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LAW AND THE NEW LIBERTIES*

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One of our contemporary critics some years ago gave us an extremely interesting comment on the nature of news. Pointing out that so much of what strikes our eyes in the press is the abnormal rather than the normal, he contended that it was the normality of life rather than its vagaries that was the most extraordinary fact of existence. He pictures for us a phantom newspaper whose columns would follow this theme. Instead of the common headlines "Man Killed in Subway Accident," or "Wife Slays Husband in Row Over Breakfast Coffee," its screamers would run somewhat in this fashion, "Quarter Million Workers Arrive Back Safely From Work," or "Half Million Husbands Dine Agreeably With Half Million Wives After More Than Five Years of Married Life."

There is an extraordinary amount of truth in this fantasy of Robert Morss Lovett's. In almost all phases of life, it is the unusual and the unexpected that reaches the plane of notice or notoriety, while the stuff that rounds out our daily routines passes unnoticed. And yet it is the commonplace that really matters; the deep, strong undercurrent of existence that moves so quietly and yet so profoundly that we hardly recognize its motion, realizing only now and then as we look backward that the scene has changed, that the old guideposts have gone, and that a new civilization has overtaken us.

Law and its development reveal these characteristics to an extraordinary degree. Supreme Court decision, for example, is always headline news. The constitutionality of TVA, the power of the federal government to control the public utility holding company, the constitutional limits

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of state and federal taxing powers, these are issues which represent some of the recent dramatic episodes of the law. True, decisions such as these represent delineation by an authoritative body of the limits of federal or state power or even of the limits of organized government as such, but they represent only by reflection the truly creative forces that are constantly at work in the law. The TVA as an idea, the shaping of the mechanisms to govern the holding company, the theory of the graduated income tax, these are conceptions that derive elsewhere than the Supreme Court. The task of that Court is to check the abnormal, to utter its "Thou shalt nots," rather than to be the source of those creative influences that direct the normality of our general legal development. And it is that normality, the day by day current of events, that matters most in the shaping of the civilization that we choose to build for ourselves.

One further allusion and I shall be at my topic. Rabindranath Tagore, in contrasting the general tenor of occidental and oriental philosophies, speaks of the former as philosophies of action, as picturing the problems of living as related to the overcoming of obstacles. In contrast the orient speaks, in the main, in terms of peace and repose, and of acceptance of the conditions with which nature has surrounded us. He illustrates the difference between these two philosophies by the example of a road between two points. To the occidental the road is something to be gotten over in his effort to go from one place to another—a thing that separates one from the other. To the oriental, on the other hand, the road is not only a happy thing, that makes for the delight of leisurely travel, but more important the thing connects rather than divides the two distant points.

An illuminating attitude towards recent developments in government is to try on occasion to view them from a different vantage point. The expansion of regulatory activity is, of course, the most outstanding characteristic of the nature of twentieth century governmental development. Protests against its extension into this and that field are rife, outcries against the deviations from the traditional forms of judicial procedure that it implies are the common fare of gatherings of lawyers, its asserted violation of traditional liberties is the grist of much argument before the Supreme Court of the United States. Too frequently, it seems to me, we fail to see the significance of this development from another standpoint, from that of the creation rather than the restriction of liberties.

To take an older illustration, in 1911 the highest court of New York declared unconstitutional that state's workmen's compensation law on the

ground that its imposition of liability without fault violated the employers' liberty of contract. It failed to see, as courts have universally since seen, that at the same time workmen's compensation legislation created a liberty for the employee, a right upon his part to insist that the inevitable hazard of industrial accident must be borne by the industry that he, as a unit in our economic processes, was allotted to serve.

It is, of course, a truism that the function of law is the adjustment of conflicting human claims. Individuals or groups of individuals are pressing divergent claims, both of which cannot be realized to the full. It thus becomes almost axiomatic that restricting the liberty of one claimant means recognizing or expanding the liberty of another. To take the present Wagner Act as an illustration, restriction of the employers' liberty to bargain on an individual basis with his employees, implies, of course, the creation of a correlative liberty on the part of employees to bargain collectively.

