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AN ADDRESS*

BY

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I value your invitation, not only as a personal honor, but as an expression of your esteem for the Court on which I sit and of your good will towards the legal profession in the United States. A sense of brotherhood, based on common traditions, always has animated the bars of our two countries. It has been quickened and deepened by the common character of our perils and problems in the war. I only remind you of what you already know; of the high respect in which the Canadian Bench is held in my country, of the fellowship the lawyer of the States feels for the lawyer of the Provinces, and of the ties of friendship that closely bind my government to your own, and my people to your people.

The structure of self-government in both of our lands has been largely the work of lawyers, and our liberties are secured by legal principles. The foundations of Canada and of the United States have so much in common that any weakness in one must be apprehended as a weakness in both. We may well devote an evening to probing at these foundations to see where, if at all, they are undermined or need attention. Of course my observations about current conditions relate only to the United States. Want of knowledge would put your conditions beyond my consideration, if want of taste did not.

We in the United States are experiencing what many call a period of confusion in the law. It is not, as some who ignore history believe, unparalleled or unprecedented. Instead, it is the kind of unsettlement that always extends to the law when organized society itself is in a period of transition. We can

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understand the evolution of the law only by reference to shift in the broader intellectual currents that affect the affairs o government.

Bryce generalized all constitutional history as a ceaseles struggle between what he called centripetal and centrifugal force and suggested a cycle from anarchy to tyranny and back again For well over a half century the United States, like most countries has been in the centralization phase of the historical cycle. The end is not in sight. New ideas about the world we live in continue to react upon our ideas of government. Science seems in a conspiracy to forward concentration of governmental and of economic power. For example, the microscope has altered our world much as the telescope did the medieval one. A new dimension of existence has been revealed by discovery of germs, bacteria, and microscopic life. Some of this is hostile to man without respect to state or national boundaries. We have found it necessary always and everywhere to be mobilized against unseen forces. Resulting health and sanitary requirements exert a powerful socializing and centralizing influence on our society, our government, and our law. They are a constant ally of increasing power in social organization against freedom of the individual and the autonomy of the locality. Pressure in the same direction comes also from the expanding world in chemistry, electric energy and electronics, in radio and aerodynamics, and from the industrial organization necessary to put these things at the service of the masses of the people.

As the eighteenth and nineteenth centuries were characterized by extreme individualization of the law to make it conform with the prevailing social philosophy, so the twentieth century is one of socialization of the law in obedience, likewise, to prevailing social attitudes. The movement today almost universally is toward advancement of collective interests at the expense of individual interests. This, of course, is not to say that we are becoming a collectivist state. Indeed, moderate concessions are thought by some to be the best defense against such extremes. While there are those who resist this drift, our more heated divisions are no longer as to the direction of our movement so much as to its pace.

Many persons have voiced fears or hopes that the post-war world will move rapidly and sharply either to the right or to the left. An extreme movement in either direction would utilize existing centralization and socialization and vastly extend it either to serve the supposed interests of a proletariat, as in

Russia, or those of a military-industrialist class, as in Germany and Italy. Whether enough of our people will give way to extremes to carry the balance either way may be doubted and, if so, any estimate as to which extreme might prevail would hardly rise above a guess. But it does seem to me probable that those who have been inclined toward the right will move further to the right, and that those who have been looking hopefully to the left will go further to the left. If this transpires, it makes wider and sharper and deeper division among our people as to the very fundamentals of organized life.

To increase the distance by which the views of men are separated is to intensify the struggle for power. The increased role of central governments in matters such as labor relations, social security, unemployment compensation, price control, industrial regulation, and fiscal policy have raised the stakes of power higher than ever before. Moreover, it is the attitude of extremists that there are no inherent restraints on power, that once in office nothing but their own wills could check them. All of these factors conspire to make future struggles less compromisable. A contest in Canada between the Conservatives and Liberals or in the United States between the Republicans and Democrats can be settled at the ballot box. Their policies are not so far apart as to justify carrying the contest further, and whichever one takes office does so with acceptance of constitutional restraints which make the minority safe in person and property. The defeated accept the result in sportsmanlike fashion and wait for another election. But a struggle between such extremes as Communist and Fascist parties could hardly submit to an election, but would tempt to extra-legal tests of strength; for either would fear, and rightly, that the other in power would stop at nothing to destroy all opposition.

