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By William H. Mellor III and Clint Bolick

The Heritage Foundation

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CLINT BOLICK: I'm excited to be here with my partner, Chip Mellor, to announce the opening of the Institute for Justice. I will leave largely to him the task and pleasure of sharing with you our vision for shaping American jurisprudence in the coming years. By way of brief introduction to Chip's more extended remarks, I'd like to reflect a bit on some of the events of the past few years, to survey the much-changed landscape that this new enterprise will encounter, to celebrate some of those changes, and to take stock of the sobering challenges that lay ahead.

Three and a half years ago, I launched with Landmark Legal Foundation an effort to transform the terms of the debate in the area of civil rights. All of us involved in the effort wondered whether it was possible to make inroads on issues utterly dominated by the Left. We wondered if we possibly could reclaim the moral high ground abdicated long ago. Working with allies such as The Heritage Foundation, the National Center for Neighborhood Enterprise—and to an encouraging extent, the Bush Administration—we helped to fashion a new agenda, based on the traditional principles of civil rights, in an effort to replace a divisive and demoralizing policy of rampant social engineering with one based on equal opportunity and individual empowerment.

I don't think any of us could have predicted, in our wildest optimism, how dramatic a change would take place in the next three years. By exposing the true nature of the Left's civil rights agenda, we were able to derail, at least thus far, legislation that would make racial classifications a permanent feature of the American landscape, but would do nothing to solve the serious problems facing the most disadvantaged members of our society. And what the events of the last three years have demonstrated about the civil rights establishment is that the emperor has no clothes. Weighted down by its special interest group entanglements and by the patronizing attitudes of its leadership elite, the civil rights establishment increasingly has lost sight of the needs of its constituency and the principles that fueled its past success. Nowhere is this more apparent than in the battle over the confirmation of Clarence Thomas to the Supreme Court, in which the civil rights establishment seems determined to prove just how irrelevant it is to the realities facing America in the 1990s.

Sharing the American Dream. More important, we recently have begun refocusing the debate on removing barriers to opportunity and helping low-income people earn their share of the American Dream. For my part, what has been most gratifying about the past three years is the people I have encountered in these efforts. People like Ego Brown and the homeless entrepreneurs who, freed from arbitrary economic regulations, are lifting themselves by their own bootstraps. Kimi Gray, Bertha Gilkey, Doretha Gayden, and other public housing tenants, who are reclaiming their communities and gaining a stake in the ownership of property. Little Devon Williams, who was able to escape the cesspool of the Milwaukee Public Schools and instead get a good education in an excellent neighborhood private school, thanks to the nation's first real parental choice program. I tell you, the inspiration, the look of joy and optimism on their faces, speak volumes to the fact that we are right, and that we must persevere in these efforts that are only barely begun.

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But for all our triumphs, we have very far to go. Perhaps never was this more painfully clear to me than in the recent case of Junie Allick. Junie is a native of the United States Virgin Islands. Like his grandfather and his father before him, Junie earns his living from the sea. For many years, he and other native Islanders operated successful businesses by sailing tourists to Buck Island to enjoy its beautiful coral reefs. It made a wonderful living for Junie, who welcomed newcomers to the business and even taught some of them how to sail the waters of St. Croix.

Vicious Process. But in the late 1970s, the National Park Service, which had assumed ownership of Buck Island, instituted a highly complex licensing process for charter boat operations to Buck Island, and imposed a so-called "attrition policy" designed to reduce the number of boats; not for ecological or safety reasons, but rather, in the words of one Park Service official, to halt "predatory price cutting" among boat operators. Unfortunately, Junie and several other skilled sailors were not so adept at navigating the sea of bureaucracy. Junie, who operated the only antique native-built sloop in the Virgin Islands, lost his permit for taking his boat out of commission to repair a broken mast longer than the Park Service allowed; and even though he consistently had received the highest ratings from the Park Service, the agency refused to grant him a new permit. Over the course of ten years, the attrition policy reduced the number of charter boat operators from 22 to seven, and the number of native Islanders to zero. Through its vicious and arbitrary licensing process, the government had systematically destroyed a flourishing native business.

I met Junie a few years ago. He took me sailing, and I was awed by his skill, and by the esteem in which he obviously is held by other sailors. I saw my first dolphin swimming alongside the boat. And even though I cautioned that the odds were against us if we sued the government, Junie told me, "I know it will work out, Clint. This is America."

