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Two Aspects of Law and Liberalism in the United States

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TWO ASPECTS OF LAW AND LIBERALISM IN THE UNITED STATES.*

I.

It is not necessary to point out in the pages of a law review that the science of law and the legal profession are the center of a bitter controversy. The recent decision of the United States Supreme Court in the District of Columbia minimum wage case has served to define the issues in that controversy more sharply than before; but they have been clear for a number of years to thinking lawyers, economists, and students of government and jurisprudence. It has been claimed on the one hand that the law has been administered by the courts in such a way as to cause it to serve almost exclusively the interests of the wealthy and the powerful. Consciously and with deliberate intent or unconsciously because of inbred prejudices and modes of thought, so runs the claim, the law has been protecting and strengthening the vested interests, serving them as their tool and protecting them from regulatory legislation. To this claim it has been replied on the other hand that the law as now administered is an ideal system, with at most defects of a very minor character. It would function almost perfectly if only the malcontents and the agitators would let it alone and permit it to operate without criticism and without interference.

Since it is thinkers of the so-called liberal school who are most opposed to the law as it is being administered, it is convenient to discuss the controversy over law under the title, law and liberalism. Liberalism is one of the vaguest

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of concepts to be sure, but the word conveys an idea which no other term imparts. The largest element in liberalism is simply open-mindedness. Whether or not there are other elements it is unnecessary to consider here. If liberalism be thought of as essentially open-mindedness there are two chief aspects to the problem of law and liberalism: liberalism within the law and liberalism towards the law.

II.

In discussing the claim that there is a lack of liberalism within the law it is necessary to note that normally a liberal-minded person will be more impressed with the necessity for change than the general run of humanity. This fact is due to that "cultural lag" about which so much has been written —the distance, namely, which separates the facts of life and men's ideas about them. The facts of life are changing all the time, and men's minds simply fail to keep pace with them. Institutions, which have been shaped in the past by ideas that already were somewhat out of date, are still farther to the rear. Your liberal sees this more clearly than other people. Being open-minded he is more likely to be influenced by the changing facts which come to his attention and which do not penetrate into the consciousness of the majority—or which are summarily rejected if they ever do succeed in penetrating. Consequently the liberal is likely to see the need for change in existing ideas and institutions to make them accord better with changed facts—although it is conceivable that he might think existing institutions to be still perfectly adapted to changes of which he is fully cognizant.

Now law is a system of ideas and institutions. Moreover the ideas, many of them, are not the ideas of today—which themselves would lag somewhat behind the facts of today—but the ideas of times gone by which have been given

immortality by a system of precedents continuously applied. The liberal who looks upon the legal system from without sees all this; and he realizes that one of the chief problems of liberalism in its relation to law is the problem of keeping those who administer the law as far as possible cognizant of the facts of life and willing to bring the law into conformity with them—the problem, in other words, of bringing about liberalism within the law. The problem has grown more acute than before since our industrial society has become characterized by change at breakneck speed. Unless the problem is solved there is no question that the present legal system will have to be superseded in its appointed task of serving as arbiter among conflicting interests and of laying down and enforcing rules of conduct that will be conducive to the general welfare.

Innumerable remedies are proposed to do away with the backwardness of the law as compared with the facts of life and with the thought of those who are more nearly abreast of the times. The courts, as is well known, are the center of the attack. It is certain of the judges who have permitted technicalities and delays to grow up and obstruct the course of justice; who have gone to excess in the use of the injunction; who have abused their power to punish for contempt; who have emasculated legislation by hostile interpretation or by placing it under the ban of unconstitutionality; and who insist upon uttering phrases about a non-existent liberty of contract for women workers. Therefore it is proposed to keep the courts out of the field of labor relations, to replace them by arbitrators in the field of business and by conciliators in the field of labor relations, to limit or abolish their power to issue injunctions and punish for contempt, and to restrict or do away entirely with judicial determination of the constitutionality of legislation.

All of these proposals, it will be seen, are in the nature of major or minor operations, which seek to remedy matters

by cutting away some of the jurisdiction which heretofore has been exercised by the courts. Some of the proposals have considerable merit; others have none at all; but two chief defects are common to all of them. In the first place they leave untouched the areas which they do not remove from the jurisdiction of the courts, and in the second place in abolishing the evils of legal jurisdiction they also get rid of its merits. Even if all of them were to be adopted there would still exist the central problem of keeping the legal system as a whole consciously functioning in the world of today and consciously serving the ends of society; and the remedies themselves would probably raise a flock of additional problems.

After all there is no possible solution to the problem of creating liberalism within the law except one which operates through the minds of the legal profession. If liberalism is open-mindedness the problem of liberalizing the law becomes one of creating open-minded lawyers and judges who will draw upon all of the evidence and upon all accumulated wisdom before giving shape to the law—upon evidence and wisdom which are contained in the facts of life and in the results of research in all fields of knowledge as well as in law books. A judge deciding a case needs something besides the legal precedents to guide him if his decision is to be anything but an anachronism. Equally as important as the precedents is the social, economic, and political background of the controversy; and this is true whether the case be one in tort between two litigants or one of statutory construction which affects hundreds of thousands of persons.

The problem of bringing about liberalism within the law, therefore, becomes a problem of getting social, economic, and political backgrounds prominently before the judges. The solution must come about through better, broader education of bar and bench and through an enlarged scope of

legal thought and method. There are few briefs which ought not contain something besides citations of cases; there are no law libraries which ought not contain more than law sheep, law buckram, and a dictionary. When law has been made something more than a self-contained system in its every-day application it will modify precedent and legal reasoning in the light of the changing facts of life. It will become normally a growing, developing system instead of one that grows by subterfuge in exceptional instances. It will become truly liberal.

