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OF THE LAW

ROGER J. TRAYNOR

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The retirement of Chief Justice Roger Traynor from the Supreme Court of California marked the end of a singularly distinguished judicial career. The respect accorded him by his colleagues on the bench is evidenced by the nationwide impact of his opinions in such areas as torts and conflicts of laws. The Law School was fortunate, therefore, to have Professor Traynor deliver the John A. Sibley Lecture in Law on April 29, 1971. Although his remarks were directed at the student disorders of the late 1960's, they retain their relevancy as the personal reflections of a brilliant jurist on order in a free society.

In a time of burning questions, crowds gravitate to pitchmen with sure-fire answers. There has been a long field day for the pitchmen of holy holocausts or holy floodwaters throughout the sixties and throughout the world. At the close of the decade, nothing has come of their promises to put an end to all the problems that attend rising expectations in mixed economies of war and peace. In the interim confusion, however, top-selling manuals of violence on street corners have multiplied as rapidly as top secret texts in bureau drawers.

No one can ignore the pervasive anxiety over the high fertility rate of top secrets that attend the waging of non-wars. For all we know, the bureaus may be bulging with completed crossword puzzles, unfinished novels on Swiss banks, or fading source materials for history, along with the usual workpapers of foreign policy. It remains impossible for us to pass judgment on something about which we are so much in the dark. We have not begun to explore the dimensions of our right to know about our government at home and abroad.

At least our lethargy in this regard is our own fault and within our own power to correct. The immediate problem now is less lethargy toward government than confusion in the face of domestic violence that can no longer be explained away as simply a consequence of foreign policy, let alone of domestic policy. Self-appointed leaders of violence

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* John A. Sibley Lecture in Law delivered at the University of Georgia School of Law on April 29, 1971. During the course of this address the author invoked some reflections he has set forth in previous addresses. Not surprisingly, they have become no less relevant with the passage of time.

** Professor of Law, Utah College of Law. Chief Justice of California (Retired). A.B., Ph.D., J.D., University of California (Berkley), 1923, 1927, 1927.
have cast about for grievances large or small, real or imagined, far removed from foreign policy. They have presented non-negotiable demands right and left with threats amounting to intimidation or all too often with force. They have pretended to nobility in their savagery, worthy of a Boston Tea Party or at least a Whiskey Rebellion. They have caused trouble out of all proportion to their numbers, trading on the willingness of predominantly freedom-loving people to tolerate abuses of freedom rather than to invite repression.

Unfortunately, many a normally reasoning person tends to lose his mind in times of crisis as his chills give way to fever. When he is besieged by public troubles that grow and grow, compounding the rate of interest that fanatics take to exploit them, when troubles close in on him in a storm of placards on the street or a welter of televised news in his modest Lebensraum, he is inclined at last to hear voices that promise him peace or promise him war if only he will stop thinking and take up a grenade or a bomb to fight either the war or the peace to a finish.¹

We can no longer ignore how indiscriminate violence has become. My own concern focuses on the dangers of violence to the very law that in recent years has so heavily protected individual freedom and so largely opened the way to social change. How do we counter the propaganda, crude or subtle, that condones violence in the name of progress?

I soon learned that violence is a slippery abstraction for the mind to confront. So I have confronted one at a time the shifty premises for violence that under fortuitous circumstances make an appeal even to some ordinarily rational people. The first premise is that there are no alternatives to violence as a means for change. The second premise, belying the first should it be challenged, is that even if there are alternatives, speed is the essence of change, and only violence has the requisite horsepower. The third premise, belying the second as well as the first should they be challenged, is that even if violence be neither the only alternative nor the speediest, it has still proved itself as the most successful.

That categorical statement has a built-in appeal to all those whose values begin and end with the concept that nothing succeeds like success, a group that includes those who specialize in succeeding at failure. They have not yet caught up with the chapters that follow acts

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of violence, bereaving it of so sunny a name as success. The real name of
the war games of the violent is not success, but abysmal failure. That
sorry realization is beginning to come home even to those who signed
on as campfollowers with the violent in the belief that their own trou-
bles could be resolved regardless of injury to other people.

Most judges and lawyers are at least aware of the personal as well
as the social catastrophes that violence has succeeded in wreaking.
Most are now also aware that various groups are at least earnestly at
work to preclude or confront violence effectively in rational ways. So
I conceive my own statement to be no more than a mite in such a
confrontation, directed against the flourishing worldwide trade in
violence in its unfair competition with law.