We filed a lawsuit challenging the Park Service attrition policy, arguing that if the government deprives a person of the opportunity to earn a living in his or her chosen profession, it must demonstrate its policy serves a legitimate purpose in a rational way. But a few months ago, the federal district court here in Washington ruled against Junie Allick. Judge Charles Richey was incredulous that someone would sue the government over a business that generated less than $20,000 in annual income. Junie Allick, in the words of Judge Richey, was merely a "frustrated government contractor," with no constitutional rights in this matter. And in no less summary fashion than that did the court dispense with Junie's hopes, his livelihood, maybe even his future. Junie may never sail to Buck Island again.

Fundamental Rights. One point that the great civil rights leaders from William Lloyd Garrison to Martin Luther King emphasized was the universality of rights. Each of us possesses fundamental rights that no government may take away. If any of us loses our rights, we all lose our rights. And if Junie Allick does not have liberty, then none of us has liberty. We have so much work to do.

There is no aspect of the mission ahead that encourages me more than to be reunited with my partner, Chip Mellor, who is the Institute's president and general counsel. I began my legal career with Chip in 1982, when he was acting president of Mountain States Legal Foundation in Denver. We have collaborated often since that time, most recently during his tenure as president of Pacific Research Institute, which developed the litigation blueprints that will guide the Institute for Justice. Of course, anyone who would leave San Francisco and move to Washington, D.C. — especially during August — has got to be committed to the mission. I am so pleased to welcome back to Washington, and to introduce to you, Chip Mellor.

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WILLIAM H. MELLOR III: I would like to express my appreciation to The Heritage Foundation for all it has done to help us launch our new endeavor. It is a pleasure and an honor to announce the creation of the Institute for Justice at a Heritage lecture. While the Institute is brand new, the idea for it has been germinating for quite some time. It is the culmination of the work and faith of many people over the last decade, so we are especially grateful for the opportunity and challenge of launching this new enterprise.

Eight years ago, in the shade of my Denver backyard, Clint Bolick and I vowed that one day we would join forces to pursue a vision of public interest advocacy devoted to individual rights and economic liberty. We had witnessed first hand the graphic difference between pro-business and pro-free enterprise litigation. We saw the tragic consequences of expedient, *ad hoc* case selection covered with a public interest veneer. Clint and I concluded that a very different approach was necessary—a long-term, philosophically and tactically consistent litigation program based on natural rights and the Constitution. We believed this new approach was essential if the courts were to play their designated role as guarantors of liberty. The rule of law so necessary to a free society was too often twisted into a force that destroyed not only isolated individuals, but also the very fabric of community upon which our society is based. Court-ordered busing as neighborhood schools failed, open-ended protection of criminals while the pain of crime victims was ignored, expansion of welfare entitlements while government closed avenues for initiative and upward mobility—all these and more were among the policies that our legal system fostered and protected.

But the time was not then ripe to launch a counteroffensive. The courts were hostile and the political terrain was in transition. Clint and I each decided to contribute our talents to the Reagan Administration.

Judicial Touchstone. It was a time of both idealism and heated debate. One of the most passionately debated issues at that time, of course, was the proper role of the judiciary. The theory of judicial restraint, that is, the notion that judges are to apply the written law and not attempt to create it, was the jurisprudential touchstone of the Reagan Administration. Conservatives vehemently opposed judicial activism that led to sweeping changes wrought by judges accountable to no one. Such egregious practices as expansive application of environmental laws and the creation of new welfare "rights" came to symbolize for conservatives all that was wrong with the way courts functioned under the influence of judicial activism. The debate became so polarized that allegiance to judicial restraint became a requirement for conservative legitimacy in certain circles. And it remains so today.

Yet, as we observed this process, it was apparent to us that these two opposing approaches to jurisprudence lost sight of legitimate, indeed vital, concerns that did not fit neatly into the respective paradigms. While abhorring many results of liberal judicial activism, we believed that emphasis on judicial restraint as an end in itself gave insufficient hope for protecting crucial rights. And for those rights already emasculated by judicial edict, judicial restraint simply enshrines bad law.

