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Justice According to Law

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JUSTICE ACCORDING TO LAW

A generation ago, when the law schools of our state universities were first founded, the dominion of law appeared to be complete. Almost every phase of public and of individual activity was subject to judicial review. It was taken to be an axiom that the people themselves were subject to certain fundamental limitations, running back of all constitutions and inherent in the very nature of free government, and it was assumed without serious question that the scope and the extent of these limitations were questions of law. Administration was subjected to strict judicial control, and almost every measure of police encountered an injunction as a matter of course. We were proud to have achieved a government of laws and not of men, and we looked down complacently upon the bureau-ridden peoples of Europe without a suspicion of being law-ridden ourselves. So important was the role of law in connection with every aspect of social and governmental activity that one need not wonder that in the West the state itself undertook to provide for public instruction in law as a part of its broad programme of popular education.

In the interval a great change has gone forward. While the generation that established state universities was proud of the American doctrine of the judicial power over unconstitutional legislation, the present generation seems eager to reject the idea of a fundamental law; and proposals to transform constitutionality from a question of pure law into a question of pure politics find support even in the legal profession. Where the generation that founded the state universities of the West conceived it a postulate of liberty that administration must be confined to the inevitable minimum and sought through judicial review complete elimination of the personal equation in all matters affecting the life, liberty, or fortune of the citizen; the present generation is eager to unshackle administration, to take away judicial review of administrative action wherever possible, and to cut it down to the minimum where it cannot be avoided. Where yesterday we relied upon courts, to-day we rely upon boards and commissions. Even in criminal causes, which the lawyer regards, before all things, as the domain of the common

law, Juvenile Courts, probation commissions, and other attempts to individualise the treatment of offenders—these, as well as the desire of the medical profession to take questions of expert opinion out of the forum and commit them to a sort of medical referee, bid fair to introduce an administrative element into punitive justice which our fathers would have abhorred. Yesterday, when the project of state colleges of law was first announced, the courts and the law played the chief role in the practical conduct of affairs. To-day, when the execution of that project is complete, it might seem that there is danger that nothing of real moment will much longer be committed to them.

Perhaps the scoffer might say this change is the justification of a college of law in a university. He might say that as long as the common-law tradition, which our fathers prized as a part of their inheritance, was a living force, it was for men of action, trained in the office and tried in the courts; but that when the march of events had deprived it of vitality and had fast begun to make of it a matter of merely historical interest, it had become something for the scholar and the teacher. One need not waste time in challenging the statement that an institution does not come within the jurisdiction of a teacher until it is dead; we may be sure that a state does not institute a school which it believes is to be devoted to a sort of social paleontology. And yet, if one looked only at the surface, one might not be sure that our scoffer was in the wrong. For while we pile up laws as never before, he would tell us, we rely less and less upon law. No school is needed to teach and to study the statutes, nor is such a school possible in a time when the biennial revision of two years ago is about to become obsolete on the first of January of every odd-numbered year. If the will of the people, or the will of any one, as mere will, authoritatively declared, is all there is of law, the law school should give way to the school of political science; the teacher of law should be put with the historian, the classical philologist, and the pure man of science, not with the teacher of medicine, of engineering, alid of applied science, and his study of the juristic theories and judicial institutions of our fathers should be reckoned a preparatory or cultural rather than a professional training. It is necessary only to read the pronouncements of an advanced type of teacher of government and of politics to see that some such notion is coming to be widely held. We may well ask, therefore, is the world, or at least our part of the world, about

to give up justice according to law? Is authority to prevail over reason? Is jurisprudence to give way to politics? Is the judge to give way to the administrator and the court to be superseded by the judicial referendum?

If legal history may be vouched, the lawyer may respond to these questions confidently. Not only has there been, from the very beginning of law, a continuous movement back and forth between will and reason, between rules authoritatively imposed and ideals developed by juristic science, between the imperative and the traditional elements in legal systems; but along with this oscillation has gone an action and reaction from justice according to law to justice without law and then back to an increasing number and detail of legal rules.

