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Remarks of J. L. Robertson

Vice Chairman of the Board of Governors  
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## A Malaise of Our Time

It is a pleasure for me to have an opportunity to visit Dallas and the great state of Texas. But there is something slightly incongruous about a central banker from the east coming out to the state that is famous for that fine law enforcement body, the Texas Rangers, to talk about law and order. However, I suppose that if Texas can send a lawyer, John Connally, to Washington to tell us how to manage money, a money-man is entitled to come to Texas to make a few remarks about the crisis in crime.

Actually there is much to be said for having our problems examined by people whose vision is not limited by overfamiliarity with the problem. The obvious is not always as plain to one who is very close to a situation as it is to an outsider. I am reminded of a story about a bartender many years ago in my home town, Broken Bow, Nebraska. An Englishman was visiting Broken Bow and he dropped into the saloon for a drink. He witnessed what seemed to him to be a very strange event. A man came in and ordered a beer. After drinking it, he walked up the wall, across the ceiling, down the other wall, and out the door. The Englishman watched this with amazement, and after the man had departed, he turned to the bartender and said: "I say, wasn't that a bit unusual?" The bartender replied: "It sure was. I have never seen him drink beer before."

I must confess that I am not exactly a stranger in your midst. My formal training was in the legal field, and my lifelong career in government has given me a deep and abiding interest in the role that law plays in our society.

There are many factors that have contributed to man's upward progress. There is the spirit of scientific discovery and invention. There is the spread of enlightenment and knowledge through education. There is the "taming" of the human animal by the inculcation of religious and moral sentiments that bring about internal self-control. All of these are important, but none of them, singly or together, could have produced the flowering of civilization without the development and acceptance of the rule of law. The orderly regulation of man's relations with his own family,

his neighbors and all the other members of his society through law has been a key element in social and material progress throughout history. In this country we have been extremely fortunate to have had a system of laws and government that has given us security and stability while at the same time affording maximum opportunity to exercise our liberty to experiment and explore. We have had government based on the consent of the governed, and that has meant heavy reliance on respect for the law and willingness of the individual citizen to honor and uphold it.

I think this has been an important key to the greatness that our nation achieved in a relatively short period of time. There are those who now think that we may have passed our peak of greatness and that we are entering into a period of decline. There is one important piece of evidence that would support this view: a deterioration in respect for the rule of law, which is becoming distressingly obvious.

Those of us who appreciate the importance of the rule of law can understand the tremendous damage that is being done to our social fabric, even though this goes virtually unperceived by the ordinary observer. We know that the poison of disrespect for law is cumulative in its effects. We cut a corner here and another there, always for a good reason, and after a time we find that we have substantially reduced our power to control human behavior by the force of law. As Professor Paul Freund counseled us a few years ago, in another context: "...to jettison principles of law because your aims are pure, or holy, or patriotic, denudes you of defenses against those who are just as certain of their rectitude." If the law may be ignored for reasons we think good, others will claim the equal right to ignore it for reasons they think good but which we may consider totally bad. Each man becomes his own judge and jury. Actions that would have been unthinkable in an earlier age, when law commanded respect, become commonplace. And as William Pitt said: "Where law ends, tyranny begins."

Let me cite a few recent illustrations of what I see as symptoms of a potentially disastrous malaise of

our time, a malaise that can afflict all members of society, including judges, legislators and public officials - and usually they are not even aware of it.

In 1970 Congress decided that the voting age in the United States should be lowered to eighteen. This is a controversial question, but let us assume that the objective was entirely laudable. The question is whether the Congress had the power to force and freeze this change in the voting requirements of all fifty states - whatever their own laws might be - through its own simple statute. The Constitution seemed clear on this point. The determination of voter qualifications had been assigned to the states, and the constitutional provision had long been respected by Congress and the courts. On three previous occasions when it was desired to change the voter qualifications nationally, the amendment route was taken; thus constitutional amendments were passed to remove the barriers to voting for reasons of race, sex, and nonpayment of poll taxes.