Lord Balfour pointed out that the British Government is not adapted to the problems resulting from this kind of strife in words certainly applicable to the United States and, I would assume, to Canada. He said: "Our alternating Cabinets, though belonging to different parties, have never differed about the foundation of society, and it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict. May it always be so."

Thus, the security of democratic institutions may depend on keeping struggles for power from getting out of legal bounds.

Primarily the burden of adjustment and reconciliation within the democratic process will fall upon Parliaments and Congresses and upon the Executives. We judges must, I think, be cautious that we do not obstruct them in the exercise of their lawful powers or make their task of governing unnecessarily difficult. In solving these great conflicts our judicial power is no substitute for that of the legislative or the executive, and the future of free government depends upon their adequacy to their problems even more than it depends on any exercise of power entrusted to the judiciary.

Nevertheless, the magnitude and delicacy of the problems of the post-war world inevitably add to the responsibilities and difficulties of courts. More and more controversies that have their origins in phases of this conflict, or which groups are using to bear upon it, find their way into the courts.

In common-law countries much more than under the civil-law system the judiciary is entrusted with a large measure of discretion in choosing, interpreting, and sometimes inventing rules by which controversies are decided. We concentrate on rightly deciding individual cases and trust these decisions somehow to fit themselves into a pattern that in matters not controlled by legislation will represent "the law." We may well feel humble and inadequate in the presence of the task, but that method has not proved unsuccessful. I do not think it is a mere coincidence that liberties are and for a long stretch of years have been relatively secure, institutions relatively stable, and all that free men prize relatively safe where the methods and philosophy of the common law prevail.

The part that legal philosophy has played in the making of our free governments and must continue to play in their successful operation makes its assumptions of more than academic significance. When legal or political principles on which the bench and bar and legislators used to be pretty much agreed are by any substantial group called into question, it has practical implications. It would be impossible to deny that in the United States assumptions once accepted as part of the original concept of our government are seriously questioned.

In fashioning the institutions and cultures, both of Canada and the United States, resort has been had to two great streams of liberal thought. The history of our two countries has been very different, but I think the influences which have made us what we are may be traced to the same two sources. One was the intellectual and spiritual forces in England which guided the

revolt against personal authoritarian government by the Stuart kings; the other source was similar forces in France which guided the reaction against personal authoritarian government by Louis XIV. While there were, of course, important differences in the conduct and consequences of the movements against monarchial totalitarianism on the two sides of the English Channel, there was a striking similarity in the doctrines that generated them, and there was much exchange of thought between those who led them. Locke and Montesquieu are examples that could be multiplied of philosophers whose meditations were made common property.

The liberal movement in both countries was stimulated and guided by a belief that a "natural law" limited the rightful powers of every government and that under it the individual possessed inherent and inalienable "rights". In England, King James, who thought of himself in quite modern authoritarian terms, was as lawyers well know boldly and bluntly told by Lord Chief Justice Coke that he was "under God and the law." The battle against "the Divine Right" of dictation in England thereafter went forward under the legal doctrine. Locke, theorist of the liberalizing movement in England, was one of the strongest of English influences in the thinking of Colonial statesmen and publicists, such as Jefferson, Madison, and Paine. He was an exponent of government limited by natural law, of inalienable rights of man, and of government by consent. But also, and particularly through Jefferson, the French influence in the same general direction was powerful.

In France, much the same ideas were fermenting and slowly gaining ground after the time of Louis XIV. In 1789, the National Assembly of France set forth "a Declaration of the Rights of Man", in which it declared the citizen to possess rights that were "natural, sacred and inalienable." They were summarized under the terms "Liberty, Property, Security and Resistance to Oppression." The state was not to interfere with ownership or enjoyment of property nor confiscate it "except in cases of evident public necessity, and then after payment of a just indemnity." Personal security would be guarded by a system of courts and a single system of law and by a presumption of innocence until guilt was proved. The right to oppose and overthrow oppressive governments was considered a "natural" right, inherent in every man.

