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THE OBNOXIOUS INDIVIDUAL*

Ben. C. Duniway†

When I was a boy, I lived for a time in a small town in Wyoming. One of the town's great celebrations was held annually on the Fourth of July. It occurred in front of the little gray brick courthouse, and it began with a reading of the Declaration of Independence. This was followed by an oration, delivered by a prominent citizen, often a lawyer. Such an oration, if it met with public approval, was referred to as a "stem-winder"—a term that has gone out of fashion with the development of the self-winding watch. Invariably, the orator's theme was the glorification of the American Revolution, accompanied by some general praise of liberty and independence, usually intertwined with a good deal of verbal twisting of the tail of the British lion. The more flowery the language, the more elaborate the metaphors, however mixed they might be, the better the oration was considered to be.

The oration was followed by the playing of the "Star Spangled Banner" by the town band. Then everyone "paraded" or rather straggled, out to the fairgrounds for the annual wild west show. The California term of rodeo had not yet penetrated to the wilds of Wyoming! By the time the day was ended, with real fireworks in nearly every back yard, everyone, with the possible exception of one or two incautious youngsters who might have lost a finger, or even an eye, had had a glorious Fourth.

Such celebrations have gone out of fashion, along with the old stem winding watch. We no longer regard the British Redcoat as the principal threat to our liberties. Today, we tend to think of the enemy as the Communist countries and party, who adopt and advocate a philosophy and a system of government that are the antithesis of our own. I do not say that there is no law in Communist nations, or in other nations where absolutism of the left or the right prevails. But it does not embody the rule of law as we know it—the idea that those who govern are just as much subject to the law, and bound to obey it, as are the governed.

Our system also embodies another idea, one that is not accepted in many of the free nations of the world. That idea is that there are

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certain rights which each of us has that government cannot take away. These rights, as we all know, are embodied in the first ten amendments to the Constitution of the United States—the Federal Bill of Rights, and in the thirteenth, fourteenth, fifteenth, and nineteenth amendments. Every state constitution, including that of California, contains a similar bill of rights, and some of those of the older states are older than the Federal Bill of Rights.

Today, most of us take the guarantees of the Bill of Rights pretty much for granted. I think, too, that most of us tend to overlook the fact that rights are correlative to duties. Indeed, we often forget that we have duties as well as rights. Most of us would agree, on those rare occasions when we stop to think about it, that we have a duty to obey the laws. Most of us do so as a matter of course. If that were not so, all of the law enforcement officers we could hire would not be enough to procure obedience to the laws. Most of the time we respect the rights of others—and we would agree, if asked, that we ought to do so.

However, I think that too many of us never think about these matters at all. Or, if we do, it is in terms of the small things that directly affect us, or of some major event that makes news on the front pages of the papers. It may be a little thing for me to park my car, illegally, in the red zone next to a fire plug. I may salve my conscience by telling myself that it is just for a few minutes, and no harm was done. But if everyone habitually did the same thing, it could jeopardize the fire protection of a whole community. I may read about a decision of the Supreme Court, reversing the conviction of someone whom the papers describe as a notorious criminal, because the police beat him with rubber hoses, or hopped him up with dope, until he confessed, and I may become indignant about it. All too often, however, the indignation will not be directed at the patently illegal acts of the police, which deprived the man of rights guaranteed by the Constitution, but at the court which upheld those rights, thereby reversing the conviction. We see manifestations of that kind of irrational indignation on billboards along our highways that display the American flag over the slogan "Save Our Republic; Impeach Earl Warren." Yet Earl Warren has done as much as any judge in our history to preserve for us the rights guaranteed to us by the Constitution.

I am a part of that division of the government, the judiciary, that has in its keeping the rule of law. It is a part of the sworn duties of the judges, both state and federal, to preserve, protect and defend the Constitution of the United States—and that includes the Bill of Rights. Unhappy experience has repeatedly demonstrated that the other two departments, the executive and the legislative, occasionally

yield to public clamor, or the apparent expediency of the moment, and take actions, or enact laws, that infringe those rights. At that point, our sole defense against such infringement is in the hands, first, of courageous and independent citizens who are willing to stand up for their rights, second, of courageous lawyers who will take and try their cases in the courts, and third, of courageous judges who will uphold those rights in such cases. It is not surprising that the United States District Judges who today man the federal trial courts in the Southern states have been described in a recent book as the fifty-eight lonely men. Some of us here in California occasionally feel pretty lonely, too.