An instructive instance may be found in the history of English law. In the middle of the sixteenth century lawyers began to complain that the common law was being set aside. Scarcely any business of importance came to the king's courts of law. It was observed that the judges had little left to do but look about them. In all criminal causes of any political importance, an examination by two or three academically trained Romanists was threatening to take the place of the machinery of the common law. Yet but a short time before the courts of law had been crowded with suitors. Indeed for three hundred years preceding the king's courts had been assuming more and more a central position in the English polity. As far back as the reign of Edward III they had enforced the doctrine of the supremacy of law upon the collectors of the king's taxes and had made clear to the king that he would not be suffered to interfere by private letter with the due course of justice. More recently they had laid down that even Parliament could not make the king a parson in contravention of the fundamental distinction between spiritual and temporal authority. In Tudor England this growth of the common law stopped for a season. For a time growth took place in quite another type of tribunal than the king's courts of common law. For a time the courts at Westminster were pushed into the background by tribunals of a Roman, and, what was more important, a summary procedure. That was the age of the King's Council, of the Star Chamber, of the Court of Requests; in short it was an age of administrative rather than of judicial tribunals. The movement away from the common law was then, as it is to-day, a movement from judicial

justice, administered in courts, to executive justice, administered in administrative tribunals or by administrative officers. It was a reaction, as the movement to-day is a reaction, from justice according to law to justice without law.

Moreover, the causes of the two movements away from law are closely analogous. In the reaction from the common law in Tudor and Stuart England, the stage of equity or natural law was succeeding a stage of strict law. The law was liberalising by an infusion of moral ideas from without; and since the hard and fast mould of common-law procedure precluded this liberalisation and this infusion through the ordinary course of the law, it was necessary to go outside of the law for a season until a readjustment could be accomplished. In like manner to-day, a stage which European writers are calling the socialisation of law is succeeding a stage of maturity of law which has much in common with the stage of the strict law. The strict law is a stage of legal remedies in which men rely on rule and form to preclude arbitrary magisterial action. The maturity of law is a stage of legal rights in which men insist on equality and security and demand the highest degree of certainty as a means thereto. It has been said that the strict law was unmoral; that in its insistence upon rule and form it took no account of the moral aspects of conduct. In the same way it might be said that the maturity of law came to be unmoral in that in its insistence upon abstract equality and security for the maximum of individual self-assertion it took no account of the moral worth of the concrete individual. Hence an infusion of ideas from without has come to be necessary, as before, and such an infusion has been going on through the absorption of ideas developed in the social sciences. But again, as before, the hard and fast mould of a legal system such as was demanded by the social interests in security of acquisitions and security of transactions—the paramount social interests in the maturity of law—has made it necessary to go outside of the law for a season and to rely upon administrative agencies until new bodies of law shall arise through which justice may be attained. We may well compare the courts developed in and for feudal England, struggling to meet the wants of England of the Reformation by a feudal property law, with American courts, developed in and for the pioneer or agricultural communities of the first half of the nineteenth century, struggling to meet the wants of to-day with the rules and the machinery devised for such communities.

Nor are these isolated phenomena. The great liberalising agency in law which we call equity has always begun as executive justice. The Roman *prætor* interposed by virtue of his *imperium* to do what could not be done through the *ius strictum*. Later the Roman emperor enforced testamentary trusts because, so the Institutes tell us, he “was moved several times by favour of particular persons.” The Frankish King was wont to decide, not according to law but *secundum æquitatem*, for those whom he had taken under his special protection. The English chancellor, at first, was not appealed to for relief which the complainant sought as of right, but out of “alms and charitie.” In all these cases the magistrate acted without rule in accordance with general notions of fair play and sympathy for a wronged or a weaker party. The executive justice of to-day is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the state summarily, largely according to the notions of an administrative officer for the time being as to what the general interest and “a square deal” demand, unencumbered by many rules. The fact that it is largely justice without law is what commends it now to a restless age, desirous of results at whatever cost, as it was what commended it once to the individualism of an England set to thinking freely and vigorously by Renaissance and Reformation. In each case the cause of the movement away from the law is the same. In each of the partial reversions to justice without law referred to, it has happened that for the time being the law was not fulfilling its end. It was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community. Hence *prætor* or emperor or king or chancellor administered justice for a time without law till a new and more liberal system of rules developed. Indeed, these reversions to justice without law mark the rise of new ideas of justice—in antiquity, the transition from the idea of law as a mere device to keep the peace to the idea of law as a means of preserving the social *status quo*; in the sixteenth and seventeenth centuries, a transition from the classical idea of preserving the social *status quo* to the idea of a maximum of individual self-assertion. To-day a like transition is in progress. The world over, a shifting of ideas as to the end of the law and the meaning of justice is putting a heavy pressure upon the administration of justice according to law; and the world over the public is dis-

satisfied with the lawyer and the reflecting lawyer is dissatisfied with himself.

