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Hysteria and the Bill of Rights

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My colleagues would feel insecure if I didn't tell a story. It's a ritual introduction to anything I have to say. Once Clarence Darrow was asked, "Mr. Darrow, did you ever get into trouble because you were misunderstood?" And he said, "Oh my, yes, but a heck of a lot less than if I had been understood."

Those who took what they laughably called classes from me will tell you that no matter what the label of the course was, the substance, if any, was always the same. So those of you who have heard me before might recognize only a difference of emphasis rather than a change in the underlying message.

Contrary to popular belief, I always write out for myself a conclusion of what I hope to achieve. But I've taught in Mormon Sunday School long enough to know that if there's a trigger that pulls down a curtain over the brain, it's to announce in advance your objective. I have an objective, but, to bedevil you, I will not announce it.

By good fortune, not of my own creating, what they asked me to speak about fits perfectly into my fundamental thesis: the Bill of Rights has never enjoyed real, widespread support, though verbally it is almost adored. The reason is perfectly understandable if not perfectly justifiable: the Bill of Rights has no practical consequences in society except in reprehensible, disgusting, frightening circumstances.

When I grew up there were three kinds of sermons in the Mormon Church: pay your tithing, live the Word of Wisdom, and they're coming to get us. That is the entrenched minority mentality with which I grew up: nobody will protect us, and on the slightest pretext they will do anything to destroy, inconvenience, or upset us. It comes to me in my adult life as an incomprehensible shock that in my own community the response to the Bill of Rights seems to flow from an internal majoritarian orientation.

I repeat my opening thesis: the Bill of Rights has never enjoyed widespread support. I wish to use the Indian sweat-lodge case to illustrate my point. I like this case because it arises in a unique circumstance. We're talking about liberties—protected liberties—but in a prison context. We justifiably have determined to restrict the liberty, within the constraints of the Constitution, of those who are confined in those premises.

What happened in the sweat-lodge case? In an Oklahoma State prison, a Native American prisoner brought an action because they had denied him his medicine bags. Officials were also going to force him to cut his hair, and they would not permit him or any Native American prisoners to enter a sweat lodge.

To understand the rest of the story, I must give some procedural background. Our court has undertaken strategic measures to solve caseload concerns. We began to do what we all want but don't agree with when it's done, and that is to implement what we learned on *MASH* as triage. We have to determine that this patient is going to die, so let him die; this patient hurts like heck, but nothing is going to happen in the next two hours, so let him lie here and scream; this patient we have a very good chance of saving if we take care of him right now. That's the same problem we run into when we decide certain cases deliberately rather than accidentally across the board. Thus there's a body of cases that can be quickly disposed of with minimal risk of serious error.

Any of you who believe in zero-based anything don't belong in this world. If you had the Supreme Court working all year on one case, every fourth year there would be a clear-cut mistake after all that effort. But we're talking now about minimizing the trouble. One way we do that is to send certain cases to a screening panel. One judge looks at it without consultation and sends a quick proposed solution to the three other judges on the panel. They read it and typically agree with the choice. So only a few minutes are taken. I participate as a voting member on over 600 cases a year. How would you like your more serious matters to be decided by someone who has to divide their attention to your work with 599 other people in 365 days? Those are the problems with which we are confronted in the judicial system.

The sweat-lodge case came to a screening panel for dismissal. The trial court said the prisoner was not entitled to any relief. Though a prisoner with limited education wrote the petition, he still spelled out a violation of the First Amendment. He even had the good wit to cite the Fourteenth Amendment. The judge adopted the magistrate's report and threw the case out.

It came to a panel that I was on. The judge who got it on a random-slot, drop-it-in-the-box basis proposed to dismiss it as frivolous. But I was persuaded that it wasn't frivolous, though two colleagues considered it so. They felt it didn't even require an answer from the defendants.

I wrote a dissent from the order that dismissed the case. Because of procedural circumstances, the dissent did not get filed. I invoked a court rule that says no case may be ordered or submitted on the briefs unless by unanimous vote of all three panel members. I proposed in my dissent that we appoint counsel and have it argued to a regular panel. They didn't agree, so it was sent back into the inventory. I was out of the case. Unfortunately for my colleagues, it came back through some procedural quirk to another panel—and guess who showed up on that panel? At that stage we couldn't agree on how to dispose of it. We did agree that it was a serious case, and since it was a screen case, we had the option of sending it to the oral-argument calendar. The oral-argument panel appointed counsel to argue the case. One judge, who originally considered the case frivolous, joined in a decision saying it was a serious allegation of a constitutional violation. It was remanded to the trial court for further proceedings—appointment of counsel, opportunity to develop the factual record, and so on.