For example, the Constitution states that private property shall be protected from government expropriation. Yet decades of court-made law removed much of this protection. Is one wrong in calling for judicial activism that urges courts to strike down wrongful government takings? The Constitution protects economic liberty, but this right was nullified through a single Supreme Court case a hundred years ago. Is one a proponent of improper judicial activism in calling for the reversal of such intolerable precedent? Of course not. The common assumption that judges are bound by precedent or *stare decisis* does not mean that we are stuck with the tyranny of the status quo. When presented with compelling arguments, courts can and should reverse prior decisions. Reversal of prior decisions is not uncommon, even at the Supreme Court. The overarching rationale be-

hind this practice is in line with C.S. Lewis's admonition: "When you are on the wrong road, progress means doing an about-turn and walking back to the right road"[1]

Temptation to Deny Rights. Questions such as these are all the more pertinent because neither the legislative nor the executive branch of government has a record of consistent support for precious rights and liberties. Indeed, examples of legislative and executive excess are all too common. And the option of simply allowing the legal system to operate in an *ad hoc* fashion gives absolutely no solace. We know that skilled advocacy by those who favor greater government involvement in economic and private affairs continually pushes court decisions farther to the left. But even more important, the legal system itself, through its complex web of procedures, statutes, and incentives provides a relentless temptation to expand government and deny rights. As Friedrich Hayek recognized nearly twenty years ago, "We live in such a period of transformation of the law by inner forces... that, if the principles which at present guide that process are allowed to work themselves out to their logical consequences, law as we know it as the chief protection of the freedom of the individual is bound to disappear."[2]

Faced with this stark reality, we believe it is proper, indeed imperative, that there be skilled advocates for liberty, armed with philosophically and tactically consistent strategies for restoring a rule of law based on natural rights and the Constitution.

The opportunity to pursue such a course reflects the maturing of the pro-free enterprise public interest movement, whose vigil in the courts has been a lonely one. We owe a debt to those who have fought in the legal trenches. Groups such as the Washington Legal Foundation, and more recently the Center for Individual Rights have been tenacious in their efforts. Notable successes of the Pacific Legal Foundation and the Competitive Enterprise Institute in the field of property rights and of the Landmark Legal Foundation in the area of civil rights were achieved precisely because they arose through litigation designed to vindicate clear principles. These victories, achieved after years of hard work, are an important beginning. Just imagine how much farther along we would be today if we had been able to develop and implement a long range litigation and education strategy ten years ago.

Manifesto for Empowerment. Fortunately, we approach this task with the strategies developed during the past several years by the Center for Applied Jurisprudence of the Pacific Research Institute. At the Center for Applied Jurisprudence, task forces of the nation's leading practitioners and scholars of law, such as Richard Epstein, Nathan Glazer, Michael McConnell, Randy Barnett, Chuck Cooper, William Allen, and others, helped us develop and refine strategies. Out of this effort came, among other things, Clint's book, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, which the *Wall Street Journal* called the "legal manifesto for empowerment," and *Freedom, Technology and the First Amendment*, by Jonathan Emord, which Michael McConnell hailed as the most successful work ever "in explaining how the free speech principles of the American Founding can be faithfully applied to the communications technologies of today." Emord joins the Institute in October as our senior litigation counsel.

Our mission is to advance natural rights jurisprudence through precedent setting cases and the development of a bank of talented law students, lawyers, and policy analysts skilled in public interest advocacy. This makes the Institute for Justice unique.

Although our enterprise is new, jurisprudence fundamentally based on rights, rather than policy or profit, is not. Natural rights theories profoundly influenced the framers of the Constitution.

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1 C.S. Lewis, *Mere Christianity* (New York: Collier Books, 1953), p. 22.

2 Friedrich Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973), p. 66-67.

While the overall influence of natural rights can be debated, it is quite clear that key provisions of the Constitution are derived from natural rights. Unfortunately, such basic beliefs fell out of favor with the rise of legal positivism and utilitarianism.

During the 1970s a resurgence of interest in rights from a variety of perspectives was created by influential scholars such as John Rawls[3], Ronald Dworkin[4], and Robert Nozick.[5] Yet this interest is to this day not manifest in applied jurisprudence, much less in the day-to-day practice of the law. In part this is because of the continuing philosophical arguments over the meaning of rights and their origin. Then too a guiding philosophy of rights has been so alien to judicial decision-making for so long that it has been deemed archaic and irrelevant. Moreover, proponents of natural rights often fail to move beyond basic premises and solve real world problems.

