ADDRESS

of

JAMES M. LANDIS

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On an occasion such as this, I always envy the gifts of a former colleague of mine. Versed to an extraordinary degree in continental history, his answers to modern problems always found suggestive roots in the dim past. Indeed, it was sometimes said of him that you were fortunate if he only began his answer with events in the time of Diocletian and didn't insist that for the solution of a matter of seemingly everyday academic policy some search back beyond the Empire was essential. And yet it was amazing to see him grasp some galvanic current moving from the past and with that distant spark illumine a modern problem.

In the field of education such a technique is or should be commonplace. One grasps for shadow, the better to comprehend sunlight. One reaches into the past, more clearly to know today and tomorrow. It is the privilege of all who care about education to test the depth and quality of that shadow, for there, perhaps more than anywhere, one must try to pierce the brilliance of continuing dawns.

Some hesitation naturally attended my acceptance of the invitation to speak before this gathering. Closeness to political life and absence for some years now from the academic scene, made me doubt just what I could contribute to this occasion. I accepted, finally, with the hope that familiarity with the firing line where law is being made might enable me to make some small contribution to the thought which the present stresses and strains within the structure of the law today have created.

Probably no institutions in our country have richer shadows than the great progressive Law Schools. Emblematic of their traditions is the fact that these shadows are vantage points rather than retreats. Let me touch for the moment upon some of those that seem to me central so that we can properly set the background of our thinking.

First, we may mention the insistence upon technical competence. Just as those who would make music a profession submit to the stern discipline of daily drill and finger exercises, the student of the law needs to master, and master effectively, the methods of handling the materials ready to his hands. It is the insistence upon competence in the method of inquiry, upon realism in the articulation of premises, upon relevancy in reasoning from them, that strikes the entering student of the law school with emphasis. Indeed, where in the first excitement of the search for knowledge he hopes to find answers to the many problems of the law, he finds at first no answers, instead analysis of methods for searching for them. It is drill, to be true, sometimes dogged determined drill, and yet the type of ground school training without which no flight can be safe. This tradition, of course, we dare not sacrifice; nor on the other hand dare we prolong it so long that the very urge to fly leaves before the opportunity arises.

A second tradition that, perhaps, should be integral to the very idea of education and yet so often is missing, is the insistence upon the centrifugal forces of instruction. From an administrative standpoint, to search for men with varying minds, varying outlooks, is imperative. As illustrative one can recall the contribution made by the combination of James and Royce in the early days of the Philosophy Department at Harvard. The bond of a faculty can never be loyalty to particular truths, but the deeper one of loyalty to the idea of truth. Under the shelter of such an idea men of

diverse legal creeds, diverse social outlook, could gather, and by their example, make of the profession of the law an avenue for the attainment of varied ideals.

A third tradition of the best Law Schools has been that of not only a willingness but an eagerness to pioneer - an attitude that embraced not only the instructional method but also went to critiques of the substance of law. To see how true this is, one need only think of the conception of Langdell at Harvard that the best method of forging ideas was not through didactic pedagogy but upon the anvil of debate. His realization that no uniform architectonic qualities could dominate structures that each man had to build for himself, led him away from the effort to impress formulated conceptions of the law upon his students, and to the effort to encourage them to select and build, stone by stone, their own structures. This contribution, commonly known as the case system of instruction, was perhaps the most effective force in the revitalization of legal training in the Nineteenth Century.

These three aspects of the best legal tradition fit into a harmonious triptych. The emphasis on technical competence protects us against newness for the sake of newness, instilling as it does the discipline that one must know the present progress of an art before one essays its further advance. The emphasis upon centrifugal forces means absence of moulds of opinion, the freedom of choosing one's own way of living, and the joy of finding that the law can be its avenue. The tradition to pioneer, means more than the glory of exploration. It means the insistence upon refreshing the law through continual reference to the needs of a nation.

