

American Liberalism at the Crossroads*

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This is the 73rd Annual Meeting of the American Bar Association. As one looks back over its record of almost three-quarters of a century, it will be recognized that the greatest opportunities of the legal profession are before us. This is because the problems which confront us are more numerous and complicated than ever before. The history of the American Bar Association is a record of substantial achievement in public service. In the discharge of its responsibilities it has measured well up to what the people have a right to expect from the legal profession.

Of the purposes of the American Bar Association stated in its Constitution the most fundamental is to uphold and defend the Constitution of the United States and to maintain representative government. Nothing is more important than this for the protection of our liberties, particularly at this time when our institutions are in such serious danger. We should take note that today we commemorate the 163rd anniversary of the adoption of the Constitution of the United States, which occurred on September 17th, 1787. When the Federal Constitutional Convention began its deliberations, Benjamin Franklin said, "The institutions of this country are dependent upon the spirit of the legal profession". To uphold those institutions is one of the important tasks before the organized bar of the United States.

The past twenty years have witnessed substantial, we may even say revolutionary, changes in the powers and functions of our federal government. The Supreme Court has held that the federal government has powers which for more than a century no one supposed it had. In so holding, it was required to reverse many of its own previous decisions. The changes effected have threatened both our system of free enterprise and the form of our government itself; the power of the states has been greatly re-

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duced and the liberties of the people endangered by the breakdown of representative government and by the destruction of local self-government due to the shift of power from the states to the federal government. What was once a federal union of states has been largely superseded by a centralized national government of unlimited power.

At the time that these changes are being made, we are faced with the conflict of ideologies raging between the Soviet Union and the United States and other western powers. The American Bar Association, long ago, registered its warning to our people of the grave danger of communism and of its serious and predatory threat to our way of living and our system of free government. No one here doubts that communism is a powerful and ruthless conspiracy to destroy democratic government and the liberties we cherish. Yet the communists advocate their policies in the name of democracy and liberalism. With these dangers facing us from within and without, traditional American liberalism seems to be at the crossroads. It is well therefore to consider some fundamentals:

At the time of its adoption, our Constitution marked the high tide of the world's liberalism in government. It combined a fine expression of a true spiritual idealism regarding the rights of man, with provisions which secured an equitable division of the blessings of liberty among the people. To the founding fathers, it was clear that man is a creature of God and that his innate and essential dignity requires the recognition of his free individuality. Man is not to look for his rights or for his abundance to the State. He has them within himself. Long before, Milton had said: "Our liberty is not Caesar's. It is a blessing we have received from God Himself. It is what we are born to. To lay this down at Caesar's feet, which we derived not from him, which we are not beholden to him for, were an unworthy action and a degrading of our very nature." This same philosophy of government appeared near the opening words of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed *by their Creator* with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just power from the consent of *the governed*, . . ." Man, as the ultimate sovereign, creates and is the master of his government. He is a citizen and not a subject.

When the Constitution was drafted, this issue of the liberty of the individual as against the supremacy of the coercive state

had been successfully fought out in our Revolutionary War on the battlefield and during the centuries-long struggles of the English people to establish their liberties. This history made the background and basis for the foundation of our Republic. These struggles were ideological conflicts. Their goal was to establish individual liberty as a reality. Which shall predominate — the divine right of kings, which means the divine right of the government, or the divine right of man?

Thus, the philosophy of government, expressed in our Declaration of Independence and carried into our Constitution and Bill of Rights, had a spiritual foundation and came from the very soul of the people. The dignity and integrity of the individual is a fundamental tenet of the Christian faith which has had its highest manifestation in our system of government and way of living. Our historical liberalism was something much deeper than the materialism of the modern intellectual, who lays false claim to liberalism and who is able to accept the fruits of great historic movements without having to fight for them.