I could not possibly utilize against today's new tyrants their verbal
shotguns of guerrilla speech. Any of you still unfamiliar with such
speech can probably find examples on the nearest newsstand. Be then
prepared for a very bad trip. You are not likely to find one organically
grown germ of an idea in a carload of strung-out kelp. Only rarely
will you come across a hard-worn tatter of unique descriptive value.
Such a find is the verb to trash, meaning to vandalize or lay waste.
Trashing is the bombing of a bank or the burning of a flower shop, the
desoiling of a supermarket or shoe repair shop, or the looting or
destruction of a scholar's files. There is also trashing of human beings,
with excremental words, sticks and stones, and hardware weapons.
Trashers capitalize on their exploits for the special public that devours
spurious sex and violence, by publishing blow-by-blow accounts in
statements purple with glee. The odes of love to trash- ing accurately
reflect the souls of its spokesmen.

However well-versed the violent are in pushing their hate, sometimes
under the guise of love, they would soon have been written off as bad
actors in ordinary times. There is nothing ordinary about an age of
far-reaching military programs and ambitious explorations; a new age
in which warriors and hunters have brought sophisticated schooling to
their pursuits. There is nothing ordinary about high waves of prosper-
ity on which float ivory or jet sets amid miserable flotsams and jetsams.
Moreover, people of all ages and conditions have become adventurers
beyond their villages or nations, even if only through television. There
are inevitable shocks to established authorities, wherever they reign.
Given such turbulence, it has been all too easy for those disposed to
violence to attract problem children of all ages to their own shows of
authority and power. The players of violence have come to thrive in a
new world of understandable disquiet with traditional authorities that have heretofore thrived on the meekness of those they govern. The new pretenders to might have also taken advantage of the special restlessness that drives some beneficiaries of affluence to renew their identities constantly with the most sensational dernier cri. The cries that attend or instigate bleeding heads on all sides are enough to warm the lukewarm hearts of more than a few dowagers and well-endowed offspring who would not be caught dead with any but the latest cause.

As violence feeds upon itself, so does rumor, and so does fear. The vicious circle of force feeding starts anew with every scene of violence that comes across Dr. Caligari's cabinets of television. In their heady leading roles before a staggering sitdown army of television viewers, advocates of violence lose themselves to the derangement of trashing even the language. Thus, a mechanic of homemade bombs, manifestly short of a basic vocabulary, bumbles out to enraptured reporters that bombing is no crime but only a symbolic act against a mysterious "Establishment."

In panic or anger listeners resort to their own labels. They are apt to describe vanguards of violence as young, altogether too smart for their boots, addicted to hippety-hopping, and mobilized to take over the universities today, and tomorrow the world, under the command of some wizened little guru in southern California who has wrested top leadership from the Atlanta Braves.

Admittedly it is hard to resist refuge in emotional generalization. Those who move with force are more likely to be young than old. They are also likely to move with a vengeance against leaning ivory towers whose own professors, administrators, and regents are at such loggerheads that they cannot make common cause against guerrilla attacks, let alone make common plans to preclude it. Moreover, young vandals who hang around universities, whether as outsiders or insiders with a controlling interest in violence, often appear more outrageous than others because of their letter-perfect glibness in passing off common varieties of looting and pillaging as the acts of knighthood in full flower.

Those in the path of violence in town or campus, bearing the brunt of the costs that are periodically recorded in undisputed official reports, are in no mood for the complacency of those yet uninjured who find no cause for alarm. There are people living in outer cities who know more of the moon than their own inner cities above whose troubles they sit. Inner city dwellers, poles apart from those dwelling in seas of
tranquility, are also poles apart from beleaguered apologists in their own orbit of trouble who minimize looting and arson as the child’s play of our day. Ivy-clad spokesmen issue glossy accounts suggesting that on balance all is well, at least under generally accepted accounting standards. Random chroniclers of dubious foundation, sometimes ignorant of the most familiar place names near a scene of destruction, send in all too careless or all too astutely edited copy or film, suggesting that the violent are simply overzealous idealists driven to extreme acts when repressors arrive to repress them. When apologists so indiscriminately cry “sheep,” even about instigators of violence, it is little wonder that at last the injured come angrily to the belief that every sheep they see in the wake of a wolf is also a wolf.