The needs of the nation today with respect to law may seem to us endless, complex, and novel. There can be no doubt of their great number or of their complexity. But I do not believe that with reference to the springs of their origin they present anything essentially new. From decade to decade our needs with respect to law have varied, but they have varied only in form or in the intensity of demand. They can all be related to the continuing existence of two fundamental desires. The first is the constant clamor of a changing society for the recognition through law of new rights, new claims, new liberties. The second is a demand for the fashioning of new machinery to give old rights their intended effects - a demand that arises because the complexities of such a society tend to dull the effectiveness of the old machinery to realize the old rights.

Examples of the first desire - for the creation of new rights and new liberties - are to be seen most frequently under conditions of national economic stress, or under conditions where a slow shift of power in society from one group to another occurs. The recognition of this need comes about sometimes dramatically through legislative action, at other times imperceptibly in the course of litigations that offer opportunities for judicial lawmaking.

The history of our law is replete with illustrations of the creation of new rights. In the employer and employee relationship, the right of employees to quit work together for the simple end of improving the conditions of labor found recognition only in the early Nineteenth Century. Indeed, the right to strike and through such economic pressure to force collective bargaining found no recognition in this country until the turn of this century, and even today in many states it is still of doubtful standing. But this insistence upon collective bargaining refuses to stand still. It is pushing itself now from a claim to use economic pressure towards the accomplishment of this end, to an insistence that the law itself shall impose a duty upon the employer to endeavor conscientiously to arrange a collective labor contract with his employees when a majority of them so desire.

In the same field we have witnessed for some years the effort of employees to bring about recognition of their claim to be free to persuade others to refrain from taking their places, who, by such action, would diminish the effectiveness of their own economic pressure. In recent months we have seen the advancement of a new claim to take measures that will effectively prevent all production until grievances are satisfied - action that in its economic effects is the counterpart of the lockout, but because of the absence of any relationship such as the lockout possesses to property, finds itself with doubtful traditional legal justification. The eventual outcome of such a claim will depend in part upon the emphasis that law will give to the concept of property and its inviolability in its industrial and corporate setting to economic pressure of this type, - and in part, perhaps, on the capacity of our law to devise new concepts and mechanisms to meet the needs out of which this type of economic pressure has been born.

Elsewhere in the industrial field other claims are being advanced, such as the claim that society must exact as a condition precedent to the existence of an enterprise a duty upon its part to pay its employees a living wage. In the consumer field, claims to new freedoms are similarly being asserted - the claim for more truthful presentation of the product that is offered whether that product be a cosmetic or a security. In the field of corporate organization the stockholder is clamoring for protection against complexity in the corporate structure, against the divorce of ownership from control, against the uneconomic combination of business units into a far flung enterprise. In the field of merchandising, complaints not unlike those that shippers made some sixty years ago against carriers are coming to the fore - discrimination in price - without relationship to quantity or quality, and the presence of a host of unfair trade practices that can so readily conceal themselves amid the complexities of modern methods of distribution. In the field of agricultural and mineral production, producers themselves inveigh against the wasteful use of limited natural resources of competitors.

The desire for new machinery to make more effective the protection of old rights arises out of depreciation and obsolescence in the established mechanisms of the common law. The normal processes of litigation prove themselves, for different reasons, to be ineffective in bringing about the practical recognition of recognized rights. They fail either because of the cost that attends the process, because of the delay that it involves, or because of the inability of men not expert in highly specialized fields to apply accepted principles to new situations. But the instinct for a living law refused to accept frustration. It simply seeks other forms for its realization. Chief among them today is the administrative process which is only a different form for the assertion of law.

Perhaps the most striking development of the last century in governmental invention for the effectuation of policies is the administrative commission. The history of its origin and development in this country constitutes a most revealing chapter in human affairs. The circumstances that led in 1887 to the creation of the Interstate Commerce Commission are well known. First, there was the realization of the need for regulation arising from the complexity and significance of the development of the railroads, and the abuses which attended this development. Secondly, there was the breakdown of the common law procedures as applied to these problems, of which two may be selected as outstanding--unreasonableness in rates and discrimination between persons and communities. Some continuing supervision over the railroad problem as a whole was demanded, for it had become only too evident that its solution could not be left to the casual and sporadic processes of private litigation.