III.

If, however, there is great need for liberalization within the law, there is no less need for liberalism towards the law. If it is incumbent upon lawyers and judges to recognize economic, social, and political facts, it is no less incumbent upon economists, sociologists, and political reformers to become acquainted with the nature and functions of law and to understand the processes by which it works. The "liberal" who has nothing but contempt for the manner in which the courts perform their functions is usually as narrow and illiberal as are the sternest defenders of orthodox individualism and property rights among the judges themselves. With his mind firmly fixed upon certain objectives which seem to him desirable, such a person is unable to embrace anything else within the scope of his vision, and he condemns whatever seems to obstruct the attainment of his objectives.

Now it is perfectly legitimate for anyone who has considered the matter carefully to advocate the drastic modification or even the entire abolition of the legal system. But it is not legitimate and certainly it is not liberal for anyone to advocate either of these measures without a sincere attempt to evaluate the work that the legal system is per-

forming and the methods it employs. Many a young student of economics, for instance, will state without hesitation that he never can have much respect for a court decision because all such decisions are made upon a basis of precedent. Such matters should be settled upon a basis of social utility, he is likely to add. In all probability he has never stopped to think that it is simply beyond the power of any human mind to consider situations afresh as fast as they arise and to arrive at just, socially desirable conclusions with regard to them. He has never analyzed his own thought and conduct carefully enough to perceive the role that precedent plays in it. What might be a legitimate protest on his part against the misuse of precedent by the courts has become a dogma with its seat in his emotions, as ridiculous as the inalienable right of man to ruin his health by working inordinately long hours under bad conditions.

Similarly no one ought to try to evaluate the legal system without considering carefully the powerful forces that are at work within the American bench and bar to bring about a more effective functioning of law and the courts in modern society. The American Bar Association alone is devoting tremendous energies to study and solve a host of pressing problems. The simplification and expediting of procedure, the improvement of the criminal law, the securing of justice for the poor, the creation of more uniform State laws: these are only a small part of the subjects which are commanding the attention of that organization. The united action of a large part of the American bar and of the organizations which have been formed by its members resulted recently in the formation of the American Law Institute, which will attempt to re-state the law clearly and definitely so as to do away as far as possible with the conflicts and uncertainties that beset the administration of justice today.

The subject of legal education and standards for admis-

sion to the bar has received more than its share of attention during the past few years. The result is that the profession has gone definitely on record as favoring at least two years of college training as a prerequisite for admission to a law school and as demanding higher educational and moral standards for all who seek admission to the practice of law. Moreover active efforts are going forward, which are attended by considerable success, to bring about the adoption and enforcement of the higher standards thus advocated. It seems hardly necessary to point out the importance of this movement in the creation of broader-minded, more liberal lawyers and judges.

IV.

Thus it will be seen that law today is, as it were, in a critical period of transition. There are forces at work within the legal system which are tending to bring that system more and more into touch with modern life and to cause it to function so as to further the progress of society. On the other hand there are reactionary forces which are working to crystalize law into something static and self-perpetuating. If the liberal forces within law are to win out they must have the sympathetic aid of those on the outside who are calling attention to shortcomings in the way law functions; and that implies an understanding on the part of those outside of what it is that law does and of the methods that the law must employ. At least, common fairness demands that no one condemn or ridicule the law without evaluating it conscientiously in the light of all the evidence.

Perhaps a figure will present the situation more clearly than any other mode of expression. Like all figures it will be suggestive rather than accurate, and it will not be capable of expansion to throw light upon other points than the one here set forth. But it may serve to bring that point into relief.

Society may, perhaps, be thought of as a solid in space. The contour of the surface of that solid at any particular time represents the state of life at that time, with high and low areas of good and evil, beauty and ugliness. The surface will be found upon examination to be not that of a dense solid but that of a crust—the mores of society, consisting of customs, laws, and institutions, which gave to life its form. The crust, however, is not rigid; it is shifting and moving constantly, altering its form in response to pressure from a seething mass of forces within—the human forces which impinge ceaselessly upon the mores and seek to alter customs, laws, and institutions. If the crust of mores were subjected to more minute inspection it would be found to be not uniform in composition. Running through it, much as the wires in wired glass, would be found the strands of formal governmental law. Consciously shaped and upheld by unique sanctions, positive law does indeed furnish the sinews of strength for the mores of society.

It is obvious that without the mores to give it shape society would be completely chaotic—a mere mass of volatile forces. It is equally obvious that with a rigid crust of mores society would become something dead and lifeless, uninteresting and hopeless. Order and form and unity in society are possible only if the mores are strong enough to hold in the seething forces of life and make them contribute to a whole which is larger and more stable and more harmonious than its parts. Progress and fulfillment in life are possible only if the mores are sufficiently flexible to permit expression to human aspirations and endeavors, and the sinews of formal law must respond as fully if not quite as rapidly as the mass of less integrated customs and institutions. Thus the form of society at any time will be a form which is the result of continued development and which is the expression in a unified whole of the human forces which are at work underneath.

Liberalism within the law demands a recognition on the part of those who administer the legal system that the legal sinews of the mores must permit expression, through change, to the aspirations of men. Liberalism towards the law demands a recognition on the part of men that without the mores and without the legal sinews of the mores there will be formless chaos, creating nothing, fulfilling nothing.