Such an analysis, of course, proves nothing as to the relative merit of protecting one liberty at the cost of another. But it explains why such a piece of legislation as the Wagner Act can be regarded at the same time by one group as an unwarranted interference with employment relationships and by another group as a charter of liberties.

It is interesting and sometimes quite enlightening to survey a course of statutory development in terms of the creation of liberties rather than of the restriction of rights. Stock exchange control, the supervision of investment banking, the control over such things as the radio, or commercial banking, speak too frequently to us in terms of restricting human action. But looked at from the standpoint of groups such as investors, or depositors, the same statutory mechanisms can be looked at in terms of creating liberties or rights of groups of people, the liberty to be protected against market manipulation, the creation of a right to continuity in radio programs, or of a right to reasonable safety in one's bank deposits.

As one surveys in the broad the statutory development of the last two decades since the World War, it would be possible almost to write and outline a great, new charter of liberties that that development has brought into existence. The creation of those rights has in turn forced an alteration of earlier conceptions of the privileges that attached to certain pursuits. Industrial property, for example, has since 1900 had certain outstanding obligations imposed upon it which alter the earlier privileges that attended the conduct of enterprise. Not only has there been an enormous extension of the concept of the "public utility" so as to bring businesses, such as

insurance, stockyards, and the distribution of milk within that concept, but industrial property, still outside the public utility category, has had a series of obligations placed upon it which have altered enormously its earlier content. Such measures as workmen's compensation, unemployment and old age insurance, legislation governing the means and methods of public financing or legislation encouraging and protecting collective bargaining, have both swelled the newer charter of liberties and altered the bundle of rights that theretofore attached to the very concept of property.

The relationship of this new charter of liberties to the continuance of our democratic processes is, perhaps, in the forefront of much of our thinking. It is too easy to conceal any real analysis of that relationship by starting with conclusions implicit in such emotive words as socialistic, totalitarian or fascistic, and the thousand and one other epithets that the politician and the orator daily employ. But if we try to think of the essence of that relationship, two things seem particularly significant.

The first is that the array of the new liberties is of greatly less significance than the manner of their creation. To view departures from a nineteenth century economy as an encroachment upon the democratic idea, is to insist that democracy and a *laissez faire* philosophy of government must go hand in hand. It was in protest against the early tendency of the majority of the Supreme Court to interpret constitutional guarantees as requiring the continuance of that *laissez faire* philosophy, that Mr. Justice Holmes uttered his famous protest that the Fourteenth Amendment did not fasten upon the country Herbert Spencer's Social Statics. Certainly, as the recent report of the President's committee to investigate labor relationships in Great Britain amply demonstrates, the encouragement and protection of the right of collective bargaining is not incompatible with the existence of a democracy. Indeed, to take another illustration from England, the democratic idea can very evidently survive such matters as the nationalization of a sick industry like mining. On the other hand, in other legal systems these and similar incidents accompany the movement away from such seeds of the democratic idea as those systems may once have possessed.

Thus more important than the actual catalogue, as it may stand at any particular moment of time, of the respective liberties that attach to individuals, seems to be the manner of the attainment of these liberties and the manner of their potential alteration. Of course, the democratic idea bases itself upon the idea of majority as affected by the exercise of the suffrage. But underlying the theory of suffrage and integral to its exer-

cise, we come to those liberties that alone make it reality, liberties such as the guarantees of free speech and a free press. The extent to which the entire democratic idea rests upon these liberties has no clearer demonstration than can be found in the world today, when the suppression of these rights and other like rights, such as those of assembly, political organization and of workship, are the first steps taken to destroy the democratic idea. This, I suppose, is why we think of these rights as truly fundamental, as being the keystone of the entire arch.

A short glance at our constitutional history makes clear the difference between these liberties and others, such, for example, as liberty of contract. At no time in the history of the common law was any fixed liberty of contract recognized. Instead, over the centuries the content of that liberty has altered enormously. In the last thirty years, the Supreme Court of the United States itself has not infrequently reversed itself with reference to the allowable restrictions that could be placed upon it. Its content is now recognized to be, in the main, the subject for determination by political rather than legalistic methods. But contrariwise, those rights that I have spoken of as fundamental have tended in the processes of constitutional interpretation to have a polar fixity. Infringements upon them have been regarded as the appropriate concern of an institution, such as a court, which should determine the content of rights more by reference to an analysis of the extent of the faiths that may be embodied in a bill of rights rather than by a nice judgment bottomed on considerations of practicality and policy.