The original judges were troubled because the word "construct" was attached to "sweat lodge," and in their white, male, affluent minds they imagined a vast expenditure of state funds to build a chapel (a chapel which, of course, was built for our Christian friends in prison). Had the judges known more about this tiny, little, strange group of Americans (the original ones I might add), they would have treated more sympathetically the arguments I introduced originally.

A sweat lodge is a little place out in an open courtyard where you turn prisoners loose (especially if they get into trouble in the cells). There's a lot of dirt out there, so you scoop out a little hole and heat up some rocks and toss them in. Then you bend three or four sticks that you've pulled down from any tree around, just enough to bend them over and throw a piece of canvas or a couple blankets over the top. Then you toss a little water on the rocks. Now that's the "construction" that is necessary. The problem is that in the very setting in which the Bill of Rights has its validity—the protection of the obnoxious, the strange, and the unusual—it gets a negative response. It seems to me that this response is the flip side of the whole notion of the Bill of Rights.

Now, let me tell you the response we got from the state: It's a fire hazard. (I didn't have to turn to the record for an answer—they light Catholic candles in the chapel where Catholic prisoners worship at state expense.) Well, it's a safety hazard. (Never mind that every prison in the state of Nebraska has a sweat lodge. Never mind that on my desk was an article and a series of pictures of a member of the Utah Governor's personal staff entering the sweat lodge at the Utah prison.) The problem here was equal protection in a First Amendment setting.

The final argument on the sweat lodge (which amused me because I happened to have on my desk a double-bunking case under the Eighth Amendment) was that letting these Native Americans go unsupervised

into this little thing—four feet each way with just a little dome—represented a security risk. I thought there was a little incongruity in that argument. In the end the court affirmed the sweat lodge as central to the Native American's religion and concluded that refusing it violated the prisoner's First Amendment rights.

To further illustrate, let's look at the Supreme Court. The Court has skeptically viewed Jewish people who want to wear odd articles of clothing in the Army. The Court has skeptically viewed Muslims claiming to be restrained by a prison rule that says you don't come back into the prison during work detail until the work is over. In these cases, the Supreme Court is saying, "Yes, you've got rights, but society can't be expected to adjust to meet everybody's claim." Why did the Supreme Court glibly toss that off instead of going right through the roof? The system has already accommodated the Court and their fellows; we have Christian chapels, and we have a Christian workday schedule. What if we get a request from somebody who is offended by that? What if, for instance, we get a Jewish majority state? Guess what the work schedule is going to be? Now I know you're not threatened personally by that. That's what troubles me in my own community—we are not threatened by that analogy. Even with all the Jewish people in the United States, we're sure they'll never get into one state in large enough numbers to control it. Even if they did, we could always move to Utah. Let me remind you of three little incidents that should disturb you in your majoritarian mentality when examining the Bill of Rights.

A certain well-known Mormon led a successful political movement in a nearby state by force of his personality. When the time came for his party's convention, another member of the group suggested that they needed somebody other than a Mormon to lead the movement. He was offended by that and asked, "Is there something we disagree on?" The response was, "No, but we need a Christian to lead our movement."

In North Carolina, a county organization threw the Mormon softball team out of the league because they were not Christian. One more example. I got a letter from the dean of one of the United States' most distinguished divinity schools in support of an applicant wanting to clerk in my chambers. Thinking he was helping, he wrote, "Now this is a scholarly man, a dispassionate man, a brilliantly educated man. Though he is a Mormon, yet he proved himself capable of understanding Christian principles."

If you're not threatened by now, let me give you a dictum you ignore at your peril. You do not get to decide, when the power of government is invoked, who you are. If you reject that, you do it at your peril and in ignorance of your own history and in ignorance of the movements that are afoot in today's society.

I opened by saying the Bill of Rights by design never is invoked in circumstances when anyone with a majoritarian mentality can gag it down.

So the founders selected a tiny handful of matters they carved out as none of the majority's business. Those who were then in the majority recognized that there are no true majorities—only uneasy shifting alliances. Any member of today's majority may be tomorrow's hated minority.