I am not so foolish as to assert that all judges always do their duty, or that even the best judge never makes a mistake. I do not wholly agree with Gilbert's delightful verse, sung by the Lord Chancellor in "Iolanthe"—"The law is the embodiment of everything that's excellent. It has no possible fault or flaw, and I, my Lords, embody the law." We judges are people, too, and can be just as foolish and misguided as others. But the position of independence that a judge occupies, the comparatively calm atmosphere that is preserved in the courtroom, the detachment that surrounds him when he retires to his chambers to study the case, to decide it, and to express that decision in an opinion, and the long lines of decisions of predecessors interpreting and applying the law to which he can look for guidance and inspiration, all contribute to the probability that his decision may be right. Of this much at least I am certain: were it not for the decisions of the courts, extending back to the days of the Revolution, we would not today enjoy the rights and liberties that are ours.

Moreover, I am convinced that we will keep the legal system of which we are so proud—and the constitutional rights that we cherish—only so long as we deserve them. To deserve them, we must do much more than make flowery speeches about them. It is too easy to spend a half hour in self-congratulation and then return to our daily round with the all too prevalent assurance that all is right with our own little world.

Let us, then, consider an imaginary case that might occur in any American community, and some of the problems that it could present, first to the community and its government, and then to the courts.

James Madison, our fourth President, was one of the authors of the Federalist Papers, that extraordinary series of essays that did so much to persuade the thirteen colonies to ratify the Constitution of the United States. In the tenth of those papers, he discussed what he

called the danger of faction; the danger, as he saw it, that in a democratic society, where decisions are made by majority vote, the majority might trample upon the rights of a minority, or of an "obnoxious individual." (This term is his, not mine.) It was precisely because of that danger that the Bill of Rights—the first ten amendments to the Constitution—was adopted. It was because of that danger that a similar bill of rights is found in the constitution of every state, including our own. It was to prevent trampling upon the rights of a particular minority, our negro citizens, that the fourteenth and fifteenth amendments to the United States Constitution were adopted, after the Civil War, as restrictions upon the powers of the states. To our shame be it said that California did not ratify either of them. We finally got around to ratifying the fourteenth in 1959, and we first rejected the fifteenth, but finally ratified it in 1962!

Now let us return to the "obnoxious individual" about whom Madison wrote. I propose to suggest such a person to you—one living in an imaginary small California city of today—a city that could well be known to any of us. I suppose that most of us would say that there are two principal types of obnoxious individuals today—the criminal and the agitator for outlandish causes. The former I do not propose to discuss, though he too has constitutional rights, and all too often we condone flagrant violations of those rights. It would be well to recall that there, but for the Grace of God, goes each of us.

My individual, whom I will name Mr. Obnoxious, in order to avoid treading on the toes of anyone present, is 45 years of age, married to a charming wife, the father of four attractive and well behaved children. His personal life has been exemplary. He loves his wife and children; he has a nice home in a pleasant neighborhood; he is a good neighbor, and has been active in community affairs—the PTA, the Boy Scouts, the Campfire Girls, the Community Fund. He is a successful businessman—so successful, in fact, that he has retired, and is living on the income from his very considerable investments. And he is a thoroughly "nice guy."

What, then, makes him obnoxious? Well, he has always been a great reader, and he has done a lot of thinking about what he has read. Particularly since his retirement, his interests have developed along two lines—religious, and economic. In the area of religion, he has become a convinced and dedicated atheist. He cannot accept the idea of a personal God, interested in the welfare of his soul, or of an impersonal supreme being to whom he owes an obligation of worship. He thinks that man alone has the ability and duty to improve his own lot here on earth, and that his only immortality is in his

children. He thinks that religion, both organized and unorganized, diverts people's attention to the Hereafter, thereby preventing them from devoting themselves to the solution of earthly problems. Therefore, he concludes, he must convert as many people as possible to atheism.

