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ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE AMERICAN ASSEMBLY ON LAW AND A CHANGING SOCIETY

8:00 P.M.
SATURDAY, JUNE 28, 1975
STANFORD UNIVERSITY LAW SCHOOL
PALO ALTO, CALIFORNIA

The American Assembly has set for itself a difficult, customary task -- to look into the future so that our present institutions of law will be better prepared for what is to come, and to consider creating new institutions, if that is the part of wisdom. This is an optimistic adventure. We assert our ability to control our destiny somewhat. The discussion is for the purpose of informing action. We have sufficient faith in some statistical predictions to listen to them, although we realize such predictions sometimes have been in great error. We think, in short, it is possible and worthwhile to foresee future movements and requirements, and we are committed to social engineering. This attempt to fashion the new world seems a typical and very American enterprise.

But this probably does not describe our present mood or at least the attitude of our day. The buoyancy and conviction we once had -- or think we had -- are diminished. America once was the new world. The achievement was here. What was required was to permit it -- or to encourage it -- to work its ways. Now we are not so certain. We have no particular utopian dream to guide us, as older societies frequently had, either of the past or the future, although of course there is plenty of talk that things will be different. Utopian dreams -- at least to the extent that they are elaborated and worked out -- are always commentaries on the present. But we seem overwhelmed and puzzled by what has happened to us. Even as we assert the power to guide the future, we are conscious we have been taken over by a tidal wave of past and present events.

Some of our guesses for the future, of course, may be satisfying because without more they may suggest some present irritants will diminish. But others gain meaning only as we see where we are today. It is our present condition, then, we must first try to understand. And as to our view of our present condition, I suspect we are compelled to welcome disagreement in good cheer.

In thinking of where we are today, three ideas or clusters of reactions, which summarize the events of the last half century, may suggest factors which have profoundly influenced us. The substance of the ideas could be put in many different ways and under different names. I have thought of them in terms of security, power and equality. The concepts are among the constellation of ideas which rule or are reflected in any society. They never can be seen only by themselves. They compete for dominance, not only among themselves, but with other sovereign constructs. Their meaning changes. It is because their meaning changes, and has been reactive in ways we recognize, that perhaps they help describe the commonplaces of our period. I certainly do not suggest them as insights but rather as ways to problems.

As to security, let me say we have not escaped the aftermath of the rise of an aggressive authoritarianism on an international scale, as to which it was widely thought the international community was slow in responding, and it gave the world an example of terror and destructiveness. The words of Churchill condemning Munich may not have been widely known

or appreciated by a generation which died in Vietnam, but the connection was there. The international order, or the attempt to achieve security in the presence of old and new forms of hostility, inevitably gained a preeminence it never before had in American life. We were not prepared for this then. In some ways we are not prepared for it now. The domestic repercussions of reaction and counter-reaction were severe. We have not fully overcome or adapted to these reactions. Moreover we are a society where many elements combine, including the freedoms we cherish most, to produce swings of reaction. In our bafflement as to how to reconcile the different requirements of international and domestic order or disorder, we have moved from one extreme to another, and perhaps the most constant theme is the refusal to face up to the differences between the international and domestic settings. But since the realms cannot be separated completely, and each realm tends to influence the other, the relationships require much more jurisprudential thought than has been given. We have found it hard to come to terms with the measure of security required for our day and with the control of that security. Unfortunately the ramifications are many.

The emphasis on problems of the international world has influenced our views on the many forms of power. It has also, perhaps through the convergence of particular movements, influenced ideas about the place of law within the body politic. There is a paradox in this, since if the international community suffers from an absence of law and the absence of institutions of law, it is odd that this absence should be used to conclude

that law when it exists is but one more aspect of the many forms of power. But other factors have contributed to this view, including, it must be said, movements which have been willing to challenge the law on this very basis. Law is a normative subject. Its stated purpose and the stated purposes of its institutions have special importance. Its commands are not simply descriptive of behavior, and indeed its orders are often violated. But as countless examples show, even in times of great stress and objection, these orders have meaning and influence conduct. The stated purposes and their reflection in the orders given are influential with respect to the conduct of citizen-rulers, for that is our concept of the rule of law. An explicit purpose in the rule is that it is not to be used as merely one more instrument in the hand of the strong against the weak. And it is a gross misuse of law if its special attributes of formality, legitimacy and fairness are ignored, because then law is seen as only one more available means of influence. Law and legal institutions can be seen in that way, as can all human institutions, but it is a partial view, and the incompleteness so far as law is concerned is particularly damaging because it can be self-fulfilling.

There are other reasons for the emphasis on power in our time. Wars have produced social change. They have influenced demographic factors. The shape of the American population is different than it was. This has had a direct relationship for example on the problem of crime because of the larger youth population. Other changes have occurred. While it is customary

to cite Toqueville -- at least for something on occasions such as this -- and he did speak of the litigious spirit of the Americans as well as their proclivity to form associations, one has the impression that groupism has never been more prevalent than it has been in recent times. This is one of those statements that may be over-reaching and may well be wrong. All that need be said is that along with the claim that there is increased anomie or perhaps just loneliness, there has also been a felt need to find identity in group membership. Frequently this is coupled with the claim that injustice can be averted or corrected only through group action.