How closely this resembles the philosophy and even the words of the Declaration of Independence of the United States,

announced a few years before, and the Bill of Rights, adopted a few years later! We declared it "self-evident" that men are "endowed by their Creator with certain inalienable Rights" that these are Life, Liberty, and the Pursuit of Happiness." Later, amendments to the Constitution incorporated the Bill of Rights, by which safeguards were provided for liberty and also for property, which could be taken only for public use and upon "just compensation," as had been declared in France. Thus, the nineteenth century opened with England, France, and most of this continent pretty solidly founded on a system of government of personal liberty and of property-holding, based on the proposition that natural rights of man limit all official authority.

In the United States the years have witnessed a reaction against these natural law theories. In smart intellectual circles it is regarded as naive to put any credence in natural law and as unsophisticated to think, as did the forefathers, that man may have inherent and inalienable rights. Instead, a multitude of theories of the nature and source of law are offered. We are told by some that all law is the creation of organized society. Some aver that law proceeds from such forces as economic determinism, institutional compulsions, or those explained by Freudian psychoanalysis. Others put its origin in pure reason. Also we have descendants of that old and influential school of "those who stand up for utility as the test of right and wrong," the creed defined by Mills as one "which accepts as the foundation of morals *utility*, or the *greatest happiness principle*, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." Other modernists are skeptical as to the exercise of reason in law-making and cynical in their disregard of any moral law or principle as a force in its shaping. They believe with almost Marxian fervor in economic determinism.

I shall not speak, I probably am not qualified to speak, of the academic soundness or the logical correctness of any of these doctrines of political and legal rights and wrongs, nor as to the origins or sanctions of natural law, nor whether it is law, nor whether it is natural, nor whether and to what extent it has been abused or carried to excess by its devotees. I am not consciously an advocate or adversary of the verity of any of them. I only venture a few practical observations which have to do with the influence of the legal profession in helping to maintain the kind of free government that the earlier lawyers helped so much to establish.

The abstract concept of "natural rights" was an ecclesiastical as well as a legal one and was, as you know, ancient. What was new was its use, chiefly by lawyers, as a practical standard to rally all sorts and conditions of men to support the struggle against arbitrary government. It is easier to make fun of natural law as an abstract theory than it is to dismiss the great humanitarian ends which the ideas behind that formula furthered. It proved to be a powerful weapon of persuasion and unification of intellectual and spiritual forces in fighting for freedom. So long as that belief dominates the culture of a people, it is not possible for a dictatorship of any sort to gain legitimacy or for authority that is oppressive, cruel and arbitrary to be given the prestige and moral force of law. For that reason totalitarians scorn and try to displace the natural rights idea with the doctrine well put by Mussolini that "The Fascist State organizes the nation, but leaves a sufficient margin of liberty to the individual. The latter is deprived of all useless and possibly harmful freedom, but retains what is essential; *the deciding power on this question cannot be the individual, but the State alone.*" [Emphasis supplied.] "The deciding power is the State alone." Add to that, "I am the State." That is the key to the legal philosophy of the absolutist, whether it be the Stuarts or Louis XIV, or Hitler, or Mussolini, or Lenin, or any future imitator of any of them.

What is at stake in this war and what will be the issue in many post-war conflicts, from the viewpoint of the lawyer, is summed up in those two fundamental and opposing principles of social organization. One attitude puts the state above and before the individual, who receives all of his rights by its grace and during its pleasure. The other is that the state is no mystical end in itself, but obtains its authority by delegation from the citizens as a means to their greater self-realization. The practical difference between these theories may be measured best by the contrast between the behavior of government towards its own citizens in Germany with that in England, Canada, or the United States.

The feature which makes one uneasy about some modern law theory in the United States is that in repudiating natural law doctrines it pretty much embraces this philosophy of absolutism of the State. Then law becomes only a phase of state policy. When policy is made manifest in legislation or in executive action or administrative decision, it follows that its finality is not to be questioned. From such premises it is hard to avoid the conclusion that in America all is law that has the votes,

just as in some parts of Europe all is law that has the guns. We thus have a New World variety of the European philosophies of no law.