None of the reversion to justice without law to which reference has been made resulted in any permanent encroachment upon the control of principle and reason in the administration of justice. The exercise of equitable jurisdiction by the *proctor* came to be governed by a stereotyped edict and its provisions passed into the law. It is true Coke lost in his quarrel with the Court of Chancery. But the other Romanised courts perished and Chancery was made over gradually along common-law lines. The equity made in the Court of Chancery and the law as to misdemeanours made in the Star Chamber became parts of the legal system and were transplanted to this country as parts of the common law. The common law survived and the sole permanent result of the reversion to justice without law was a liberalising and modernising of the law.

If we meet the movement away from law, therefore, by a modernising of the legal and judicial machinery which will enable it to meet more effectively the demands of the present, to attain the ends for which the legal system exists, we may be confident that now, as in Tudor and Stuart England, the law will prevail. For executive justice is an evil, even if sometimes a necessary evil. It has always been, and in the long run it always will be, crude and as variable as the personalities of officials. No one can long be suffered to wield the royal power of deciding without rule according to convictions of right but one trained to subordinate impulse and will to reason, disciplined in the exercise of reason and experienced in the difficult art of determining controversies. If we did not know it, legal history could teach us that no one may be trusted to dispense with rules but one who knows the rules thoroughly and knows how to apply them on occasion. Hence time has always imposed a legal yoke upon executive justice and has turned administrative tribunals into ordinary courts. A law-ridden people, finding that in an age which demands positive action the legal system furnishes only checks and safeguards, may for a time throw over justice according to law and seek relief outside of law. But the experience of the past makes it clear that if we improve the output of judicial justice till the adjustment of human relations by our courts is brought into better accord with the moral sense of the public at large and is achieved without unreasonable not to say pro-

hibitive delay and expense, the onward march of executive justice will soon cease.

Not only have periods of growth been marked by a change in the conception of justice, an infusion of ideas into the legal system from without, and a rejection of law and of judicial justice in order to experiment with magisterial authority and executive justice, but such periods have been characterised in politics by absolute ideas of law as a product of human will, followed in jurisprudence by a revival of idealism and a renewed insistence upon reason and justice. Both of these phenomena may be observed to-day. In the seventeenth century it was progressive to insist upon the royal prerogative. Those who thought of the king as the guardian of social interests and wished to give him arbitrary power that he might use it benevolently in the general interest, were enraged to see the sovereign tied down by antiquated legal bonds discovered by lawyers in such musty and dusty parchments as Magna Carta. To them the will of the sovereign was the criterion of law, and it was the duty of the courts, whenever the royal will for the time being and for the cause in hand was ascertained, to be governed accordingly. Indeed, in the preceding century the protestant jurist-theologians of the Reformation held to the political doctrine of passive obedience and vigorously denounced the rebellious peasants. Yet at the very time a new philosophical development was at hand in jurisprudence, as a result of which the imperative element in law was long to be forgotten and a conception of law as deriving authority solely from its inherent reason and justice was to hold the field for two centuries. To-day, political thought is full of absolute ideas of law as the will of the people. Those who think of pluralities and militant minorities as the guardians of social interests and would give them arbitrary powers that they may use them benevolently in the general interest, are enraged to see the sovereign tied down by dead precedents and antiquated legal bonds discovered by lawyers in eighteenth-century bills of rights. Once more it is asserted that the will of the sovereign, even for the time being and for the cause in hand, must be both the ultimate guide and the immediate source to which judges shall refer. Nevertheless as before, while absolute views of the sort are current in political thinking, a return to juridical idealism is at hand. Already jurists of Continental Europe are once more writing elaborate treatises on natural law. A revival

of philosophical jurisprudence in the United States has definitely begun and conscious attempt to make the law conform to ideals is once more becoming the creed of jurisprudence.