In the area of economics, which is, in his opinion, inextricably intertwined with politics, he has arrived at equally unorthodox convictions. He thinks that the State of California has all the resources necessary to make it economically self-sufficient. He believes that the activities of the federal government have been, without exception, detrimental to this state and its people. He considers that our downfall began with the federal income tax, and that if we did not have to pay it we would then be forced to solve our own problems instead of looking to Washington for help, and would have the money to do it. He resents the great influx of people into the state and believes that we should at once stop all further immigration to California, not only from abroad, but from the rest of the United States. He is outraged that the federal government has even considered a plan whereby some of California's water might be diverted to Arizona. He is equally upset by the fact that so much of our land is owned by the United States, and is convinced that the state should own it all—including the oil resources beyond the three mile limit. He can go on about additional grievances for hours. He thinks, in short, that California should promptly get out of the United States and become a completely independent nation.

But he remains devoted to the Bill of Rights, both as it applies to him, and as it applies to everyone else. He would be horrified at the idea of achieving his aims by force or by any unlawful means, and would vigorously oppose any person who advocated such methods. He feels duty-bound, however, to propagate the ideas that he has formulated. His convictions in this regard are reinforced by his religious view, that man alone, unaided by a Supreme Being, must work out his own salvation.

The school board of the district in which he lives requires that all pupils salute the flag every morning. It was because of this that Mr. Obnoxious first came to public attention. A few years ago, when the pledge was amended to include the phrase "under God," he went to a meeting of the Board and demanded that his children be not required to take the pledge, or be permitted to leave out those words, on the ground that the compulsory use of the new words violated his children's constitutional rights to freedom of religion. There was a rather heated debate, and the matter was reported in the papers, but the Board decided to exempt his children, and the matter blew over.

Now, however, he is ready to push his views. Having money at his command, he sets about the propagation of his ideas in a big way. He has a printing press, and has printed thousands of pamphlets advocating his ideas. He has a truck, equipped with a rostrum and a loudspeaker that can be heard at a great distance. He has prepared speeches on atheism and his demand for California's independence, and has had them recorded on tape and has hired a number of young people, equipped with portable machines that can replay his speeches.

He tries to rent the high school auditorium from the local school board, for the purpose of having a mass meeting to "kick off" his great new movement, but is refused, although many other groups, such as the local Democratic and Republican parties, are permitted to use it. So he prepares advertisements to go in the local papers, and tries to buy time on the local radio and T.V. stations, for the purpose of announcing a mass meeting in the local public park, but the papers and the stations turn him down. He then prints a quantity of handbills announcing the meeting, and urging support by all atheists and secessionists. These are distributed for him in two ways—by a crew of persons hired by him who hand them out at every intersection in the downtown area, and outside every church on Sunday, and by his young people and their portable machines, who fan out through the residential districts. They ring each doorbell, and when the bell is answered, give a handbill to the person answering, and then turn on the machine, insisting on playing the tape all the way through, even when asked to leave. Meanwhile, he himself cruises the streets with his sound truck, with the bull horn turned on full blast, expounding his theories and urging one and all to attend his meeting.

It happens that the town, like many in this state and elsewhere, has what is commonly called a handbill ordinance. The ordinance makes it a misdemeanor to distribute handbills on the city streets without a license. The license must be obtained from the chief of police, who is authorized to deny it if he finds that it would be contrary to the public interest to allow the distribution. No distinction is made between commercial, religious and political handbills. There is also an anti-littering ordinance, which makes it a misdemeanor to scatter papers on the streets. Then there is a third ordinance, which forbids house to house canvassing for any purpose whatever without a similar license from the chief of police, and also specifically makes it a crime to refuse to leave private premises when requested to do so by the owner, whether such a license has been obtained or not. Mr. Obnoxious firmly believes that each of these ordinances infringes his rights to freedom of religion, freedom of speech, and

freedom of the press, as guaranteed to him by the first amendment to the United States Constitution and by the Constitution of California. So he has not applied for any license.