Anyone can better understand such anger if he takes a walk such as I took in May of 1970, across the campus at Berkeley, some two months after the burning of a main reading room in the university library. The stench of smoke still hung over the gray-black wasteland, as it hung earlier over the ruined cavern once known as Wheeler Auditorium. The smell of walls flooded with water to fight fire matched the sight of boarded windows up and down the campus.

Whatever our anger, we must steel ourselves against the madness of interpreting our very real troubles as a war between generations who happen to have different datelines, or between groups who happen to fly through life under different colors, or between such inconclusive groupings in a mobile country as the perennially shifting groupings by tax brackets. So out of nine lives, I take a few recent leaves to support my view that violence is not to be confronted in terms of a generation gap or any other abstract gap between people. Since I was called up from the bench some months ago to resume teaching after the lapse of a generation, I have been seeing a great deal of the class of 1971 in such varied places as Connecticut, Virginia, Colorado, and California. I can report that although some members are now well over twenty, they are still of sound mind, recovering nicely from the shock that the class of 1972 is closing in on them, and that soon they will no longer have all the answers.

Much more important, they do not appear preoccupied with bombshells, apart from the questions they are forever tossing at the teacher. They are even more interesting than their predecessors, perhaps because even the least privileged of students now grow up amid an affluence of opportunities for learning, from library and museum tours to job
training to the nearest television. They give cause to believe that in the long run there can be a renaissance that will touch and concern the lives of everyone, not just of one group or another. Hence I feel some obligation, as a courier between generations, to counter reports that indiscriminately lump the large number of students who are hitting the books with the small number who are hitting the windows.

Moreover, I can perhaps counteract irrational alarm over the sometimes startling, but still non-injurious aspects of the young. I waive the right to toss in a chapter on sex, however, a subject which is already being worn threadbare by the pros, semipros, and amateurs who are marketing it in hot lines for cold cash. If this bookishness on sex continues among the very people who otherwise subscribe to the senses in lieu of reason as a means of knowing the world, they may soon be reading aloud to the partners of their choice as a test of compatibility for living together.

There remains indiscriminate alarm among the aging over the smell of youth, their current trappings or dishevelment, or their current fads in folk art. On the average, most of the young smell no worse than their parents did, though there are exceptions who make their presence known more strongly than the chemical factories they decry in the name of a sweet-smelling ecology. Dishevelment is usually such a minor matter that it is a waste of time to split hairs over bounds to the length of straight cascades or the width of spreading billows. They may constitute an occupational hazard for hairbrained employees in such places as sawmills, or render them a psychological hazard to employer stores or banks whose business may depend on a non-gypsy image. In the main, however, the hairline should become a receding issue of war between the generations.

Likewise there should be little cause for alarm at the improvised costumes of the young, whose fantasies are no stranger than those of designing designers. Occasional aging remittance juniors from Atlantic or other states, decked out in pioneer gear as they shuffle off to deposit trust income in Berkeley banks, appear less to have taken the vows of poverty than to have seized the handouts of affluence. They merely decorate the scene, however, rather than typify it, outdoing their contemporaries as well as the families they malign in their consuming interest in consumer products. The only real worry is that if enough ignoble savages are cut off from tribal funds, host towns will have to pinch pennies to look after them, now that wayfarers in need of welfare
are no longer hung up on residency requirements.2 That problem would resolve itself, however, for it would not take long for host towns to run out of pinched pennies.

I have been newly reminded of the need to fill in the supposed gaps between generations by the inscription to the architrave of the library at the University of Colorado: "He Who Knows Only His Own Generation Remains Always a Child." The timely reminder cuts at the insularity of the young as well as the old. There are young dogmatists who indiscriminately view all seniors as representatives of an invisible "Establishment," that figment of the imagination in an age of affluence does little more than separate the men in Edwardian suits from the boys.

The new dogmatists imagine a society of materialists newly released from ancient movies, who consume alcohol, cigarettes, and whatever morbid meals can be written off on expense accounts, whenever they are not indulging in their incurable vice for work within a system. At first, the preachers against such wilderness of wealth sought only mildly to dent the complacency of conspicuous, though hardly representative elders, given to frequent renewals of everything but their minds. The preachers found ready converts on the easy streets whose denizens comfortably await the salvation of others while they expand consciousness with miracle drugs, or waistlines with double ice cream cones. What profit it a man, they asked, to be saved by a machine from mowing his lawn if he did not then improve his soul by baking bread and weaving? Sometimes they set the example by proceeding with fanfare to an oven or spinning wheel, wearing beads that had not been taken from poor, defenseless oysters. No one seemed to stay with the flour or flax very long at a time, however, for there was always more ego-building work to do in the streets.