But not only is the manner of the creation of new rights significant as a litmus test to the idea of democracy, but also the method chosen for their protection. Here one of the most characteristic features of our age is the tendency to entrust the development and protection of these rights, at least in their initial stages, to tribunals other than courts. Indeed, as one views the great political battles of the last century which resulted in additions to and alterations of our industrial charter of liberties, the very striking fact that stands out is the generality with which we have given the initial protection and elaboration of these liberties to administrative agencies. With the outstanding exception of the battle over the trusts that resulted in the Sherman Act (and even there one wonders whether the present monopoly inquiry will not eventually give us a different answer) railroads, banking, utilities, water power, stock exchanges, labor organizations, social security, radio, employment conditions, all have given us this administrative answer. Let me call a portion of the catalogue of administrative

agencies just to make the thought concrete, for one takes them in the order of their creation, one is really calling the roll of the major political issues of the last half century—the Interstate Commerce Commission (railroads), the Federal Trade Commission (the problem of big business), the Federal Reserve Board (banks), the Federal Power Commission, the Radio Commission that later became the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board, the Social Security Commission, the Wage and Hour Board. Though I have named only some of the major agencies, I have named the great national issues of our recent political life.

This administrative method then can be regarded as the dominating pattern that is evolving today for the protection of the newer liberties. Its contrast with the nineteenth century pattern is marked, for during the major portion of that century, courts and courts alone stood as the agencies for the protection of claims.

The significance of the role that courts have played in the preservation of the democratic process cannot be overestimated. The translation into reality of liberties that otherwise would exist merely upon paper was their function. And the democratic idea, as one can draw it from its great charters, conceived of agencies that followed traditional notions of fairness and equality as the instrumentalities for conforming law in books to law in action. How far, one must therefore ask, are these newer administrative agencies consonant with that tradition?

No adequate answer to this question can be made without some realization of the reasons that have made for this great extension of the administrative process. Of course, a multitude of reasons underlie that extension. A few, however, seem to have been especially predominant. Among them has been the demand for an expertness in the administration of justice, especially in these new and complicated fields, greater than it was believed courts could bring to this task.

We tend frequently to forget the great strides that have been taken in education in the last century. At the beginning of the last century, professional education was essentially a simple matter. Indeed, the professional world divided itself, broadly speaking, into three categories, the ministry, medicine, and the law. As one regards that division, the adjustment of temporal claims fell to the only expert in that field, the judge or the lawyer. Other disciplines were non-existent. Economics as a science was the speculative domain of a few individuals. Labor relationships, the

problems of industrial engineering, sociology, and other fields now teeming with specialists, with men devoting their lives to the study of these problems, with regularized and disciplined methods of approach, had not even emerged. But as the new disciplines arose, disciplines that concerned themselves with the analysis and weighing of human claims, a recognition of the possibilities of expertness came to the forefront as well as a demand by these new professions that they too should have some say in the adjustment of human claims. Considerations such as these explain in part the resort to the administrative process, the belief that men who devoted all their time to an analysis of one problem might eventually give us a better solution than others who could, at best, concern themselves with the problem only intermittently and who already had their hands full with other difficult and important issues.

A reason such as this for the administrative as distinguished from the judicial attack need hardly disturb one, for surely one need feel that no threat to any conception of liberty is involved in entrusting the decision of issues to men who either by training or by a continuing concern are best equipped for their determination.