The founding fathers' conception of what man is explains many of the provisions of the Constitution. Those which express the powers of the state are largely limitations upon the government's power to interfere with the citizen. Our Constitution guarantees to the people rights which constitute our basic freedoms, freedoms which no totalitarian state gives to its citizens — the right to the liberty and to the security of the individual person; to equal treatment before the law; to freedom of religion, of thought and of speech; to assemble peaceably and petition for the redress of grievances; to criticize the government; to own property; to contract about their own affairs; to manage and operate any legitimate enterprise; to buy and sell in a free market so long as this freedom does not conflict with the public interest; to be protected against unreasonable search and seizure of person and property; to be protected against double jeopardy, and from being compelled to give testimony in a criminal case against themselves, and from being deprived of life, liberty or property without due process of law; and to be secure against the government taking property for public use without just compensation. These provisions, written into the Constitution, and the Bill of Rights, gave recognition to the human and divine dignity of man. They were the results of the experience of the people showing the need for provisions to safeguard man's individuality against a coercive government. As Woodrow Wilson, the great liberal and historian, said: "Liberty has never come from the government. Liberty has

always come from the subjects of it. The history of liberty is a history of limitations of governmental power, not the increase of it."

Our government, with such a background, has certain plain characteristics:

First: it is not authoritarian. The Constitution establishes no final seat of authority in any man or position. It contains a carefully worked out system of checks and balances designed to secure the liberty of every man.

Second: it protects minorities. The drafters were familiar with past political experience and knew the dangers of majority rule, under the democratic form of government, to the freedom of those in minority groups. The abuses of pure democracies were well known and had been commented upon by students of government as early as Plato. In order, therefore, to ensure liberty, a representative and republican, not a purely democratic, form of government was established.

Third: it protects local self-government. The colonists had always objected to the denial of the right of local government by the British Crown. Local government is an essential of self-government. Therefore, the functions of local government were carefully preserved excepting in those fields which are essentially national.

Fourth: it contemplates a free enterprise system. The free enterprise system is necessarily the natural expression of the fundamental freedom of man to express the fullness of his 'being. He was not to be deprived of the opportunities of his freedom and industry.

Citizens are the slaves of the state if they depend upon its will for their means of life. Consistently, the Constitution contains provisions protecting the fruits of man's labour. These were of the very heart of his freedom.

Fifth: It contemplates individual responsibility for personal economic security. Under this conception of freedom, it is intended that man look for his economic security to the abundance which is the natural product of his own untrammelled liberty, intelligence and work. The colonists had made their choice between liberty and security. They had established a home in the wilderness of an unexplored continent where there was complete freedom from social or political limitations but little other security. The free enterprise system, which is inherently a system of risk, thus became a fundamental which has permeated American life ever since. For man's welfare, the founding fathers relied not on

the government but on man's God-given, individual responsibility, intelligence and industry under the stimulus of freedom. It was by no means inappropriate that the words "Liberty" and "In God we Trust" were inscribed upon our coinage although it is the very symbol of material wealth.

So designed, this nation has prospered materially. It has been a leader among nations in its high productivity of wealth and in the breadth of its distribution among its people. At the high tide of that abundance we are witnessing, however, great activity by certain groups of our people toward reversing these traditional concepts. This attack is part of a world-wide swing toward socialism. The danger to our liberty from the military and political efforts of Russia to rule the world in the name of communism has now been made entirely clear to our people. But our danger from within is more subtle, is little understood by most of our people, and is, therefore, more of a threat to our liberties. I refer to the trend away from our American liberalism indicated by the centralization of power in the federal government and the corresponding loss of local self-government, the breakdown of representative government of the type contemplated by the Constitution, the attempted substitution of socialization in the place of our free enterprise system, and the growth of what is often referred to as the welfare state, but which more appropriately should be called the service state. Observe the changes:

(1) Instead of self-government being ensured by the maintenance of local government, we are witnessing the twilight of the state governments. In our lifetime, the federal government has been converted into the major power in the lives of our people. The federal government has taken control of the important phases of the conduct of local and intrastate business, transportation, finance, production and distribution. An absentee centralized government has thus been substituted for local self-government. Great responsibilities have been vested in a central state which is already heavily burdened and which has a bad but clearly deserved reputation for inefficiency and extravagance. The eligible voters in the last election were so uninterested in its operations that only fifty per cent of them voted.