These, then, are the circumstances that led to the creation of the Interstate Commerce Commission. As we examine these circumstances closely, we can discern the fundamental causes for the creation of that Commission, and of other similar agencies, causes which lie deep in the fabric of our society. Various industries and occupations, complex in character, and with manifold internal problems, have from time to time come to assume such significance in our national life that a measure of social control of them has become essential. But this social control has had to be devised and applied in a manner fundamentally consistent with the slow and intricate evolution of the American economic system, and with the processes of democratic government.

The nature of this problem was perceived almost instinctively, and it was solved almost instinctively. The administrative agency came into being not as a single comprehensive philosophical conception but by a process of empirical growth. These agencies have always sprung from a concern over things rather than over doctrine. Their business has related not to society as a whole but to its particularized aspects. Their concern, to give only a partial catalogue, has been with banking, utilities, stockyards, commodity exchanges, securities exchanges, investment banking, telephones and telegraphs, radio, shipping, insurance, busses and trucking. In a few fields, the jurisdiction of the administrative commission has been defined with reference to certain concrete problems that cut across different industries and occupations, rather than with reference to any particular area of economic activity. This tendency is exemplified by the extension of the commission technique of government to such problems as unfair competition and collective bargaining.

Indeed, if one sets aside details for the moment, one perceives that what has acutally happened during these years is that groups of men have been entrusted with the direction of particular industries under legislative mandates broad and general in character. Although the objectives are different, the reasons that led men to band together in trade associations instinctively brought forth the administrative commission as the mechanism for regulating an industry. Both growths, strangely parallel in time of organization as well as in powers that are wielded, are not the creation of theoreticians but the response to empiric needs and desires.

One driving impulse in the creation of these new instruments of government was the need for specialization in the art of administration. The complexity of the situations dealt with demanded men who could give their entire time and energy to the particular problem. And for that time and energy to be effective, means for carrying out policies that they devised had to be given them. It was not enough to have them merely in the position of powerless planners.

That mistake had originally been made with the Interstate Commerce Commission. For twenty years power to remedy the admitted evils that gave it birth was denied to it. The courts were jealous of the intrusion of this new governmental mechanism into a domain which they had regarded as their own. They viewed with suspicion the exercise of powers similar to those possessed by them by men untrained in the traditional forms of legal procedure and not too respectful of its antiquities. For years the very vitality of the administrative process was in the balance. But as confidence in its expertness grew, and administrative powers became a commonplace of government, this judicial resistance became less, and the deposit of power with the Commission greater.

The fact that administrative agencies are the products, not of dogma or of abstract theory, but of the gradual development of control by a democratic government over the varying phases of our economic life, makes generalization about their functions and about the powers that they should be permitted to exercise not only difficult but frequently superficial and misleading. A structure that is built for the railroad problem may have only a casual likeness to that created for banking. If they spring, as they should, from the ground up, their architecture will be indigenous, as varying in its utilitarian characteristics as the Grand Central Station and the First National Bank. True, a certain amount of imitativeness is always present - a method of adjusting stresses and strains found valuable in one structure will be employed in the creation of another. But it is banking, insurance, utilities or railroads that form the dominating motif, rather than some highly theoretical doctrine as to powers that should or should not be possessed.

Illustrative of this point is the creation of the Securities and Exchange Commission. Trading in securities on exchanges is not only a specialized technique but essentially a cooperative enterprise. An exchange begins with an association of men, who, for their earliest functioning, must have a form of government, perhaps only tacit in the beginning, but gradually becoming articulated in the form of a constitution that defines the rights and privileges of its members. As the volume of business increases and its membership grows, this internal regulation becomes more detailed.

To protect the members and their business against unfair advantages taken by other members, regulations outlawing certain practices come into being. They expand as the pressure of outside forces demands further protection against the possibilities of exploitation. Other means, besides the banning of certain practices, for the protection of members also develop, chief among which are the requirements for the listing and approval of securities dealt in on the exchange. Devised originally to protect against the illegal over-issuance of securities by corporations, possibilities for further control are envisaged, together with the realization of the necessity for getting some record of the performance of corporate enterprise. Means for the enforcement of these regulations naturally have to be invented, and governing committees come into existence with power to strike the securities of offending corporations from the list and to suspend or expel members guilty of breaking the rules governing the manner of trading.