But even if these doctrines are not intended to afford support to absolutism, they at best are only feeble instruments of opposition. These theories may be intellectually satisfying, but they arouse no passions in men's breasts. Perhaps it was the religious element in the creed that each man has been endowed by his Creator with rights to life, liberty and the pursuit of happiness that lent fervor to its cause. If it was a simple, it also was a fighting, faith. Lawyer leadership never attained such influence as when it advanced under that standard. Perhaps in becoming a more sophisticated profession "the lawyer has spoiled the statesman," as Disraeli said of Brougham.

It seems to me, however, that there should be enough unity at the bar on propositions that, if debatable in theory, are hardly open to doubt in practice and which are understandable to laymen so that the lawyer may again be leader of the forces that make for freedom of the individual and for limitation upon the power of the State. I am convinced that de Tocqueville's observation in the first half of the nineteenth century holds true in the twentieth. He said: "I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

My hope that the lawyer and the law may prove again as in the past one of the effective bulwarks of democracy is not at all based on the idea that the world can stand still or that our law can be like that of the Medes and Persians. Indeed, I am sure the world is in for very extensive change and renovation. Democracy does not mean merely holding on to the *status quo*; it is a method of progression by peaceful and orderly means and by gradual, instead of by revolutionary, steps. The law itself and the professional and judicial mind must be receptive to the legal implications of changes in the social order.

We, of course, would not deny that authority is an essential ingredient of law. Many rules of law and procedure represent a choice between reasonable alternatives, and such a choice is the function of authority. But it is a different matter if authority makes a choice that is without reason, and is arbitrary or capricious. In that case courts have long found precedent and precept upon which to vindicate reason as against the mere fiat of authority.

We are agreed that there is and must be a spiritual and intellectual inner life that is wholly free. And there is a sphere of action that must be largely free of governmental control in order that the personalities of men may fulfill their potentialities. These include freedom of worship, of conscience and thought, freedom to pursue the sciences, philosophy, the arts, freedom to speak and to listen or not, freedom to print, freedom to make a living by honest and socially useful labor, freedom to benefit by one's own thrift and industry as compared with the consequences of indolence and waste. We uphold the right to criticize and oppose authority and concede to a man the right to make a good bit of a nuisance of himself.

Lawyers have never, however, taken the position that the individual may decide his rights for himself, nor do we admit that we are faced with the dilemma posed by Mussolini that the alternatives are decision solely by the crowd in control of the State or decision solely by the individual. That is where, in our philosophy, the law comes into play, law which binds both the individual and state officials, law interpreted and applied by judges, independent of the individual and, so far as humanly possible, of the state as well. That is what we mean by a government of laws. That trite phrase means something concrete to the lawyer mind. "Decision solely by the State" as a principle in action was illustrated by Hitler's blood purge of 1934, when many, including some eminent associates in his own party, were executed without hearing. What a sense of personal insecurity must have settled upon the citizens of Germany, both high and humble! Contrast this with events in the United States in 1942. The Supreme Court convened specially that summer to inquire whether the President of the United States had departed from the law of the land in summarily condemning to death a group of alien enemy saboteurs. It was taken by the public as a matter of course that they were entitled to a hearing, the President's action was upheld by the Attorney-General, and an able lawyer assigned by the President's order represented the prisoners and earnestly presented their cause. That is "government by law" in action. The humblest man in your streets or ours must feel a dignity and a security and an unfolding of his whole personality to know that between him and legal harm stands such a tradition, such a custom, such a law. It is for this that our people fight.

The decisive victory for our arms, that will not be long delayed, will cast upon lawyers the duty and opportunity to be more than lawyers. They must not permit preoccupation with

ordinary professional routine, or attachment to interests of clients, or risk to themselves to withhold from their countries that leadership in solving post-war problems for which their training and experience give them special competence. Our reasonable way of life under law, law that binds alike the governors and the governed will not suffer impairment if lawyers exert their leadership. They can always rally forces to protect free government from real dangers, if they take their stand, not on the ground that it has utility or that it is logically sound, or that it is economically determined, but on the ground that it is the only kind of government that can be morally right.