The town is a quiet and conservative one. Nothing like this has ever happened there. As can be imagined, all of this activity produces a sharp reaction from many citizens. Various people who receive the handbills phone the mayor, the city attorney, the police, the F.B.I., the American Legion, the fire department, the state highway patrol, the sheriff, the district attorney, and some of the local Municipal and Superior judges. The same thing is done by many outraged housewives and by other persons hearing the sound truck. Angry letters go to Congressmen and Senators, the Governor, the Attorney General of California, the President, the Secretary of Defense, the Atomic Energy Commission, the Attorney General of the United States, J. Edgar Hoover, the local papers, and to all kinds of private organizations, ranging from the John Birch Society, the D.A.R., the Archbishop of San Francisco, and the local ministerial alliance, to the Secretary General of the United Nations, and the Central Intelligence Agency. The afternoon papers carry banner headlines describing Mr. Obnoxious and his activities and ideas, as well as interviews with prominent local citizens and an editorial, all highly denunciatory. The local and national radio and T.V. play the story, and every commentator is highly critical.

The chief of police, who firmly believes in constitutional rights, and can tell when he is about to get a bear by the tail, is reluctant to act. But he is under heavy pressure to do so, and finally he does. Mr. Obnoxious and his handbill distributors and doorbell ringers are arrested and hauled off to jail. Each is charged with the four separate misdemeanors of violating the anti-handbill ordinance, the anti-littering ordinance, and the anti-canvassing and anti-trespassing ordinance.

Having plenty of money, Mr. Obnoxious gets himself and all his employees out on bail, and announces plans to go ahead with his mass meeting. This time he gets plenty of free publicity from the news media—the press, the radio, and the T.V. Every news story and announcement, however, is accompanied by critical and sometimes denunciatory editorial comment. Public officials are deluged by phone, by wire, and by letter, with demands that the meeting be stopped or broken up. The mayor announces that he will not allow the city park to be used for the meeting. Every politician in the area gets into the act, and Mr. Obnoxious finds himself charged with heresy, subversion, and treason by most of the “responsible” and “decent” people in the town. On Sunday, he is denounced from every pulpit in town, save one. That minister analyzes and refutes

his ideas, in a careful sermon, and then begs his flock to remember that Mr. Obnoxious has a right to advocate, and to stand up for his right to do so. The minister is denounced, and several of his flock resign from his church.

But Mr. Obnoxious believes that he is right, that he can convince people that he is right if they will only listen, and that he has a right to hold his meeting. He demands police protection. Again, the chief is on the spot. He announces that he will see to it that public order is maintained, and that if any person breaks the law, that person will be arrested.

Meanwhile, a few thoughtful persons have become alarmed by all the hubbub and denunciation. They are not at all afraid of Mr. Obnoxious' ideas; they believe that the best and simplest thing to do is to let him have his say. They believe with Justice Holmes that freedom includes "freedom for the thought we hate," and that the best test of the validity of Mr. Obnoxious' ideas is their ability to get themselves accepted in the market place. They send a carefully reasoned signed statement to that effect to the news media—and find themselves denounced.

On the day of the meeting, a large crowd, mostly hostile, has gathered in the park. A few students from the local University appear, carrying placards supporting Mr. Obnoxious, and some are manhandled by the crowd. When Mr. Obnoxious drives up in his sound truck, there are boos and catcalls, and some rotten vegetables are thrown. However, the police hold the crowd back, and Mr. Obnoxious begins to speak. At that point the crowd starts to get out of hand, a few try to rush the truck, and the police are soon involved in a meleé with the crowd. Mr. Obnoxious turns up the bull horn and goes on talking. But the chief has had enough. He orders Mr. Obnoxious' arrest for disturbing the peace, inciting to riot, and trespassing on city property, and once more Mr. Obnoxious finds himself in jail. Again, he bails himself out. He is forced by anonymous threats to ask police protection for his home and family. To the great credit of the chief, he gets it.

Meanwhile, certain ambitious politicians see an opportunity for publicity. The district attorney announces that he will convene a grand jury to investigate the conduct of Mr. Obnoxious, and the chairman of the House Un-American Activities Committee announces that his committee will investigate Mr. Obnoxious as a subversive. The grand jury is duly convened, and there results an indictment of Mr. Obnoxious and his employees for conspiracy to commit each of the seven misdemeanors with which he is already charged, such a conspiracy being a felony. He and his associates are

arrested at their homes, late in the evening, and again hauled off to jail. This time Mr. Obnoxious is not permitted to make any phone calls, or to see a magistrate or anyone else, so that he cannot post bail until morning. So they all spend the night in jail.