Guiding Principles. The Institute for Justice will meet this challenge head on through systematic litigation designed to take us, step by step, closer to a modern jurisprudence based on natural rights. In doing so we will be guided by two overriding principles. First, a recognition that our system of law is based upon inalienable individual rights to life, liberty, and the pursuit of happiness. Second, a belief that in every instance where government activity adversely affects these rights a court should begin its inquiry with a presumption in favor of liberty. This presumption should only give way upon a showing that a law is actually necessary and proper to the exercise of a Constitutionally delegated power. These two principles are crucial because they recognize and seek to restore the fundamental relationship of the individual to the state envisioned by the Founders.

Our litigation agenda can be characterized as broadly seeking to enable individuals to take control of their own destinies as free and responsible members of society, and to form voluntary communities based on common interests and aspirations. When we file an economic liberty case to strike down government-created barriers to entrepreneurial activity, we will work to create a system in which productive lives are not arbitrarily restricted. When we fight for educational choice and challenge the public school monopoly, we will seek to ensure that children of this country have that most important tool for intellectual growth and economic well-being: a quality education. When we sue for a uniform First Amendment standard for all media, regardless of the technology involved, we will seek the unfettered flow of information that people need to exercise political freedom and to participate in a thriving market economy. In every case, we will advance our cause in the courts of law and the courts of public opinion.

Too often today a legal education means learning how to manipulate an increasingly prescriptive and complicated system for the narrow benefit of a particular client. Even the most fundamental law, Constitutional law, is frequently used as a tool to serve either the partisan end of a particular client or the political ends of the welfare state. Many graduates quickly become technocrats with little time, interest, or opportunity for public interest work. However, a small but growing number of law students and lawyers are not satisfied with such a fate. The Federalist Society and the Institute for Humane Studies are finding impressive young people who want to pursue legal careers dedicated to conservative and libertarian principles. We will teach such people how to apply their talent and idealism in the real world of litigation, media relations, and public debate. We will conduct intensive seminars in public interest advocacy so that whether they go into private practice, government, or academia, these crucial individuals will know how to recognize opportunities and effectively advance rights-based jurisprudence.

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3 John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971).

4 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

5 Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

At the state and local level, grassroots organizations struggle valiantly for important causes, ranging from educational choice to term limitation. In the heat of their respective efforts, few have time or expertise to consider the ways in which strategic litigation could complement and enhance these organizations' efforts. Our seminars will train grassroots activists so that they can incorporate legal strategies into their efforts from the outset. Equally important, they will help us identify prospective plaintiffs and mobilize community interest and support. Currently there exists no opportunity for these people to learn the theory and application of natural law as part of a comprehensive and intensive program to recapture rights taken by government action or lost through judicial inaction.

Representing the Powerless. But the question remains: Who will we represent in court? At a time when there is more litigation than ever before, increasing numbers of Americans are shut out of the legal system. They have no recourse for many legitimate grievances because of the cost and delays involved in litigation. They must stand by while the government's presence in their lives grows relentlessly. They are increasingly powerless to control their own destinies, to provide for their families, or to enjoy the benefits of liberty.

These are the people we will represent. We will represent the entry-level entrepreneur in his quest to strike down arbitrary barriers to opportunity and thereby earn a share of the American Dream. We will aid parents who are striving to rescue their children from the fate assigned to them by the failing public school monopoly in the inner city. We will represent people whose right to enjoy the fruits of their labor—their property—has been taken from them by oppressive government regulation and outright expropriation. And we will fight for the producers and consumers of information in their efforts to resist government control over the most precious of markets: the marketplace of ideas.

In sum, our efforts are about rights, but more important, they are about the people who possess these rights. For too long we have talked in abstractions and theories. But as our movement has matured, we now have the opportunity to move from academic debate into the real world, and to address the vital concerns of real people. For these people yearn only for what Thomas Jefferson referred to in his first Inaugural Address—to be left "free to regulate their own pursuits of industry and improvement."

These are the people we will represent.

And, after all, we really are only helping them reclaim what has been rightfully theirs all along.

Justice indeed.

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