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ADDRESS

BY

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ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE UNIVERSITY OF CHICAGO LAW SCHOOL ALUMNI LUNCHEON/
AMERICAN LAW INSTITUTE

1:00 P.M.
WEDNESDAY, MAY 21, 1975

MAYFLOWER HOTEL
WASHINGTON, D.C.

For a number of reasons I hope I may be forgiven if I use this occasion only to speak briefly and not so much as a time for an expression of reactions to particular current events, but rather as an opportunity for what I hope you won't regard as unseemly reflection.

After all, the circumstances for this talk have changed since the time when you invited me. Then I was president of our University -- a University which gains in strength and meaning by keeping in touch with its alumni. A president, whatever his shortcomings, knows that particularly when he goes out of town and meets alumni he is something of an ambassador. He hopes he can evoke and strengthen the better recollections of a shared institution. He finds if he does this he will think better of the place himself. Moreover, he likes to be nicely treated, and while I certainly don't want to over-emphasize the point, there have been times when being away from home had its advantages. More seriously, the pride which any university president or law school dean would have in meeting with this group was refreshing. I don't believe a university lives solely or perhaps even mainly for its alumni -- it would be very un-University of Chicago-like to think that. But even though at times it may seem to be a well-kept secret -- alumni are very important. They authenticate what the university is about. This is the reason why one of the last ventures I sponsored at the

University was the making of a film -- on the University to be sure -- but the University as seen through its alumni -- and thus a film on the alumni.

But I don't come here today as an ambassador from the University. I have lost that card. Indeed I have reclaimed my card as an alumnus. And as I look around, I see others from the University and I wonder why they aren't doing the talking. I would like to have them tell me what is going on at the University -- and yet in a way, I wouldn't. I have been too newly sprung. A university president carries a heartful of concerns about the institution. When he leaves it is a wrench. He doesn't give up these concerns but he must avoid being tortured by them. Yet it is certainly true there are those here who could give you a more engaging, thoughtful and informative talk -- any one of you I suppose, with more preeminence. But this was always true. You were in fact deceived when you asked me. Deceived by my office and now I have lost that office. It might be thought that I have gained something which so many of you have had for some time. But I am too newly returned to pretend to be an expert. I am surrounded by people more knowledgeable than I -- or so they can rightly think -- about how things get done and how things actually are. And if an expert is someone who is away from home, I am in the presence of too many people who live where I do to claim to be an expert.

I thought it might be appropriate, however, at a time such as this to attempt to evoke something of the reflective mood, characteristic of the University of Chicago, and to think with you about the times we are in. We never truly know the significance of a moment in our history, I suppose, and the least so when the moment is now. One high purpose of the education we have shared, however, is at least the desire, if not the continuing ability, to try to capture the larger meaning of the times we are in.

We have recently removed ourselves as a people from a war that tapped stores of agony. As a government we have passed through an encounter with both human weakness and strength. In our day human weakness surprises us -- possibly because we have lost an ancient view of the frailty of ourselves. Our present reaction to violence mostly past and to weaknesses revealed mark this as a time of transition. As Toqueville reminds us, transitions of this kind can themselves be periods of weakness and some peril. We have lost the authentication of the old. We are apt to slight the values of the past in an effort to find some purging solution for the present. We are apt to turn upon each other -- puzzled and impatient with the disarray of views reflected in our disagreements.

At such a time the law has a tendency to be used as the physic by which we hope to purge ourselves. This

is a simple view of law -- as though by the force of its dictate, disagreements and evil can be made to vanish and redemption may be achieved. It is a view not unlike that which as a people we possessed following the Civil War. After the Civil War the law was used grandly against the rebels who had been defeated in the South. The reconstruction laws had a lofty and enlightened purpose. But they were enacted and enforced with the dangerous arrogance of moral certainty. They failed to serve their purpose. Some of them serve us only now after a long period of darkness.

Redemption requires much wisdom of us and of the law. It requires a sense of our tragic nature in which good and evil express themselves in every act and a sense of irony at the way the best of our intentions often lead to our worst conduct.

It is with this sense of irony that the poet wrote in 1969:

"That was the year of the bad war. The others -- Wars, that is -- had been virtuous. If blood

Was shed, it was, in a way, sacramental, redeeming . . ."

He ended his poem with this terrible prayer in the voice of those whose agony over the war was at its highest:

"For conscience

Is, of innocence, the final criterion, and the fact that now we are troubled, and candidly admit it, simply proves

That in the past we, being then untroubled,

Were innocent. Dear God, we pray
To be restored to that purity of heart
That sanctifies the shedding of blood."

We are never innocent, of course, even when we call upon the best within us, for that itself is a recognition that there is always an indecency lurking in our souls, waiting to be out. Nor are we ever entirely guilty. The poet -- he is a southern writer, after all, one who has learned of the subtleties of redemption -- has at least one thing more to tell by his irony. Nothing "sanctifies the shedding of blood," though a sense of innocence may deceive us about that. Human violence may be necessary, may be noble, may be justified. But even when it is any of those things, it is also mixed with sorrow at our failure to prevent it. So too with all our social affairs. To sanctify them is not to make them perfect but rather to hide their imperfections from ourselves.

It has become a commonplace to speak of the response of the society and its government as if it were a cycle or a pendulum. Opinion seems to swing one direction until the error of that course becomes manifest then it swings the opposite direction into as inevitable an error on the other side. A democracy may require that the cycle cut a wide arc since in a democracy the central values of the society come into conflict with the pressure of

the public will that something new be done -- whatever that something may be, just something -- to make things work better. But if this is a characteristic of a democracy, it is a weakness and not a strength, and it is a weakness we must believe can be overcome.