The representatives of the states in the Congress^{are} very willing, and we might say eager, to support what would speedily be recognized and avoided as a consistent policy of extravagant spending if made by the states, but which does not appear extravagant when done with federal funds. But federal funds are drawn directly from the people of the several states, largely

through the income tax. This extravagance must be paid for through such taxes. The tax is on the industrious citizen, and the wage-earners. It falls heaviest on the man who works with his hands, the artisan, the farmer, the skilled labourer; all of whom must be taxed, and heavily, to provide funds for these federal disbursements. There are enough rich individuals and corporations to pay only a small part of the cost. It is the plain man who in reality pays. People lose their capacity for self-government by failing to govern. If we are to continue to enjoy self-government in these United States, the people must again resume the burden from which they have sought to escape.

(2) Observe the trend away from individualism toward socialization. Although the founding fathers certainly never intended to create a government designed to engage in private enterprise, it is plain that our government is turning from a system based upon the energies of individual men to a system based on his socialized efforts. As an illustration, the federal government proposes to duplicate the existing capacity of the private electric generating plants. The discouraging effect of this programme on private enterprise is plain, particularly when it is projected against a background of other socialization projects, including the Tennessee Valley and Columbia River developments, the socialization of medicine, the declared intention to secure authority from Congress to build government steel mills, and such comprehensive planned economy programmes as the Brannan agricultural plan. Necessarily, such systems of planning require central control to the exclusion of the right and initiative of the individual. Necessarily, they involve the denial of free markets, free enterprise and economic freedom.

(3) We have moved rapidly in the direction of the service state. In Britain, the service state was used as a prelude to the more serious forms of socialization. In this country, we are now engaged in an exploitation of the idea of the service state, designed to give material good to certain restricted groups of our people which have great voting power — the veterans, labour, the farmers and those groups of voters who will benefit specially by socialized medicine, the federal subsidization of education, old-age pensions, housing legislation, employment insurance and so on. Many of these things are good in and of themselves. But man is thus induced to look for his material good to the socialized action of the state, whereas it should be found in an economy which preserves the individuality of man, and encourages him to rely upon the exercise of his own skill, energy and talent for his personal advancement and individual prosperity.

Edmund Burke said "People never give up their liberties but under some delusion". Therefore, they resort to delusion who seek to take away the liberties of the people. It is important to observe that generally the changes, which put emphasis on the socialized, not the individual, efforts of man, are proposed and defended on the ground that they are an expression of what is said to be a true "democracy". This conception, however, was repudiated by the drafters of the Constitution. These changes are also declared to be an expression of a modern "liberalism". But this so-called liberalism is not only a denial of the liberalism under which the Constitution was drafted but a denial of true and fundamental liberalism.

The word "democracy" has more than one meaning. In a political sense, it signifies a government designed to depend fully on the rule of the majority. In the social or economic sense, it means equality of social or economic status. It was not discussed in either sense in the historic documents defining the nature of our own Republic.

As I have said, the government of the United States was set up not as a democracy, using the word in the political sense, but as a republic. The founders of the government knew the danger to minorities from majority action in a fully democratic government. It is always the minorities which are prejudiced. In their care to protect the freedom of man from his government, the founders intended to safeguard against this danger. No one would question that the New England town meeting type of pure democracy is ill adapted to our governmental needs, but that we must depend upon representatives duly elected by the eligible voters.