Congress ignored these precedents and chose to make a sweeping change in voter qualifications by simple statute. The plan was not to have this ratified by three-fourths of the states, as the constitutional amending process requires, but by a simple majority of the Supreme Court. A quick court test was arranged, with the backers of this procedure hoping that at least five justices would go along with this Congressional assumption of a right that had heretofore been universally recognized as a prerogative of the states. The Supreme Court split down the middle in the most literal sense. The deciding vote was cast by a justice who decided, in a truly unique opinion, that Congress could set the qualifications for federal elections but not for state elections. Since this was not a practical solution to the problem, Congress has now gone back to the constitutional amendment procedure that it should have followed in the first place. Some may say that no harm was done, but the fact is that we have seen a partially successful circumvention of the procedure laid down to protect against Congressional majorities effecting fundamental changes in our Constitution.

I doubt that many members of Congress or the Supreme Court who supported this end run around the Constitution gave any thought to that passage in Washington's Farewell Address in which the Father of our country said:

"If...in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

If the procedure followed in the case of the eighteen-year old vote is allowed to stand as a precedent, what is to prevent our Constitution from being similarly altered by legislative majorities in other cases? Nothing but the consciences of five justices of the Supreme Court. This is an imperfect defense against constitutional usurpation. One could feel more certain of the future of our constitutional safeguards if there had been a loud public outcry against the circumvention of the amendment process. I heard none.

The door was opened, if only by a crack, to the abrogation of the power of the people, through their state legislatures, to veto proposed changes in the Constitution.

This malaise is infectious. We are an impatient people. We are a practical people. We see what looks like a desirable objective, and we want it now. In the past we have been restrained by those wise restraints built into our legal system which served as a barrier to our natural impetuosity. This worked only because we accepted the great principle that the law must be observed. Deny that principle, and the barriers to impetuous action collapse.

I am sorry to say that the infection has spread so widely that it has even invaded my own agency. In a recent case involving a matter of bank supervision, the Federal Reserve Board was confronted with a dilemma. The

Board wanted to permit banks to carry out what many think to be a perfectly reasonable operation of collecting deposits by armored cars. The difficulty was that the Supreme Court, interpreting the federal statutes, has ruled that such deposit-collecting cars were bank "branches".\* Thus, in states where the law restricted such operations by banks, the federal statutory restrictions on branch banking would seem clearly to apply to the use of armored cars to gather deposits.

If the objective of facilitating the use of armored cars to gather deposits was a good one, it should have been achieved by seeking changes in the laws. But this would take time, and besides it might not be possible to get the laws changed. A simpler course was available. A legal interpretation was formulated which the majority of the Board utilized to avoid following the Supreme Court's decision. Thus, the corner was cut. The immediate objective was achieved; but a precedent was established, a precedent that in my view contributes to the cumulative undermining, step by imperceptible step, of the rule of law on which modern civilization has been built.

The public will not get very excited about the ruling of the Federal Reserve on armored cars, although the principle involved is an important one. I would like to cite another case which is a more likely candidate for deep public concern.

Recently the Federal Communications Commission issued a notice advising broadcasters that they should make themselves aware of music "tending to promote or glorify the use of illegal drugs". The Commission did not actually bar this music from the air, but it said that the airing of songs that glorified illegal drugs by broadcasters would be a factor that would be taken into account in the Commission's consideration of applications for license renewals.

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\*First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). In Jackson v. First National Bank of Gainesville, 430 F. 2d 1200 (1970), certiorari denied by the U.S. Supreme Court March 1, 1971, the same principle was applied even though the armored cars were owned and operated by a subsidiary of the bank's holding company.

One member of the Commission dissented from this decision, charging that this was an effort to censor song lyrics. Two days after the ruling was issued, this same official, according to one press report, appeared on a radio station in New Haven, Connecticut, and for a solid half-hour played the very type of records his Commission had asked the broadcasters to avoid.