An obvious concern for us today -- the one most often connected with the present use of the image of a swinging pendulum -- is finding the proper balance among the branches of our government. Human weakness among public officials called into question the power of the executive, as at other times in our history the power of other offices has been questioned. But as one Supreme Court Justice wrote, we should not confuse the flaws in the office with the flaws in the men who hold it. There must, in the complicated and tumultuous world America shares with other sovereign states, be someone who speaks for the nation. There must be someone who can act decisively. In part because of the dangers in decisiveness, we also vest the accountability in one man. The executive branch -- no less than the legislative or judicial -- is composed of many persons acting sometimes in concert and sometimes in opposition with one another. But when the executive branch acts, the President is accountable. And that is as it should be. It is one of the strengths of the office we should take care to preserve. To avoid the abuse of power by the destruction of power altogether is to trade a

potential danger for an inevitable one. To create a government is to create a dangerous instrument. But to live without a government, without laws, is something we should fear most of all.

A related matter concerns our very attitude in facing our recent experiences. There is no harm -- and perhaps some virtue -- in admitting failure. But that admission is different from the urge to place blame. There is a vindictiveness in human nature, to be sure, and an inevitable desire to find scapegoats. But if it is redemption that we seek, we should control this desire. Placing blame may be done in the solemn name of innocence, but it most often results from an impulse of guilt within us looking for an object. We ought not allow ourselves that self-deception.

The same temptation to proclaim the good and condemn the evil can impair one of the vital functions the law ought to serve, especially in a time of reconsideration and reform. The law developed as civilized man's means to resolve conflicts. One of its mechanisms, of course, was to determine fault. But beneath the symbolic expression embodied in the assessment of fault lay law's greater purpose to provide a means by which conflict could be resolved that violence might be prevented.

If we are divided today as a people, the law ought to aspire to more than deciding which faction will prevail. If disagreement with government policy threatens

to become violent, the law should do more than to prepare to meet the violence with a greater force. It should find ways to mediate, to soothe, to calm men so that it will not have occasion to bring them to trial later for their vehemence.

The law ought to be both the forum for and the product of discussions among differing interest groups. If it is seen to be the weapon of one powerful interest against the others, the law ought to try to prove that it will not act as anyone's weapon. It is the genius of our system of laws that it guarantees that nothing -- that no man's edict -- is beyond discussion or beyond the constraints of the law. The reason for this rule of law is not alone the recognition that absolute power corrupts absolutely. It is a statement of the value law places on deliberation and the sharing of opinions.

If one were tempted to be sanguine about the ease with which the disagreements among us might be mediated or the level of discussion raised, recent events should counter the temptation. The emergency evacuation of Vietnamese refugees, for example, evoked the echoes of a decade of division about the war itself. It was not humanitarian enough, some said, because we brought out too few. Others argued that it was not humanitarian at all but rather was a cynical effort to rob the victorious North Vietnamese of the most educated members of society. Some have

decried the possibility that Vietnamese bar girls who had consorted for hire with our soldiers might find their way into America. Others have demanded that those who worked most closely with Americans in the military and political struggle for decades be excluded as "war criminals." Finally, many have demanded to know how the government can extend aid to Vietnamese aliens when so many within this country need help.

The process of accommodating such a range of opinion on this and other issues will be difficult. The law must recognize the difficulty and approach it with an enlightened understanding of the reasons for division. If the law listens to the opinions of the people and consults with their representatives on important decisions, then it may be able to separate the real areas of disagreement from those which spring from emotions of anguish and anger. And if this process works well perhaps the law itself can create one area of agreement -- that the law itself is just and legitimate. It was through such a process of listening and consultations that the refugee policy developed.

The same spirit required of law as a promoter and mediator of discussion is also required of it in the task of insuring "domestic tranquility." Years of turmoil have destroyed some of the social fabric that is one of the best preventives of crime. President Ford recently used the constitutional phrase "domestic tranquility" in presenting his views on the problem of crime in America.

I believe that term is the correct one because it emphasizes a quality in society that cannot be imposed. Tranquility can only be nurtured by government, and in that humble spirit government might seek wisely to exercise its duty to the people.

Institutions designed to promote tranquility, to provide us with a measure of security in our lives, have themselves been called into question as a result of our discoveries about the way officials used their power. Again the law must recognize the damage that can follow from abuse by police, investigative and intelligence agencies. Not only can their misconduct infringe upon the rights of citizens, but even more, the discovery of their misconduct can erode people's trust in the law. Without a measure of popular trust, the law is all but powerless. At the same time, it is the abuse of their function and not the function itself that should be restrained. And the remedies ought not be so vigorous as to destroy the institutions that were designed to protect us. As St. Thomas More once warned, if you cut down the law to get at the devil, what will you hide behind when the devil turns and takes out after you. The law must be capable of effective enforcement in order that it deserve its name. The law must act swiftly and surely against those who violate it so that it can deter future violations and provide society the occasion to be tranquil.

In all of these matters the worst we can fear is that we will come to believe ourselves certain of the rightness

of our course. This is a time, difficult as it may be, for us to recognize the limits of our knowledge. If we pretend to knowledge we do not have, we begin again the cycle of error. Humility, after all, is the nature of redemption. That is its lesson. And if there is anything to be found in the experience that now burdens us, it is that there is the danger of evil even in the acts we do most faithfully in the name of goodness.

I do not suppose this little sermon fits the image of the chief prosecutor. But I do not believe the law fits the image of the chief prosecutor either. Law is more than that and must be if it is to help with the redemption of this time. It is after all an effort to find the forms and to guide the consultation which will muster into action the wisdom within us. It is a higher duty for the law to heal rather than to destroy, and this is one of those moments in history when we must keep this in mind.