Now it happened that, frightened by anonymous calls, the hostility of the neighbors, and the carloads of tough looking men who cruised slowly past her house, Mrs. Obnoxious had taken the children and gone to another city, hoping that things would soon blow over. And when Mr. Obnoxious was arrested, he forgot to close the front door of his house. Shortly after his arrest, there appeared at the house an investigator for the Un-American Activities Committee, armed with a subpoena requiring Mr. Obnoxious to appear before the committee in Washington the following week. The open door was too much for the investigator, and in he went. He ransacked the house, and took with him every paper and book that seemed to him remotely subversive, including much personal correspondence and many books. One was by Dean Griswold of the Harvard Law School and entitled "The Fifth Amendment."

Next day, Mr. Obnoxious gets out on bail again, and is promptly served with the committee subpoena. Upon going home he finds his house a shambles, and his books and papers gone. And the school board announces that it will henceforth require his children to take the pledge of allegiance. At that point, he finally decides that he needs a lawyer.

Now, many of us will recognize the fact that our little story is constructed around a number of decisions of the United States Supreme Court and of the Supreme Court of California dealing with constitutional rights of the individual. It is probable that most of the things that happened to Mr. Obnoxious violate his constitutional rights to freedom of religion, freedom of press and speech, freedom of assembly; rights to be secure in his person, home, papers and effects, and against unreasonable search and seizure, and perhaps others. In a series of decisions involving the Jehovah's Witnesses, the Supreme Court of the United States has held that their children cannot be required to salute the flag if it is contrary to their religious beliefs to do so; that licenses restricting distribution of handbills, house to house calls, and using phonographs, are invalid when applied to their evangelizing activities. In the famous *Hague* case, it held that Mayor Hague denied constitutional rights to the C.I.O. when he refused to permit a meeting in a public park. But the Court has also denied that one has the right to propagandize by cruising the streets with a loudspeaker.

The basic principles behind these decisions have been variously

stated. The Court has said that a citizen has a right to hold views upon any and all controversial questions, and to disseminate them, including the promotion of Communism by the ballot box, but not by incitement to violence. It has said that each of us has the right to maintain theories which are rank heresies to followers of orthodox faiths. Many decisions make it clear that the seizure of Mr. Obnoxious' papers violates his rights against unreasonable search and seizure. And it is at least doubtful that one who merely advocates secession or atheism can be hauled before a Congressional Committee and questioned as to those beliefs.

One thing, however, is certain. Mr. Obnoxious desperately needs a lawyer, and a good one. Both Supreme Courts have repeatedly stated that a man charged with crime is in no position to defend himself. Every lawyer knows that that is true. That is why the Constitutions of the United States and of this state guarantee the right to have the assistance of counsel in one's defense.

Now, the question that this example raises for lawyers is this: If Mr. Obnoxious, with all this legal business, involving constitutional questions of the greatest importance, and well able to pay a lawyer amply for his time and effort, were to walk into a lawyer's office and ask him to represent him in all these matters, would the lawyer do it? Or would the lawyer refuse, either because of fear of community disapproval or of the disapproval of present or prospective clients? Or would the lawyer insist, as a condition to representing him, that he give up what the lawyer considered to be a foolish—indeed, an obnoxious—crusade?

And the question I wish to put to those of you who are not lawyers is this: If your lawyer took Mr. Obnoxious' many cases, what would your attitude be? Would you be shocked that the man whom you have considered to be so able and upright would permit himself to be associated with this dangerous and subversive character? Would you feel that perhaps your lawyer had the same kind of ideas as Mr. Obnoxious, or otherwise he would not represent him? Would you be afraid to have your lawyer continue to act for you because you think his representing Mr. Obnoxious would make the judges and jurors regard him with suspicion or hostility? Would you decide that you had better get another lawyer?

I suggest to you that if the lawyers' answers are that they would not represent Mr. Obnoxious, or if the clients' answers were yes, I would have doubts about my lawyer and I might get another, then constitutional rights in this community are in grave danger.