Look at the flag-burning case. This may surprise you: I'm personally not troubled if we wanted to write a statute that outlaws flag desecration. But let me tell you about the problems you'll have, however, if you set about to.

Pass an act that says you shall not desecrate the flag—it will be a crime. Suppose I put on a T-shirt with the American flag on it—the stars under my sweaty right arm and the end of the bars under my sweaty left arm, and "I Love America" and the Pledge of Allegiance below it. Would you arrest me? Your instinct is no—it might be covered by the statute but your instinct is not to arrest me.

How about the Fourth of July picnic? Let's talk about those flag replications that we hang around the table so we can dribble our gravy on them. Somebody might be so patriotic that they leave their flag out in the storm and lightning strikes it and burns it up. We know whom we'll arrest—the person who does what the person in the flag-burning case did. Guess what distinguishes the flag-burning case from these scenarios? It's the message contained in the conduct.

I'd like to challenge you students of statutory construction to write a bill that legitimately exempts everything you would protect in dealing with the flag: a bill that would stop the conduct in the flag-burning case but not make criminal all the things that you don't want to make criminal. Do all this without saying explicitly that we intend to prosecute a flag burner wishing to send a negative message about the country or the flag—a classic First Amendment definition.

I sometimes get a little lonely. My colleagues think I enjoy being a crank and a crackpot. But what I'm telling you today has been the central burden of my active life. It has been the central burden of my life since I went to my first sacrament meeting and stayed awake and listened.

We had in my day, as you remember, three subjects: the Word of Wisdom, pay your tithing, and they're coming to get us. Living in my day were children of those who left the blood of their feet on the Mississippi ice as they were driven out of Illinois. Let me describe us (the Mormons) from the view of people like Governor Ford, who had the power to decide with gunpoint who we were.

We were blasphemers. We still are. That is why the dean from a most distinguished divinity school in the United States would write to me, "Though he is a Mormon, yet he proved himself capable of understanding Christian principles." (That is the thesis of the film *The Godmakers.*) We were adulterers. We were enslavers. Unless you are good students of history, you will not know the principal cliché of Lincoln's campaign. It wasn't

freedom for the slaves; it was save the union. But the popular campaign talked about those twin relics of barbarism—slavery and polygamy.

I recommend you read *Reynolds v. United States,* written by the United States Supreme Court. It is still out there and still being cited as the law of this country. It includes a discussion of the conduct of most of your forebears, comparing them to the East Indians who burned the living widows on the funeral pyres of their husbands. *Reynolds* is still the law of the United States. When the 52 percent majority decides that its interest lies more in power than in the individual, some of you might be challenged and even persecuted because the written words of your scriptures still contain the doctrines for which your forbears were persecuted.

I hope I've bedeviled you enough. I hope that you'll be troubled by this proposition because there is this problem: the time that the Bill of Rights is needed most is in times of hysteria, which is when we are most likely to offend it most egregiously. I cite the abuses of the McCarthy era. I cite the present-day hysteria over the illegal drugs that are used in our society. We are so hysterical that we are willing to insist that the Constitution yield rather than examining whether there are more effective methods of achieving the same goal.

If you think hysteria won't arise again, you can't yet be 30 years of age. It happens in society so quickly that we wonder where it came from. Having been the object of it a time or two in my life, maybe I'm oversensitive and I probably exaggerate. The only way the Bill of Rights has any chance of ameliorating unconstitutional hysteria (since we're entitled to be hysterical as Americans as long as we don't do it in violation of the Constitution) is if generously enforcing it becomes a habit of mind and emotion for our principal opinion makers.

I made my talk personal to those here today so that in your humble moments you might say, "Oh boy, are we in trouble." You are the opinion makers who should be busy embedding these principles in the habits of our enforcement institutions, in our private dialogues, and in our political exchanges. If you and enough people do, there is a modest chance that the next time hysteria breaks out, and you're the object of that hysteria, the courts—the institutions that give life to the Constitution when it's needed in a practical situation—will be amenable to making it a living document rather than an icon. I leave you now with my proposition: when the power of government is invoked against individuals in a way that arguably implicates a right enumerated in the Bill of Rights, we should instinctively be inclined to give the Bill of Rights a broad and generous application.

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