In the wake of the first decriers of materialism came young authoritarians who commanded the complacent to render unto Caesar's children the things that are Caesar's, and to let them determine, as the new master race of things spiritual, what should be rendered unto God. Violently though they denounced materialism as a hangover of the Puritan ethic, they showed no disposition to shun its benefits. The astute among them hawked their "Bewares" at sharp prices in established marketplaces, once they discovered that with preachments of violence in street terms of sex, they could readily capitalize on the

boredom or dissatisfaction of the idle, rich or poor. The rambling preachments were held together by the all-purpose plot of the supposed generation gap that serves as a cover for any other supposed gaps. It was a plot that appealed to those of the young so preoccupied with their own unpredictable procession from the cradle to the grave that they remained ignorant of the material and social insecurity of nearly everybody in preceding generations.

Nevertheless, teachers who remain close to the young can remind us that there is no monolithic hostility between age groups. Birthdates leave no birthmarks on the minds of babies. As they grow, the members of one year differ as much from one another as they do from the members of other years. Moreover, each one constantly changes with experience. There are so many crosscurrents among the elders, as among the young, that no one can predict which way each among them will turn. One can only say, in the words attributed to Galileo, *Eppure si muove.*

I have digressed this long to dispel the all too prevalent equation of youth with violence by way of alerting you against the calculating instigators of violence who would bully us into believing that they have the blind support of the young across the land for any and all causes, after having in times past sought to bully the young into believing that violence was the indispensable means to the end of a good world. Those of the young who turned on for awhile to the hard sellers of violence are now turning off, aghast at the consequences of violence. The times they are again changing, perhaps enough to insure that people of all ages will make common cause against violence as a way of life.

Only the law can assure a genial environment by leading us anew on what mariners might call the kindly course in human relations. We are dangerously off course now, led astray by advocates of violence who profess to speak in the name of brotherhood as they call upon babies of all ages to burn and bomb. In their fraudulent words, as in their violent actions, they have exposed themselves as sordid fakers, technicians of the monstrous lie, often with no nobler end in mind than the advancement of their own theatrical careers. The hit and run spokesmen, who profiteer from local appearances whenever they thus can take advantage of any large or small cause, are adept at disappearing to their own safe refuges when violence follows on their violent words. The most cynical fakers of all are the scribblers who have learned the market value of tall tales in low terms, thickly larded with grunting sentences that are up against the walls of the barnyard.
So desensitized have people become to violence that they mechanically avert their eyes from such sights as that of a California judge in the custody of violent men, escorted from the courthouse with a shotgun attached to his neck. So fearful have people become of the violent that few dare to challenge those who blatantly condone such an episode as a blow, out of this world, against our legal system. When commissions of inquiry do materialize on campus unrest, or inner city rioting, or disorder in the courtroom, few of those entrusted with inquiry have known firsthand what it means to live within the shadow of a beleaguered university or in the heart of a tumultuous inner city, or to work as a public servant of the law amid the verbal assaults and flying missiles of the streets.

Only one who has lived amid the hit and run trashers for a long time is aware of their strategy of turning legitimate grievances to their own ends. They aggravate the grievances they exploit, undoing the work of those who are patiently working to remedy legitimate grievances. Anyone who has observed the violence mongers at close range has more reason than ever to understand that law, and independent courts remain the only safeguard of justice.

As a member of the class of 1970, which has taught me much this year, as well as a member of my generation, which has taught me much over the years, I plead with each of you, no matter where you are situated in time, not to lose your mind to loss leaders. Instead, you can make your mind count against them; and if you do you may learn that mind is the best four-letter word there is for freedom, for your own and that of your country.

What we can do with our minds, at best, will be little enough, given the patently grave ills of our time and the complications of patent remedies.