The phenomenon, in addition to involving an assertion of power or the need for power, says something about the idea of representation. And it is accompanied by skepticism or conviction about the sources of power to control representatives. The demand is frequently that representatives have a more abiding identity -- through race, craft, sex, age or income -- with the group represented. Disclosure laws, open meetings, increased standing to participate at all levels and dislike of neutrality suggest a variety of questions as to what is happening to the professions of representation and to the theory of delegation central to our government. In a somewhat harrowing way this new approach questions the idea of the good citizen or at least of public citizenship as separate from the manifestation solely of self interest. It is an old debate, of course, -- one which interested Rousseau -- and I do not know whether this new emphasis should be taken in its own terms or rather as a reaction to the

breakdown of so many supportive institutions, a consequence also of the size and mobility of the population, and the effect of the communications media. These items, along with the ramifications of the international order, are in any event matters which we cannot forget.

The importance of special representation as an aspect of power has naturally grown as this has been seen as the way to share, through governmental intervention, in increasing resources made possible through an economy of abundance. Either the recognition that resources are limited, with choices to be made, or the proliferation of overlapping interests may save us, as the Federalist Papers hoped, from the worst forms of factionalism. Yet at the center of many demands for special powers and recognition is the insistence that the goal is equality. The concept is among the most influential of our time. It reflects for us an enormous and continuing effort to correct injustices of the past. The concept is ambiguous, limited, and, perhaps inevitably, in its use contradictory. The traditional constitutional problems of preventing discrimination, requiring affirmative action, denying or requiring that individuals be treated as members of groups, are well known. They press for definition and guidance and this no doubt will come. Since society can be divided many ways, and population patterns will change, one can try to anticipate which groups in the future may gain additional protection. But for long term basic governmental policy, the frequent suggestions

for a new bill of rights, requiring a minimum standard of the requirements for everyone, seem to me to pose the interesting issues. The reason for the interest, I hasten to add, is because I think this is descriptive of the direction in which in fact we have been going. The large scale federal intervention directly and indirectly at all levels and through local governments is largely for this purpose. We have travelled an enormous way from the time when only a most limited number of items were considered within the governmental power or appropriate for direct government action. Yet the proposals for a new charter seem to signify that this new direction has not worked sufficiently well. One such proposal is set forth by Professor Hauser as an Urban Bill of Rights to constitute a Declaration of Interdependence to supplement the Declaration of Independence. I do not doubt its hortatory value, but I am sure Professor Hauser will not mind if I suggest that he has not attempted to work out answers to the questions of what our society can afford to accomplish; what it would be willing to give up to achieve these goals; what the actual consequences would be. Professor Hauser as an expert in these matters knows we have not achieved appropriate levels for such basic services as

schooling and police. The urban problem as a manifestation of the difficulties of achieving a minimum adequacy of services and protection for all citizens does not suggest that the assumption of responsibility for everything will produce the most improvement for the most important things. Indeed it proves the contrary, and I assume this is what Professor Hauser means when he suggests the need to study priorities so that choices can be made.

The concepts of security, power and equality, as I have used them, are merely suggestive of what I think are important trends, influences or problems. Security reminds us of the limitations and some of the influences on the open society of international conduct and pressures. Power describes the denigration of the idea of law and therefore the weakening of standards for official conduct. Equality marks an achievement and a direction, but also emphasizes the choices which must be made among resources, now seen as more limited, and among values. These concepts do not adequately carry the message of our malaise, which we know only too well. They are related to the events which have occurred, but there are other factors. There is a background of a lack of forthrightness, which history may or may not justify, but which takes its toll. It now permits a crescendo of recollection of past events, many of which were known in a different light at the time they occurred, but which we now permit ourselves to see, as though for the first time, in true cyclical fashion. I have always thought it was the

special duty of the legal profession, and surely that of jurisprudence, to attempt to emphasize and explain the basic values of our legal order in the light of the problems of our time. It is one of the duties of the legal process to provide this explanation. The relationship between problems and values is reciprocal. The exploration of that relationship is particularly important in times of change.

We appear to be in such a period. The response of law is made more difficult and is conditioned by a transformation in basic units of order in our society. I do not know whether the family, the church, volunteer religious orders, community organizations, the school, the university are less important than they once were. I suppose it could be argued that in some ways, contrary to popular belief, some of them have been strengthened. But in many ways they have removed themselves from a leadership of civility. And law, recognizing this, has not only accepted but accentuated this trend. But a democratic society requires many kinds of institutions to hold it together and to give it governance. The individual citizen may be protected by the growing arm of procedural safeguards which the law now extends. But these safeguards, even though they may avoid some of the abuses of an older day, are most inadequate substitutes for the relationships of meaning, belonging, and idealism. Many, although not all, of these basic units were willing to assume the role of reinforcing legitimacy and rules of conduct. For many centuries it was thought to be an obligation of law, even though it often regarded them as competitors, to be supportive of other basic units of

societal organization. This is less true today; it is as though we were waiting for acts of creation to provide adequate substitutes. The consequence is that our legal system carries an overwhelming burden. The terrifying rate of crime is one of the results.

Even though the concept of legitimacy has not been in much favor in recent years, as though it were solely the protector of the power which corrupts, the concept of legitimacy is one upon which law depends. So do our civil liberties protected by law. We have come through a crisis of legitimacy. It is no doubt difficult for us to characterize objectively the nation's response to these events. We are left with uneven and see-sawing relationships among the branches of government, with basic questions asked concerning parliamentary forms, the role of the executive and the courts, the nature of federalism. Of course we have much to think about. My guess is that history will not see our difficulties as great as we imagine them to be, that it will look with special favor, if not upon us, then upon the founders who created a hope for mankind, and that indeed it will probably add a word of approval as that hope is renewed in our day.