A second important reason for resorting to the administrative method seems to have sprung from a belief that an appropriate appreciation of the newer liberties could be had more easily from agencies more responsive to existing popular conceptions than courts. The existence of a time lag in the judicial process has been recognized for a long time. Years ago the great English jurist, Dicey, speaking of the judicial development of law during the nineteenth century remarked: "We may lay it down as a rule that judge-made law has, owing to the training and age of our judges, tended at any given moment to represent the convictions of an earlier era than the ideas represented by parliamentary legislation." He adds, picturesquely: "If a statute, as already stated, is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday." That such a time lag has virtues as well as drawbacks may, of course, be admitted. Nor is it my purpose to attempt to strike a net balance between its assets and liabilities. I simply point to its existence. The desire to eliminate to some degree that lag seems to have been another great reason for resort to the administrative method.

One could put this matter in a somewhat cruder manner, namely the existence of a desire to create tribunals that would have a greater

allegiance to the new liberties than could be expected from the older tribunals, indeed, tribunals that would have a bias in their favor. Such a thought may disturb and yet—and I overemphasize this aspect purposely—we expect of judges a bias, a zeal, in defense of what we are pleased to call the fundamental liberties, such as those of free speech and a free press or the other liberties that each of us with our varying viewpoints would derive from his study of the common law.

I cannot here go into the other important reasons for the rise of the administrative process, such as the revolt against technicalities, the desire to balance more equitably the ability of different groups to discover and present the basis of their claims, or the hope of replacing in certain fields the adversary method of administering justice by the method of independent inquiry. Reasons such as these making for differences in mechanisms for the administration of justice need, I believe, disturb one no more than the existence of similar reasons two centuries ago that were responsible for the rise of equity courts, correcting and supplementing the jurisdiction of the common law courts.

Where the concern should focus is rather upon the procedural side, to see that the methods for achieving justice have regard to those standards of fairness and equality before the law that are intrinsic to the maintenance of the democratic idea. It is already crystallizing in that direction. From plain opposition to the administrative process, criticism is now centering upon the requisites that should attend administrative procedure. And it is good that criticism here is active, not so much because of the prevalence of abuse, but because the adequate fashioning of these instruments demands the play and interplay of informed opinion.

One can see this trend not only in the tone of current literature but also in the course of Supreme Court decision. Where two decades ago judicial review tended to superimpose upon the substantive ideas of administrative agencies the substantive ideas of courts, almost upon the theory that the judicial process held a patent upon wisdom, a monopoly upon statecraft, review these days tends to limit itself to a consideration of the intrinsic fairness of the procedures employed by the administrative. That tendency corresponds with a more adequate appreciation of the nature of law as consisting of that branch of human knowledge in which lawyers are expert and hence should be entrusted with the ultimate duty of decision. For lawyers by training and decision are wise in matters of the manner in which decisions should be made rather than necessarily wise

as to the substance of the legal rules. What causes should constitute grounds for divorce, what should be an appropriate rate base for rate regulation, what particular trade practices are in the long run harmful to the consumer—why, one may ask, should the lawyer as such have wisdom in these respects denied to the sociologist, the engineer, or the economist? But in the manner most appropriate for the adequate presentation of facts, the manner of framing issues for decision, the creation of appropriate safeguards against unwarranted bias or prejudice, here the lawyer plays his proper role of expert and guardian of the great democratic traditions.

This thought may seem too simple to some, too revolutionary to others. But the thought seems to me a necessary consequence of the advance of the scientific method. It seems also basic to the conceptions of the part that the administrative process is to play in the coming years, of its proper attunement to the democratic idea. Of course, today our other disciplines are still young, still far from the attainment of much in the way of accepted and tested truths, still too subservient to the pressures of time and place. But a great share of the weighting that should be given to competing claims is already their trust. It manifests itself not only in the increasing reliance upon the scientific as distinguished from the speculative method in the judicial development of law, but also upon the very rise and expanse of the administrative process.

And that expanse has been enormous. The newer charter of industrial liberties has, in the main, been committed to its charge. The great new rights of the ordinary person are determined within those halls so that today these agencies have become in large measure the tribunes of the common man. The responsibility, however, that is theirs is no less than the responsibility that resides in the law to fashion their lines of action with due regard to the reasons that underlay their creation. Here is, perhaps, one of the major fields of twentieth century statecraft. Its competent discharge in a broad and liberal spirit is as important to the retention of the democratic idea as the maintenance of adequate means for the formulation of ever new and differing liberties.