This does not mean that jurists are going back to the eighteenth-century conception of a set of fundamental legal principles of universal validity for all men, in all places, in all times, from which a complete set of rules might be drawn by purely logical processes. They are content to search for the ideals of the age and to set them up as a guide. They are content to seek what Kohler calls the jural postulates of the civilisation of the time. But they are not content to abdicate all function and to concede that court and lawyer have no more to do than to ascertain and interpret the will of the majority or plurality for the time being. The notion of juristic superfluity involved in such a doctrine is as impossible in the complex industrial society of to-day as the notion of legislative futility, held so generally during the hegemony of the historical school or the notion of juristic futility added thereto by the positivists. Men are not born with intuitions of the principles by which justice may be attained through the public adjudication of controversies. The administration of justice is not an easy task to which every man is competent. It is no more possible for the people to administer justice directly or to control the course of justice directly than it is for them to administer medicine or control the course of medical science directly or to direct armies and control the course of military science. In each case study of the experience of the past joined with scientific understanding of the problems involved is the road to the ends sought, and a technical body of knowledge inevitably results which may be mastered only through special study and training. This is the meaning of Coke's famous answer to James I. When the King said, "Have I not reason as well as my judges?" as the people say to-day, "Have we not reason as well as our courts?" Coke responded:

"True it was that God had endowed his majesty with excellent science and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance of goods or fortunes of his subjects, are not to be decided by natural [*i. e.* by untrained] reason, but by the artificial [*i. e.* the trained] reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it."

Every attempt to go back to justice without law has enforced the lesson which the judges of England taught King James in that memorable Sunday conference. In this country we should have learned it when in the period after the Revolution the bitter hostility to lawyers and the attempt ruthlessly to break down the professional tradition, to insure the access of the untrained and incompetent to the opportunities of the bar, and to degrade the judicial office, resulted only in establishing the lawyer as the leader of the community and in intrenching the fundamental dogmas of the common law in our constitutions. Indeed, much of which we are now complaining so justly is not in any wise to be attributed to something inherent in law or in the common law or in lawyers or in judges. It is largely due to the untrained and unorganised bar and mediocre, politics-ridden bench forced upon so many of our jurisdictions by popular suspicion and false notions of democracy in the last century.

We may be assured, therefore, that justice according to law is not to disappear. We may be confident that we shall have, not merely laws, expressions of the popular will for the time being, but law, an expression of reason applied to the relations of man with man and of man with the state. We may well believe also that a new period of legal development is at hand and that, as in like periods in legal history, it will be a period of working over the jural materials of the past and working into them new ideas from without. We shall be warranted in prophesying that this working over will be effected by means of a philosophical theory of right and justice and a conscious attempt to make the law conform to ideals. Such a period will be a period of scientific law-making by lawyers trained in the universities. For the notion of law as the will of the people belongs to the past era of a complete and stable system in which certainty and security were the sole ends. Throughout legal history law has been stagnant whenever the imperative idea has been uppermost. Law has lived and grown through juristic activity. It has been liberalised by ideas of natural right or justice or reasonableness or utility, leading to criteria by which rules and principles and standards might be tested, not by ideas of force and command and the sovereign will as the ultimate source of authority. To-day the most significant changes in our law are not those which have been proceeding with much flourish of trumpets

through legislative experiment, but those which have been going on silently beneath the surface in our case law and have been quietly and gradually but surely bringing the traditional element of the legal system into accord with a newer conception of justice. Along with this a no less significant change has gone forward in legal thinking. It has been seen that the old controversies as to the nature of law were barren. Hence the social philosophical Jurists, who have created a new science of law in the universities of Continental Europe, have abandoned that question and have gone behind it to define the legal order in which law results and for which it exists. The means of attaining this legal order, or, as we should put it, the means of administering justice, may vary. The agencies which determine the content of the body of principles by which it is regulated may be this or that. They may be command and sovereign will, or reason and juristic science, or custom and tradition. But the end has been before men from the beginning of legal evolution. By appealing from the particular form of law which is now current to the ultimate conception of the legal order, the new school points out the road for future development in jurisprudence. It keeps before us that law is not an end but a means. And this functional conception of law gives a new meaning and a new value to the juristic ideals of reason and justice which have been our main reliance in all periods of growth in the past. But this study of law as a means, this measuring of it with reference to the end, this study of the actual social effects of legal institutions and legal doctrines, this study of the means of making legal rules effective for the ends to be reached, can go on only in the universities.