The propriety of the action of this official in openly flouting the decision of his own Commission is questionable. It is one thing to criticize a law or a ruling; it is quite a different thing to defy it. One of the great reformers in law and government, Jeremy Bentham, put it well when he said: "Under a government of laws, what is the motto of a good citizen? To obey punctually, to censure freely."

My purpose here is to focus your attention not so much on the conduct of this official as upon the attitude - another symptom of the malaise - that I believe to be responsible for much of the shocking increase in crime and lawlessness that this country has seen in the past decade.

I refer to the attitude that society must accept the verbal or pictorial justification and even glorification of unlawful activities. It is the attitude that society may bar the criminal acts themselves, but has no right to bar incitement to commit such acts. The dissenting Commissioner said that the lyrics of songs that encourage or glorify drug use are "irrelevant" and that artists must be allowed "to run free". Never mind if these lyrics and the artists who compose and sing them lure thousands of youngsters into the trap of drug addiction, ruining their lives, forcing many of them to turn to crime to support their habits, bringing tragedy into the lives of all who love them. Society, according to this theory, has no right to still the Pied Piper's flute.

When a society does not tolerate a certain form of conduct, it takes the measures necessary to see that that form of conduct is rarely, if ever, seen. There was a time, for example, when American society did not tolerate

the use of narcotics. Virtually every member of society agreed that this was an evil that should not be tolerated. Drug users were severely punished, when caught. But their numbers were few, not because the punishment was severe, but because no one recommended, condoned, or defended the use of narcotics.

Today we have a serious narcotics problem in this country. The punishments have not changed. The diligence of the law enforcement agencies did not suddenly diminish. What did change, slowly but surely, was the extent to which society became tolerant of the use of narcotics. The punishment remained the same, but we began to see toleration of the advocacy of the use of marijuana, LSD, and harder drugs. The notion that use of narcotics was not bad, but perhaps even good, began to appear in various media of communication - newspapers, magazines, books, motion pictures, and popular songs. The advocates of drug use acquired sufficient respectability that they were able to spread their message with relative ease and in many cases to their own substantial pecuniary profit. It is saddening to note that the strongest opposition to the FCC ruling on drug-oriented music comes from the record companies that have made millions of dollars from these songs.

In narcotics control, as in any other constraint, the rule of law depends on the maintenance of a climate in which the law violators are a minuscule proportion of the population. This means that only a small part of the resources of society has to be devoted to detecting, trying and punishing the lawbreakers. When the number of people who flout any particular law rises to a certain level, an open society that does not wish to resort to terrorist tactics finds it impossible to enforce that law. This is true even though those who defy the law may actually comprise only a small minority of the total population.

If we really want to stamp out the narcotics traffic and other crimes, it seems clear to me from all past experience that we have only one practical course that would be appropriate for our kind of society. We must cease to be tolerant of incitement to or encouragement of



violations of the law. We ought to aim at the creation of a climate where the commission of these crimes is virtually unthinkable, as it indeed is in many civilized countries.

This is not an untested theory. Some months ago an article in the Washington Post pointed out that Japan had successfully avoided the kind of drug use epidemic that has swept our country. Writing from Tokyo, the author noted that the Japanese strictly enforce the laws against illegal drugs, including marijuana, and added:

"Apart from the tougher police approach here, the underlying reason for Japanese success in controlling drug abuse appears to be the overwhelming public hostility toward narcotics and a corresponding willingness to cooperate with the police...In movie and TV thrillers here one of the most common villains is the dope smuggler, invariably depicted in venal colors."

He then went on to describe the great caution with which the daily press handled narcotics-related news.

This is in sharp contrast with the irresponsibility displayed by the communications media and the entertainment industry in our own country. Here we have seen dangerous narcotics glorified in the songs designed to appeal to impressionable teenagers. These have been distributed by large record companies and have been played over the air repeatedly throughout the country. The "artists" have indeed been allowed to run free. Those who were notorious advocates of the use of dangerous drugs have been lionized on television and in the press.

