favored. There is an unwillingness on the part of these hordes of people to stay in the positions of inferiority which they have had. The existence of a powerful challenge to our dominance is the second aspect to the recent and current threats to security.

Couple these two with the inevitable scurrility of war—whether hot or cold. Members of our services who risk their lives behind the iron curtain to find out the things we need, are heroes *here*, are spies *there*. The gentlemen performing the similar service for the other side, are heroes *there* and spies *here*. It is inevitable that any weakening of the enemy is an improvement of the balance. War is the negation of morality. The scurrility of war, be it cold or hot, is a factor in the recent and current threats to security. Religions have always proselytized. The Mohammedans as they spread imposed Allah. The Catholic Inquisition sought to save the souls of the people that they investigated. The missionaries of modern Christianity have had the same motivation to save the souls of those to whom they spoke. Communism has emissaries with similar proselytizing tendencies and interests.

The conclusions to which I come from all of this are simple. There are dangers which exist. Against these, protections must be provided. Those protections should be appropriate to the need.

What are the recent and current challenges and threats to liberty? John Lord O'Brian is no Red. Those of you who are familiar with the profession know that he is a partner in the firm of Covington & Burling, probably the leading firm in Washington, D. C. He delivered some lectures at Harvard in 1955 and embodied them in a published book called *National Security and Individual Freedom*. Walter Gellhorn, son of a respected family of St. Louis, is a colleague of mine at Columbia. He delivered some lectures this fall at Louisiana State University and these have been embodied in a book just published called *Individual Freedom and Governmental Restraints*. The Association of the Bar of the City of New York has just completed a study of the *Federal Loyalty-Security Program* which has been published within the past few months. I urge all of you to be familiar with those three books. I can not do more than touch upon a very small fraction of what they give. What are these recent and current threats to liberty? Perhaps the basic depreciation of the rights of individuals and of the individual sense of responsibility deserves first place. O'Brian in his book said,

It is an understatement to emphasize that one of the principal influences which threaten the very existence of democracy is the all-pervasive craving for security at any price. . . . I have mentioned the intellectual claims of the nuclear scientists, the shattering events of the war, emergent totalitarianism, and the un-

precedented power of the forces making for intolerance and conformity, because throughout a great part of the civilized world these influences have all but obliterated any respect for the sanctity of the individual. The combination of these influences has produced, even in this country, a climate of opinion increasingly conducive to the depreciation of the rights of the individual by the exercise of governmental functions. The same forces also tend inevitably to weaken the individual sense of responsibility for government.⁷

He gave a bill of particulars in good lawyer-like fashion of the expanding trends of policy at variance with the American concept of fair play, listing: the imputation of guilt from association; the administrative consideration of opinions held by individuals; judgments based on ideas believed rather than on acts done; the Attorney General's list of subversive organizations, and the use of those lists to determine the qualifications for employment; the use of anonymous sources of charges; the denial of the right of cross-examination (except to Mr. McCarthy); the supervision of travel by American citizens. And after that listing he went on:

These then are the innovations and the new restraints affecting the American society. That at least many of these innovations in some degree invade or threaten invasion of the constitutional liberties of the citizens does not seem to admit of doubt. The vital question is whether all these measures are made necessary by the character or the extent of the Communist Danger in this country. Assuming, as we do, that some system is necessary to protect the security of the nation, is it necessary for the most powerful and the most civilized nation known to history to disregard, and perhaps discard, the principles of individual freedom which have been successfully maintained for nearly three hundred years and which were given special sanctity in the Bill of Rights?⁸

Second, after the basic depreciation of the rights of individuals comes the stifling consequences of the recent pressure for conformity. Henry Steele Commager, in another book, *Freedom, Loyalty and Dissent*, published in 1954, said this:

The new loyalty in the United States is above all conformity. It is the uncritical and the unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices. It rejects inquiry into the race question or socialized medicine, or public housing, or into the wisdom or validity of our foreign policy. It regards as particularly heinous any challenge to what is called the “system of private enterprise,” identifying that system with Americanism. It abandons evolution, repudiates the once popular concept of progress, and regards America as a finished product perfect and complete.

7. O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 7, 10 (1955).

8. *Id.* at 48-49.

Last week I noticed in the *St. Louis Post-Dispatch* a news item that Columbia Broadcasting System had cancelled a broadcast of Eric Severeid, because he planned to criticize the State Department ruling on newspapermen visiting China. I noticed also a reproof administered by the same broadcasting system to Edward Murrow for expressing less strong views on the same topic. I find in a book this passage:

Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinions calculated to embarrass the government?

Who wrote that? Lenin, in 1920. I wonder how many non-Communist Americans share that particular bit of the hated ideology. Of course the Soviets represent the apotheosis of this demand for conformity, for the minimizing of the individual.