The Constitution did not attempt to create economic equality by a democracy. It is true that the Declaration of Independence declares that all men are created equal. But it was a standard of political, social and economic opportunity that the Declaration stated. It did not purport to command that the wealth be shared equally. Individuals necessarily reflect different ancestry, environments and training, and these differences produce inequalities in capacities and skills. Under a system of political equality, by which the free play of man's individual intelligence and industry was fully protected, it contemplated that the natural products of man's capacity and energy would be his. Its heart was individual liberty, not a socialized status. The Constitution fully protected property rights and intended to safeguard every man in his right to retain the fruits of his own individual effort.

The modern so-called "liberals", however, have adopted a ma-

terialistic concept of liberalism and a concept of democracy in the economic sense. They say that "social justice" requires action by the government to create economic equality. They, customarily, place what they call "human rights" above property rights even though the right to own and hold property is one of the most precious of human rights. The service state is a natural implement of the materialistic liberalism. Social legislation to provide services at government expense to certain classes of the population has a common and very strong appeal because of its material beneficence. On the surface, it promises material good. Nevertheless, the dangers of the service state, as an instrument of materialistic liberalism, should be obvious:

The proposal to equalize men from a material standpoint involves the limitation of the liberty of other men, where it is accomplished by taking wealth from those who have and giving it to those who have not. Legislation designed for such purposes is essentially discriminatory when it confers benefits or privileges upon certain favoured groups, at the expense, directly or indirectly, of other groups. Such legislation violates in spirit the provisions of the Bill of Rights which guarantees to all persons equality before the law. If this kind of legislation is to meet the test, it should not coerce or discriminate between the different groups of citizens.

I do not suggest that the government, as well as private enterprise, have no functions to perform in matters broadly categorized as "welfare". Society should protect the unfortunate persons who are unable to rely upon themselves through the accident of physical or mental disability or personal disaster. But this does not require that where such welfare measures are justified they shall be undertaken by the federal government, rather than by the states or within the framework of the free enterprise system. Government bounty should not be spread among persons well able to stand on their own feet and to be the masters of their own destinies. The people can be broken morally by such schemes, which substitute subservience for self-reliance. A healthy man needs no crutches. Through their use his limbs will wither. Where private enterprise can provide the security called for, it will embrace the opportunity.

Of course, individual liberty may not remain absolutely unrestrained. No one today would say that the old doctrine of *laissez faire* should be tolerated. We are all aware of the corruptive influence of power on persons and organizations. We have seen abuses flow from large aggregations of corporate power. When

such corporations refused to use self-restraint, Congress has properly enacted anti-trust laws or other regulatory legislation employing restrictive power. And paradoxically we have seen that restrictive power itself grows hugely until in some instances it is a choking threat to free enterprise. As a people, we are not mature enough to eliminate all restraints upon individual freedom. But again there is a vast difference in restraint and control. Here the function of the government is in limitation and not in the complete regulation which essentially is control. Control is but a few paces short of pure socialism and is a far cry from our heritage of true liberalism.

I do not propose any limitation on the abundance of the product of industry which is to be distributed to our people. The great volume of that abundance is one of the wonders of the world. I am considering here not ends but means. The question is not whether the distribution of abundance shall be reduced. The question rather is how it shall be provided — by the state through socialism or within the framework of the free enterprise system? Where shall the emphasis be — on the freedom of individualism or on the limitations upon individualism which are the heart of socialization? The free enterprise system in America, in point of its productivity and the distribution of the bounties of that abundance to the public, is without parallel in human experience. All experience indicates that a governmental system of production will not equal it in productivity. Within the framework of the free enterprise system and without striking down human liberty, free enterprise is capable of producing a greater measure of bounties than a service state can provide.

It is significant that the basic philosophy of our government, with its emphasis on spiritual values has manifested itself in such a measure of material prosperity. Our country's use of the free enterprise system is a way to attain a goal. The goal is not the free enterprise system. This goal is not really materialistic. The purpose is the full development of man. The spiritual aspects of free enterprise may not be recognized by all business men. But whether recognized or not, it is clear that the fundamental of the American system is, and always has been, this spiritual freedom of man. The effort of today's materialistic liberals is to make material welfare the purpose of our nation's being at the expense of freedom. This is a perversion of the American ideal.