Recent public opinion surveys have brought to light some very disturbing things. Most people, when asked what they think of

the Bill of Rights, don't know what it is. The others either think it is a "good thing," or have no opinion. But when they are asked whether a man like Mr. Obnoxious ought to have a right to do the things that I have described, a very large percent say, no he should not. Yet his ideas and conduct are no more obnoxious to the powers that be—and to the majority of our people—today than were the ideas and conduct of those whom we revere as the founding fathers of this Republic in their day. We would do well to recall a famous definition of a conservative—"One who worships dead radicals."

It is not enough to write guarantees of individual rights into the Constitution. They are only as good as their enforcement. It is the courts that must enforce them. That means that we must have judges who are convinced of their importance, and who have the courage of their convictions. It means much more. It means that lawyers—competent lawyers, lawyers of unquestioned reputation and integrity, must be willing to assert those rights in court, regardless of public clamor and hostility. And, because lawyers cannot live without clients, it means that clients must recognize that it is the right and the duty—indeed the proud privilege—of lawyers to defend the constitutional rights of unpopular persons. It means that we the people—all of us—must understand the meaning of the Bill of Rights in practical application, and support those who defend it.

John Adams set the standard when he undertook the defense of the British soldiers who shot and killed some of the citizens of Boston in the famous Boston massacre, and obtained an acquittal. He was severely condemned by some of his fellow patriots, but he went on to become a signer of the Declaration of Independence, the veritable architect of freedom, and the second President of the United States.

There are modern parallels. Some time ago, Life magazine carried a book review about the case of Colonel Abel, a Russian spy, who was defended by a well known lawyer in New York, James Donovan. As the review puts it:

Donovan took on the defense of a dedicated and dangerous spy out of his deep belief in the guarantees of the Constitution—and he did it, as his book recurrently shows, against a lot of social and business pressure. Clients took accounts away from his firm. Women made snide cracks at his wife. He went right ahead anyway, but despite the superbly skillful defense he gave Abel, the court sentenced the spy to 30 years.

I suggest that the people who so treated attorney Donovan were themselves being disloyal to our Constitution. Donovan deserved praise, not condemnation, for what he did.

Do not misunderstand me. This paper is not an advocacy of atheism or of secession. It is not an advocacy of the activities de-

vised and carried out by Mr. Obnoxious to propagate his ideas. There are many cases in which good judgment tells us that we will accomplish nothing, and may damage our ultimate objectives, by adamantly standing on our rights and pushing them as far as we can. Getting things done in a democracy is primarily a matter of persuading our fellow men, in an orderly manner, to want to get them done.

But if we are to remain a great and free nation—a beacon light in a world largely in darkness—we cannot tolerate the whittling away of our liberties by denying them to those whom we dislike, or with whom we violently disagree. Many an idea that was anathema to the majority when it was first propounded, has since become an accepted part of the thinking of mankind. We may look back with shocked disbelief at the people who tortured Galileo to make him recant his scientific observations, thinking of them as benighted members of a less enlightened age. Yet it is not very long ago that Scopes, a teacher, went on trial, in this enlightened nation, for the crime of teaching the theory of evolution. It is even less long ago that a famous scientist was publicly stripped of his character, primarily because he dared to doubt the wisdom of developing a hydrogen bomb. There lurks in each of us a little of the unreasoning zeal of the inquisitor. Nor is that zeal confined to those who would oppose change in our society. We see it today on the part of many advocates of change, who damage their own cause by conducting demonstrations in a manner that clearly violates the laws, and promotes disregard of law and order.

We need, then, to remember that we have responsibilities as well as rights. Correlative with the right to resist and defy a law that is unconstitutional is the duty to obey the law that is valid. Our system contains built-in ways of procuring change, by orderly and peaceful means, including orderly and peaceful demonstrations. We have a duty to protect and defend the right of each of us to use them.

Admiral Rickover, in a recent paper, has stated the matter well. He said:

Implicit in democracy is the correlation of liberty and responsibility. A citizen is a person with private rights and public duties. In an oversimplified way, one can say that he safeguards his private liberties by conscientiously attending to his public responsibilities. Democracy will not function well unless at least a majority of citizens recognize this correlation and act accordingly. Individual rights will be lost unless they are, as it were, earned by each generation through active and intelligent participation in public affairs.

I would add only this—that each of us also has a duty, in our participation in public affairs, so to act as to preserve, protect and defend the rights of all of us.