More than two decades ago, one of the wisest men of this century, Judge Learned Hand, in his famous essay on "The Spirit of Liberty", said:

"The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of

reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous."

It appears to me that this tremendous power described by Judge Hand has, in our society, devolved upon men who in many instances seem ready and willing to promote crime and the moral disintegration of our society for their own profit. This is clearly true of the record companies that have protested the FCC memorandum on drug-oriented music. The movie makers, the broadcasters, and the publishers have frequently shown similar lack of concern for the consequences of the products they peddle.

One of the most pernicious influences has been the so-called "underground" press, which circulates very much above ground among our young people. These papers openly advocate the use of dangerous drugs, and in many cases they have condoned and even encouraged crimes of violence - printing instructions, for example, on how to make bombs.

The irresponsibility is not limited to the "underground" press, however. One of our most prestigious newspapers has published numerous articles that have defended and even advocated the use of an illegal drug, marijuana. The paper, of course, editorially deplores the terrible drug epidemic that is daily taking the lives of children in its city. It apparently sees no connection between the spread of the evil it deplores and the advocacy of drug use that is found in its own columns and in the movies and books it advertises.

We have also seen in the press and on television a tendency to explain the inexcusable bombing of public

buildings, including even the Capitol Building in Washington, in terms that come very close to a rationalization of these despicable deeds. It has been said that the bombings were the acts of frustrated young people who found society unresponsive to their legitimate demands and who took this way of expressing their disappointment. This is a form of the discredited argument that it is society, not the individual, who is to blame for crimes the individual commits.

If a society permits its young people to be taught, by one means or another, that it is all right to blow up buildings, no one should be surprised if some of those young people decide to engage in that activity. I know that it is contended that no harm is done by mere advocacy of illegal deeds. There are some very respectable people, including some eminent jurists, who contend that a truly free society must permit the advocacy of anything and everything, no matter how repugnant it may be. The idea is a very noble one, in theory. We are attracted to the idea for two reasons. The first is that our thoughts and the expression of those thoughts should not be subject to the control of anyone else, including the government, or perhaps I should say especially the government. The second is that thoughts have their consequences in the real world and hence the course of the open society is advanced by a free market in ideas. Yet the latter proposition confronts us with a dilemma. Experience and logic both show that human conduct is strongly influenced by suggestion. Our multi-billion dollar advertising industry is based on the idea that people can be induced to buy this or that product - from vitamins to hot pants - by reiterated suggestion, by repeated advocacy.

A society that tolerates advocacy of illegal conduct will inevitably be faced with a higher crime rate than a society that clamps down on the advocacy of criminal conduct as well as on the conduct itself. It will be obliged to put a greater amount of its resources into policing the criminals, trying them, and incarcerating them. The cost of this, as we are discovering, is very great not only to society as a whole, but to those individuals who are unfortunately led into the commission of

criminal acts. Their lives are almost invariably ruined and wasted.

Hence, we have the seeming choice between two alternatives. On the one hand, as members of a free society, we want ideas to be generated and circulated without censorship or fear. On the other hand, we must be free of the terrible plague of criminality, which can snuff out not only the rights of freedom and security that civilized men are entitled to enjoy, but even life itself. But that choice is really illusory for - as the late Justice Robert Jackson warned us - the choice is not between liberty and order, but between liberty with order and anarchy without either. And until very recently, virtually all societies have agreed. They have opted for some restraints on what could be advocated, aiming to prevent crimes by that small part of the population that might prove susceptible to suggestion that they flout the law. This was a view that was supported by our most eminent official interpreters of the Constitution, including Justice Oliver Wendell Holmes, up until fairly recent times. It was Justice Holmes, you will recall, who struggled with this problem and formulated the so-called test of "clear and present danger". This distinguished between advocacy of illegal acts which might clearly involve the danger that it would lead someone to break the law and advocacy that did not appear to involve that risk. Holmes felt that society could safely tolerate the latter, but it had every right, even the duty, to suppress the other.