People naturally love liberty. They will surrender liberty only through misunderstanding. I do not believe that the departures from our traditional position, which the law makers have made,

represent an understanding choice by the people. The people have not understood. The departures have been made under the impact of the severe depression of the 1930's and of the world war, when the stress was upon haste and upon temporary and emergency conditions. In some instances they reflect, furthermore, the selfishness of individuals and organized pressure groups. The prime purpose of too many people has been to get something out of the state in subsidies, bonuses and government aid of one sort or another for special groups. Too few have been trying to protect the nation against such selfish demands.

Under an absolute government, it is not necessary for the people to understand; but the preservation of liberty requires the light of understanding. Consequently, it is vital that every citizen of our Republic fully understands the fundamentals of our representative form of government and the principles necessary to the retention of the freedom of the individual. Without such knowledge, the citizen cannot intelligently determine whether or not the policies which are pursued by his representatives in the government will lead to the destruction of our form of government and the loss of basic freedom.

Our fundamental liberties today are accepted as commonplace. This is because many people do not know how those liberties were won. To retain our freedom, we must understand it. We must want to retain it and be willing to make all sacrifices necessary to that end. We must not take freedom as something that is free — that is, guaranteed to us forever without our own continuous effort. Such complacency can lead only to our own destruction. Lawyers should be the last to forget that not only the eternal vigilance but eternal effort is essential for the preservation of Liberty. As Woodrow Wilson said, "No more vital truth was ever uttered than that freedom and free institutions cannot be long maintained by any people who do not understand the nature of their own government".

There is no present danger of a sudden collapse of our country as a free country. Freedom is not lost by a sudden breaking of the governmental structure. It is destroyed by an imperceptible nibbling away of one essential of liberty after another, each nibble seemingly, at the time, innocuous. It is a gradual process and extends over a long period of time. It is like the fall of a great oak. In outward appearance, the tree has great strength, and when it falls, in what seems to be a moment of great stress, it is actually the culmination of the slow and imperceptible deterioration of the years.

On every possible occasion, we lawyers, therefore, should expound fearlessly the principles of the true American liberalism written into our Constitution. This requires courage, perseverance and a strong faith in that liberalism. Some lawyers feel that the political stream is running too strongly towards some form of collectivism to be halted. Many think that the problem is so big that their individual efforts are futile. These are mere counsels of despair. They are unworthy of our profession and of our American heritage. The nation was born in a battle of ideas. Today we face a new battle of ideas. The cause is not hopeless unless we will it so.

There is an old Chinese proverb which says, "It is better to light one candle than to curse the darkness". The lawyer's candle should burn far brighter than any other citizen's. He is trained in law and advocacy; his opinions on public questions gain special attention because of his profession; he has many opportunities to speak and to advise. Frequently, he is a man of prestige in his community and often he holds political office or is active and influential in a political party. In any battle of ideas, he should be — he is — the best equipped and the most effective soldier in the field. The battle to retain our free American society and to defend it against further inroads must not be lost by the default of lawyers. There are many positive actions which lawyers may perform:

We can advise the managers of private enterprise, with some of whom every lawyer has contacts, to study and to deal constructively, in their own organizations and trade associations, with the problems which, unless handled effectively and promptly by the private enterprise system itself, ripen into legislative proposals of governmental action. In this respect, the managers of the system have an important duty. The public will demand that the system fully measure up to its responsibility to serve the public good. It is in competition with the forms of socialistic endeavour and must bear the full brunt of ministering best to the public needs, if the public is not to turn elsewhere.

We can resist the permanent fastening upon the nation of authoritative measures, proper and necessary in times of war but which are not natural to nor a part of the peace-time economy. We are today confronted with the threat of another world-wide conflict. We are faced with the all out mobilization of industry and man power. Steps have necessarily been taken within the past week to set in motion war time controls for the emergency. But after the real emergency has passed, we should stand stoutly in defence of freedom and be quick to insist that emergency

measures, designed to meet war needs, shall be given no more than temporary life and shall be permitted to make no permanent inroad upon our liberal institutions.