Bernard De Voto, before his death, wrote one of the last segments of the Easy Chair in *Harper's Magazine* for July, 1955, in which he said:

I keep hearing that the crisis of the national fever has been passed and that we are on our way back to sanity. All this shows that a few victories for the rational mind can be as intoxicating as a pint of champagne taken on an empty stomach. . . . Texas is still afraid of a book. The Daughters of the American Revolution are still agitating for the abolition of the Bill of Rights. The Girl Scouts flee from mention of the United Nations. University Presidents refuse to expose their students to subversion by our greatest scientist. The Public Health Service will cancel a grant for research on the common cold, if a woman who washes test tubes in the researcher's laboratory turns out to have had a date twenty years ago with a delegate to the Writers' Congress. . . .

At Washington University in this city Earl Warren spoke in February, 1955, and said this:

A few days ago I read in the newspaper that a group of state employees . . . charged with the responsibility for determining what announcements could be posted on the employees' bulletin board, refused to permit the Bill of Rights to be posted on the ground that it was a controversial document. It was reported that the altercation became intense, and that only after the Governor, in writing, vouched for its non-controversial character was the Bill of Rights permitted to occupy a place along with routine items of interest to the state employees. And this happened in the United States of America on the fifteenth day of December, 1954—the 163rd anniversary of our Bill of Rights—declared by proclamation of President Eisenhower to be Bill of Rights Day.⁹

9. Warren, *Blessings of Liberty*, 1955 WASH. U.L.Q. 105, 106-07.

Granted, ladies and gentlemen, that security deserves appropriate protection! Are the protections extended within the scope of what is reasonably needed? On that I have views, on that it is your duty to have views, not necessarily the same as mine, but to have views that represent your thoughts. My views are that we have had an excess craving for security; that loyalty oaths are worthless, since one able, or willing to betray secrets would not hesitate to break an oath; that success is more important than secrecy. Senator Anderson of New Mexico said a time back, "security by achievement is better than security by concealment." Justice Jackson of the Supreme Court said something worth listening to back in 1943 in the *Barnette* case—

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.¹⁰

Churchill, when asked to muzzle the Red Dean of Canterbury, rejected the idea, saying:

Free speech carries with it the evil of all the foolish, unpleasant, and venomous things that may be said. But on the whole we'd rather lump them than do away with it.

Hu-Shih, the President in exile of the University of Peking, says that the free press of Hong Kong was a contributing factor in the success of the Communists in China. There are costs to this liberty, to this freedom. But I am willing to line up with Learned Hand when he said:

Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust, which accepts rumor and gossip in place of undismayed and unintimidated inquiry. I believe that that community is already in process of dissolution where each man begins to eye his neighbor as a possible enemy, where non-conformity with the accepted creed, political as well as religious, is a mark of disaffection; where denunciation without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent.¹¹

There is a difference that we do not always observe between the man in the kitchen who can poison the soup and the man on the soap box able only to poison the air. I believe that our history justifies all of us in having a faith in the power of truth to prevail, when there is available the competition of the market place, a free trade in ideas.

Why bring this to you? Because, ladies and gentlemen, this country is in a life and death struggle for a continuance of the way of life that *made* this country, that made its free enterprise system possible. We

10. Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

11. Address by Judge Learned Hand, University of the State of New York, Oct. 24, 1952.

are in a life and death struggle for a discard of that conformity which blights progress. You are the potential leaders in the traditionally guiding guild of citizens. If you do not live true to the paths of your great heritage, upon whom can one count? The assumption of this task is the high privilege of our chosen profession.

Lest you feel that there is an undue impediment in my silence—I'm through!

MINUTES OF DISCUSSION GROUPS MAJOR ARTICLES AND BOOK REVIEWS

1. Topics

Few reviews expressed definite ideas on the subject of selection of topics. The great majority prefer, apparently, to leave the selection to the writer. There were, however, three definite suggestions offered. One review successfully follows the practice of contacting the local bar association to determine what topics are of current interest. Another distributes questionnaires to its subscribers to determine topics of reader interest—this practice was conceded to be expensive. A few reviews depend entirely upon the recommendations of their faculty advisors.

There was a great diversity of opinion as to whether reviews should adhere to matters which are strictly legal in their leading articles, or should include works pertaining to non-legal subjects. Reviews which have experimented with non-legal material reported a high degree of acceptance by readers. Some examples of well-received non-legal material are: public opinion polls, legal history, sociological studies, tests on intoxication, statistics on criminal insanity, "Morals, Medicine and the Law," and psychological and economic studies.

An even greater diversity of opinion was indicated in the discussion of the question whether reviews should direct their leading articles at "practical" problems. It appeared that individual bias as to the basic purpose of the review was reflected in the positions taken on this question. Delegates personally committed to the philosophy that the review's primary function is to serve as a handbook for the practicing attorney emphasized problems most likely to arise in day-to-day practice. Generally speaking, representatives from reviews having close ties with local bar associations agreed with this viewpoint. On the other extreme were delegates who posited that the review's principal function was that of a tool to be used by teachers and students, and therefore, that the review should primarily concern itself with problems of theory, logic, and development of the law, treading into the "practical" realm only incidentally. Most delegates were of the opinion that the law review should strike a balance and include a respectable assortment of articles of both types.