This seemed to be the obvious resolution of the essentially spurious dilemma. However, a more recent school of jurisprudence has discarded it in favor of the theory, an incredible theory - unsanctioned by history, untenable in logic, and repudiated by experience - that freedom of speech is indeed an absolute, which should under no circumstances be subjected to any restraint. The acceptance of this theory in recent years has opened the way for uninhibited advocacy of criminal conduct in a wide variety of ways. Not only has it become possible in song and drama to suggest the glories of the use of narcotics to impressionable young people, but it has become possible for agitators to harangue emotional crowds with recommendations that they burn or bomb public buildings.

We are now told that the proper remedy for the evils that we have caused to be visited upon our society is intensified education. It is said that we must step up our efforts to persuade young people that it is not in their best interests to ruin their lives with drug addiction or to take up bombing as a hobby. I would certainly agree that education along these lines would be highly desirable. However, I wonder how much sense it really makes to redouble our efforts in this direction when at the same time we do nothing to halt the countereducation which is in progress - the advocacy of these evils by means that seem to impress many of our young people more than do the lectures that they receive in school or at home. The popular music that suggests drug use is something that even a highly skilled teacher might have difficulty overcoming. A salacious underground newspaper, spiced with titillating pornography, that carries articles on how to make and use bombs to "overthrow the establishment" may be far more exciting to some young minds than Bible lessons.

The educational approach reminds me a little of the Washingtonian who came home one warm day to find that his wife had turned on the air conditioner but had not turned off the furnace. The thermostat on the air conditioner was set at 70 degrees and the furnace was set at 75 degrees, and the two were battling it out. This is what we are doing with the minds of our young people. Common sense and our long historical and legal tradition tell us that we can and should protect them against the corrupting influence of those vicious elements in society who would lead them down the path to self-destructive criminal conduct. We should do this by applying the reasonable restraints on freedom of expression that were applied with eminently satisfactory results during the first 160 years or so of our Constitution.

I will not pretend that a return to the constitutional insights of Mr. Justice Holmes will immediately solve the problem of spiraling crime. That return, however, affords us the necessary beginning, which is to understand what the problem really is - namely, that

crime is essentially a consequence of intellectual and moral forces, not economic ones, and more specifically it is the fruit of ideas which circulate in society and influence the behavior of a susceptible minority.

What we see about us today in the high crime rates and the declining security for persons and property is the cumulative effect of the malaise I mentioned earlier, the gradual erosion of respect for the law. We see this in the increased willingness to cut legal corners to achieve desired objectives more rapidly than could be done if the letter of the law were observed. We see it in the open flouting of the law by men and women who command wide attention in our communications media. And most seriously of all, we see it in the attitudes of some of those who determine the conduct of our communications media.

Even though I am sure the malaise is curable, I do not profess to be able to prescribe the cure. However, I suggest that we try to find it:

- (1) by accentuating the positive about this great land of ours rather than magnifying its defects;
- (2) by focusing the spotlight on those people who are striving to improve our society rather than on those who seek to destroy it (and in the process, stop making heroes of those who blatantly refuse to abide by the law); and
- (3) by devoting more of our efforts to modernizing and speeding up our legislative and judicial machinery and to improving our laws and their administration, and less of our effort to devising ways and means of "righteously" evading the law, or cutting corners, in our haste to get somewhere fast.

As I reflect upon the danger to our free institutions that is posed by the evident decline in respect for the rule of law, I am reminded of the remedy prescribed

by Abraham Lincoln at a time when he was troubled with a similar concern. Lincoln warned that if the laws were disregarded and the rights of the people were not secure, the alienation of their affections from the government would be the natural consequence. Then he said:

"Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others...let every man remember that to violate the law, is to trample on the blood of his father, and to tear the charter of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap--let it be taught in schools, in seminaries, and in colleges...let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation...

"While ever a state of feeling, such as this, shall universally, or even, very generally prevail throughout the nation, vain will be every effort, and fruitless every attempt, to subvert our national freedom." ("The Collected Works of Abraham Lincoln", Volume I, p. 112)