The exchange is a full-fledged institution by the time it comes within the purview of regulation. In fact, it is a self-governing organization of numerous independent business enterprises, governed badly, it may be true, but still self-governed. Legislative, executive and judicial powers are all possessed by the institution and inextricably intermingled. Powers to impose penalties, that would obviously be arbitrary if exercised by government, are already possessed by it. Procedures that hardly bear any resemblance to traditional court procedures are pursued by the governing authorities in passing upon charges of violation of rules, and practically accepted without objection by its membership.

Obviously a scheme of regulation that took no account of the institutional development of the enterprise with which it was concerned would prove futile. Assuming that some merit attended this scheme of self-regulation, that some contributions to the broader public interest had resulted from its operation, the central issue of regulation focussed upon the area to be allotted to self-government and the conditions of its supervision.

The structural plan of the Securities Exchange Act, under which the exchanges are regulated, when viewed in this light, is of intense interest to the student of government. Some matters the Act deemed of such importance to the public interest at large that it entrusted their regulation and administration directly to government. This was true, for example, of the tactics of manipulation, the prescription of margins and the concomitant control of credit. On the other hand, the Act occasionally divided authority as in its treatment of the listing of securities. Here it required government to insist that no listing could take place without a certain minimum of disclosure, but at the same time left the exchange free to determine, whether, that minimum being met, the security was of the type and quality that it would admit to the list. Again, by a mechanism novel in governmental regulation, the Act entrusted certain aspects of exchange organization and exchange trading to the exchanges with the right, however, on the part of government, in the event that the situations were handled inadequately by the exchange, not to prescribe its own rules but to insist that the exchange should adopt as its rules regulations formulated by government. Finally, by a system of licensing the Act imposed upon the exchanges the duty to police and enforce not only their own rules but also such regulations as government might adopt upon its own motion.

Regulation built along these lines welded together existing self-regulation and direct control by government. In so doing, it followed lines of institutional development, buttressing existing powers by the force of government, rather than absorbing all authority and all power to itself. In so doing, it made the loyalty of the institution to the broad objectives of government a condition of its continued existence, thus building from within as well as imposing from without.

The economy of this process, its capacity within itself fairly to dispose of controversies, its ability to do so with dispatch and without insistence upon some of the technicalities that the ordinary law demands, the relationship of court review to administrative action, are all the concern of the present-day lawyer. Administrative law in this sense finds only sparce recognition today at the bar or in the schools. In court and out of court, it remains something of a stranger regarded suspiciously because of its intrusion upon traditional patterns. Yet fundamentally it is the outstanding response of our generation to the demand for a modern machinery to protect our old liberties.

In the field of legislation, articulation of legal principles grows apace. Principles of law, formerly left to enunciation through cases, are finding their way with rapidity into statutes. The content of the law contained in statute books could once be conveniently ignored. Today, legislation, instead of being a sporadic characteristic of law, tends often to be the sub-structure from which the major portion of rights and obligations derive. It calls for independent study not only of its content but of the processes that bring it into being.

These, then, are briefly some of the vital needs of the nation, needs which will inevitably determine the pathway of the law. And the life of any school will rest upon its capacity to divine that pathway. The challenge that it must be able to meet lies upon the frontiers of today's knowledge, the frontiers of social and economic change where the patterns of the legal order still are confused and where the role of law itself is still in doubt.

But such a challenge is readymade for our outstanding law schools. A fair answer to such a challenge to me spells lawyers conscious of their role not as craftsmen but as mediators of human affairs, eager to understand the new claims, anxious to weigh their merit in the light of the cross claims to which the new claims give rise, and fearful not of change, but of the want of understanding. The best traditions of legal training are basic in fashioning and refashioning the substance and machinery of law to effectuate the aims of today's and tomorrow's society. To seek safety by retreat to the shadows of the past will not provide the answer to this challenge of a new day. But to seek strength in those traditions of technical competence, of variety of outlook, of the boldness to pioneer is to build upon rock the changing house of the Law.