In the making over of our common law which is about to take place we may no longer rely upon the formulating agencies which have served in Anglo-American law in the past. There is no common legislative authority set over all common-law jurisdictions nor is there likely to be one. The conditions of legislative law-making to-day and even more those of direct popular law-making are not such as to warrant belief that legislation upon purely legal subjects may do more than add sanction to what proceeds from some other source. Again, there is no common reviewing tribunal set over all common-law jurisdictions, nor is the world likely to see one, at least in any period we can foresee. There are no signs that the Bench in America is likely to regain the position requisite for purely judicial development of the common

law. If nothing else, stress of business in the modern industrial and urban community makes it unlikely that American courts will much longer be able to do more than give authoritative form to what has been worked out and formulated by others. Indeed, we see such a condition to-day. Who would contend that either legislation or judicial decision, with no stimulus from without, could ever have done for our law of evidence what has been done by Thayer and Wigmore? As our jurists give over the purely historical method, which has governed exclusively in the past, as efficacy of effort, already part of the social and political creed, becomes part of the juristic creed, a new mode of developing legal principles is afforded by academic teaching. For the teacher of law is coming to work in the conditions of permanence and independence that were the strength of the common-law judge. He is in the position to do historical, critical, and analytical work that would be impossible, even if in place, in a modern judicial opinion. Moreover, he may deal with the law and with departments of the law as a whole, while a court must look at each piecemeal.

In providing colleges of law, accordingly, the state is ensuring that development of the legal system of the commonwealth and is assuming its part in that development of the legal system of English-speaking peoples which will give law a new life. But it is doing more. No form of conservation is more important than the conservation of social institutions. And no social institution is of more value than the legal tradition, the tradition of justice according to law, upon which generations of lawyers and judges have wrought in England and America. In the volumes of reports in which the common law is set forth we have a body of experience in the administration of justice which is without parallel in any other system. However law is to be made, whether by jurist or judge or legislator, this traditional material cannot be neglected. The reports, says Judge Dillon, "are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of experience of many generations of men shines forth from them to mark out and illumine the legislator's pathway. He need scarcely take a single step in the dark." No one, however, may hope to use this tradition as the basis of a new body of law but one who has mastered it. Looked at simply as a body of rules, our Anglo-American law is at its worst. It is not as an abstract system or as a body of rules that

the common law has imposed itself upon a French code in Louisiana and in Quebec. It is not as a body of rules that it has all but overcome a received Roman law in Scotland, that it is invading the Roman-Dutch law of South Africa, or that it is creating a system Anglo-American in substance, if Roman-Spanish in its terms, in the Philippines and in Porto Rico. It is not as a body of rules that our common law of torts is coming to be a law of the world as truly as the Roman law-of contracts. The conventional method of comparative legislation, the mere comparison of rules, and the attempt to choose from among them according to their abstract justice or their *a priori* fitness for the end sought, was long ago likened by Savigny to the frame of mind of the child who, when the history of battles was related to him, asked which side was the good and which the bad. It is not enough to compare rules as abstract rules. The greatest value of our huge body of reports is that rightly studied it enables the lawyer to perceive how far rules have been able to maintain themselves in their practical application and to gain some insight into their effect when applied to new situations. The Roman imperial lawmaker gave authority to constitutions and rescripts prepared by the juriconsult who had mastered the Roman juristic tradition but measured every detail by his theory of natural law. The American popular lawmaker will leave no permanent mark upon the law unless in like manner he is guided by the lawyer who has mastered the Anglo-American tradition, but has learned to measure every detail with reference to the social sciences of to-day. If the legal tradition is not self-sufficient, neither are the social sciences self-sufficient in the administration of justice. The principles are empty except as content is given them by judicial empiricism or juristic adjustment to the materials of the past.

The most significant feature of twentieth century thought is faith in the efficacy of conscious social effort and of intelligently directed social control. For it is not physical nature alone that may be harnessed to man's use. The laws by which mind combines its work-with mind and with the non-sentient factors of human conditions are no less a part of nature and are no less to be learned and put to use. Not the least part of these laws consists of those determining the standards of conduct in the relations of man with man and of man with society which will advance civilisation and will make for the best and noblest society. And

the administration of justice as far as reason and principle may insure conformity to such standards, not arbitrarily or in the conscious interest of any man or any class—this is the justice according to law of our Germanic, our Anglo-American tradition, the sighing of the creature for the justice and truth of his creator, which marked the German law of the Middle Ages, the rule of the king under God, and the law of which Bracton spoke, and the fundamental law running back of all states and constitutions which our fathers sought to express in bills of rights.

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