Nevertheless we can be much more active than we have been to implement the thesis that the mind counts, in a world appallingly more dulled than horrified by statistics that keep book on body counts, but lose track of the grim reapers. We can act more firmly than we have to mitigate the irony that although education is on the rise, new guards as well as old use words with increasing skill to put minds to death. We can insist as lawyers that when we say the mind counts, counts is an action verb, not a noun for the tolling of the dead. Each lawyer has an obligation to use his head to keep the law on a forward course, if only in whatever niche of the
law he occupies. In the process he must be on the alert to clear the air of whatever word-pollution he encounters. Each time he does so, he declares anew his faith that the mind counts.

I make here my own declaration of faith in the simplest way, in the limited area of my own experience and reflection. I want to clear the air of the growing befuddlement of information, calculated or addled, about the courts of the United States, which represent perhaps the fairest system of justice the world has ever known.

Befuddlement there has always been about our judicial system, but it was once a consequence of public indifference rather than of irresponsible attack.

For years I cherished the hope that the public would take a real interest in its courts. I came finally to understand the skepticism of Chief Justice Vanderbilt of New Jersey, who once observed that the courts and the continuing process of judicial improvements were of little concern to anyone save such stalwarts as the League of Women Voters and the Boy Scouts. Even today there is little interest in learning about courts except as stops on commercial bus tours. In recent years the public has proceeded from indifference to hysteria about its judicial system, without ever understanding that what we become as a nation in the next generation depends in no small measure on what becomes of our still predominantly independent courts.

So it is not only timely but urgent that we take a look at the current hysteria and in the process at our own souls. We can concede real grievances: widespread delays in courts, antiquated procedures in some states, and the plague of politics in others. Such grievances could be readily remedied whenever bar associations and judicial councils impelled legislatures to set reform in motion. There would be need of only one help more, the sustained support, and I emphasize sustained, of editors and reporters.

It is one thing to identify a court procedure as archaic and another to remedy it. It is not so easy to counter the irrational attacks upon courts, particularly when they serve to divert public attention from all the ills that attend perennial warfare and from all the growing pains that attend the increasingly rapid succession of one revolutionary age after another.

Every troubled age has its scapegoat, but none thereby escapes
its troubles. This country, in a universally troubled time, would
do irreparable injury to itself if it continued to make a scapegoat
of its courts, whose open and rational procedures are among the
brightest of its achievements. 3

We are all concerned these days to strengthen respect for law. It is
important to understand that if we mean what we say, we must respect
the established law of the land, whether we like all of it or not. There
are differences among courts and among judges on some of the basic
issues of our time, as there are among you. Nevertheless, we are able to
call our country the United States because we unite in our respect for
established law. The state courts are bound by the decisions of the
United States Supreme Court, just as the trial courts of a state are
bound by the decisions of its appellate courts. The alternative would
be anarchy.

As one who has long seen the judicial process at close range, I
have some basis for confidence in the sturdiness of its procedures.
I also know, however, how hard it is to stand with reason as your
only weapon against extremists on all sides. Moreover, though
extremist camps appear temporarily at war with each other, their
common scorn for the law might in time impel them to join forces
to destroy it and so put our minds to death. At the moment they
are in the limelight. Countless bystanders are silent, and no one
knows whether they will in time marshal their strength for or
against one extreme group or another. Come what may, it remains
with independent judges to make their minds count by keeping
vigil over fair procedures. They will succeed in that vigil only if we
make our own minds count against the enemies of reason, the
worst enemies a free country could have. It is for the lawyers to
take the lead on high roads or lowlands against the mongers of
confusion and fear, the ugly substitutes for law and freedom, and
to reason why every inch of the way. 4

Last summer I walked again high in the Rocky Mountains, where
the environment can be less than genial in the event of sudden storms.
The lightning strikes hard in the high reaches of tundra country, and
human beings soon learn simple rules of survival. Occasional signs
acquaint us with the rules of the game. Among them one reads: "Build

3 Traynor, supra note 1, at 259-61.
4 Id. at 268-69.
fires only in established fireplaces.” At high altitude, where solitude and raging winds blow the mind clear, one seizes the benevolent meaning of fire in an established fireplace. Is is the flame of justice within the law, lighting the hard way upward from the jungles of violence.

To keep that signal flame of freedom in clear view, to guard against guerilla fires, we must revitalize old rules of conduct and perhaps formulate new ones to enforce the limits of freedom against the hit and run trashers of law. Only when we have clarified the universal civil obligations that attend universal civil rights will we safeguard the live-and-let-live freedom that has so long been the spirit of the New World.