We can convince our fellow citizens that government cannot furnish the solution of every economic ailment and that history shows that the increased assumption of the functions of private enterprise by the government not only destroys individual freedom but brings economic decline and insecurity.

We can challenge every measure which would transfer to the federal government additional functions that have been and can be performed by private organization and enterprise. There is no such challenge from any political party. It must come to the political parties from the people.

Serious questions may be involved in formulating social legislation, which meets the needs of a modern industrial state and does not at the same time destroy the individual rights of the citizen. What we have done in recent years to break down the sovereignty of the states, and to impair local self-government, and the action we have taken in all fields of social and economic legislation, should be carefully re-examined. Congress should without delay authorize and direct to be made an authoritative study, by a Commission of distinguished and impartial experts.

The Commission should be directed to report what steps should be taken by recommended constitutional amendments, legislation or otherwise:

(1) to restore local self-government and to return to the states the responsibility of handling such affairs as can best be dealt with on a state or local level rather than by the federal government;

(2) to give to the states exclusive power to collect certain types of taxes so that the states themselves may be in a position financially to resume their proper functions of government;

(3) to withdraw from the federal government and transfer to local governments or private enterprise control over matters involving social welfare to the greatest extent deemed possible;

(4) to re-examine generally all legislation now in effect which has a tendency to involve or promote the socialization of business and to hamper individual initiative and the continued development of the free enterprise system.

The examination should be divorced from consideration of an emergency, selfish or political nature. Only the best interests of all the people, and the protection of their freedom and the preservation of our form of government, should be considered. In

this study, the issue should be considered with the same high measure of intelligence that guided the founders of our republic when the original Constitution was drafted. Let the same wisdom and light in which our nation was born show forth to save it in this critical hour.

All Americans, who are sincerely devoted to the future welfare of their country, stand today at the crossroads. Many of their fellows have already been misguided in the name of a false liberalism down the road that leads toward autocratic materialism. The other road follows the true spiritual liberalism which is the basic constitutional principle of the Republic. Before it is too late, it is the duty of the Bar and of all others whose training and abilities enable them to recognize where these two roads lead to devote every talent vouchsafed them by their Creator to guide their fellow men along the path of liberty.

Trades and Professions

It is no disparagement of honorable trades and callings, which when properly carried on render real public service, to insist that an organized profession of physicians or of lawyers is not primarily analogous to a retail grocers' association and that there is a generic distinction between a medical society or an organized bar and a plumbers' or lumber dealers' association. It is unhappily true that there was in the last century in America a tendency to deprofessionalize the old professions, to reduce all callings to the level of individual business enterprise, and to think of medical societies or bar associations as like trade associations. But the root purpose is different. The trade association exists for the purposes of the trade as a money-making activity. The medical society exists primarily for the purposes of medicine, not of the doctor of medicine, and for the advancement of the healing art. The bar association exists primarily for the purposes of the law rather than of the lawyer and for advancement of the administration of justice according to law. Lord Darling spoke of certain legislation enacted at the instance of trade organizations as intended to relieve the members of those organizations from the humiliating position of being on an equality with the rest of the King's subjects. An organized profession, on the other hand, seeks no such legislation relieving it of duties incumbent upon it. It does not seek to advance the money-making feature of professional activity but seeks rather to make as effective as possible its primary character of a public service. What medical associations have done for advancement of medicine I need not recount to you. But I may remind you that bar associations have in the present generation lifted the standard of professional education, codified professional ethics, promoted uniformity of commercial law, and brought about simplification of legal procedure and removal of archaic technicalities. An engineer may patent his invention. . . . What a member of a profession invents or discovers is not his property. It is at the service of the public. (Roscoe Pound, *The Professions in the Society of Today*. *The New England Journal of Medicine*, September 8th, 1949)