

THE ABUSE OF LAW.¹

Perhaps the most significant change in legal thought during this generation has been the more general realization that law is made by man to serve human interests, and can and should be changed as those interests change. The old theory of natural rights, the notion that there exist immutable principles of justice which may be discovered but cannot be made, have given way to the more modern conception that law is a device for social control, and should be moulded to suit present day needs. This change is not only reflected in the decisions of courts, the writings of jurists and social scientists, but also in the platforms of political parties, and in the propaganda of all varieties of social reformers.

While this change in attitude towards the nature and function of law has made possible many desirable reforms, it has also given an impetus to law making which has created new dangers. A prodigious number of laws, touching nearly every aspect of life, have been passed. The flood of legislation has become so great that it is impracticable for even the lawyer to keep abreast of the statutes which are annually enacted. In many instances these laws have been hastily drawn, in disregard of the principles of draftsmanship, thereby causing uncertainty as to their meaning and effect. Due regard has not always been given to the feasibility of enforcing or administering a particular statute, resulting in an increasing non-observance or positive disregard of law. Frequently the futile attempt has been made to control by local law a national situation. On the other hand, Federal laws have been enacted which dealt with matters of local concern. Moreover, the propriety of regulating by law certain phases of human action has, at times, been little considered, and the law has been made the ally of intolerance and bigotry.

When we speak of social control, we ordinarily mean a restraint upon the liberty of one individual for the protection of some interest or another, which interest is believed to outweigh in social value the detriment which may result from the curtailment of the other's freedom of action. The values which we place upon conflicting interests necessarily vary with the extent and intensity of particular human desires, the conditions under which we live, and the prevailing beliefs as to what does and what does not inure to our well being.

Our desires we know; our environment may be discovered; but what will promote our well being must, at best, remain a prophecy based upon past experience. When we consider that existing pre-

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cepts of morality and present social conventions are to a very large extent the crystallized judgments of many generations as to what inures to man's well being, we should proceed with the greatest caution in casting them aside.

The justification of a new law on the ground of social utility presumes the accomplishment of its purpose. Assuming that the evaluation of the conflicting interests is correct, if the law is ineffective to accomplish the desired result, the invasion of individual liberty which it costs is obviously a bad investment. Moreover, there may be devices for social control, other than law, which are better adapted to the accomplishment of a particular result, and which are less costly in their operation. Therefore, the matter of social legislation presents a three-sided problem. First, does the protection of a particular interest justify the interference with other interests necessary to the accomplishment of the desired result? Second, will the proposed law prove effective to accomplish its purpose? Third, is there a better way of accomplishing the result?

The chief danger from the new conception of law is that it makes easier the adoption of unsound as well as sound theories of social reform. It has already become the chief weapon of the fanatic as well as of the more intelligent student of social problems. There are many agitators in our midst who have been seized with a desire to compel all human beings to conform to a type, whether it be fundamentalist, teetotaler, or one hundred per cent. American. This will to standardize man has been justified on the grounds of efficiency, humanity, patriotism, and religion. It has encouraged a spirit of intolerance among large portions of the population, and a strong desire to persecute the nonconformist has been manifested.

During the past summer the country was aroused by the trial and conviction of a school teacher for teaching a biological theory which is generally accepted by men of science throughout the world. Many people who had paid little heed to the tendencies in American life which culminated in the anti-evolution law were suddenly shocked into a realization that our most cherished liberties are at stake. But the anti-evolution law of Tennessee is but a manifestation of the same state of mind which brought forth the Lusk law of New York, and similar statutes which were enacted in different parts of the country.

It is true that law is a device for social control, but it is a mistake to assume that all forms of human behaviour should or may be controlled by law. There are many matters as to which most people are unwilling to submit to governmental control. The restrictions upon the power of the government found in the Constitution of the United States and the constitutions of the several states afford ample

evidence of this fact. The privilege of expressing one's views, or choosing one's vocation, or one's place of abode; the privilege of selecting one's spouse, or one's religion, are examples of matters concerning which people resent dictation by the state. Indeed, if inventiveness in man is to be encouraged, if originality and new ideas are to be fostered, it is essential that there be a large sphere of activity within which the individual is left free and unhampered to follow his own bent. The occasional harm which may result from thus indulging the individual is the price which society must pay for genius, for character, and for progress. It was with the view of preserving for the individual this domain of free choice, even as against the will of majorities, that many of the constitutional provisions were adopted. While it lies within the power of the states, by constitutional amendment, to further limit this important field of human activity, such action should be taken with the greatest caution and only after it is clear beyond doubt that a settled public judgment demands it. This great domain of free choice is a priceless heritage from the centuries of struggle and suffering which have gone before. It should not be lightly sacrificed for novel and untried theories of social reform.

There is also a vast domain of human action concerning the regulation of which the Federal and state constitutions are silent. It follows, of course, that within this domain the state legislature is supreme. It can legally pass unwise as well as wise laws. But it does not follow from the fact that the freedom of the individual in a particular field of conduct is not protected by constitutional provision, that his action should be governed by positive law. There are many restraints upon human conduct other than the restraints of positive law. Morals and manners would not exist if this were not so. Indeed, human behaviour is controlled to a far greater extent by these non-legal restraints than by the restraints of positive law. If the students of social psychology are to be believed, people are influenced more by the conventions of society than by the prohibitions of the penal code. If the penal code of New York were repealed tomorrow, I doubt whether many, if any, of you would commit murder or robbery or any of those offences against which there exist generally accepted inhibitions of morality. On the other hand, the prohibitions of the Volstead Act have had little effect upon the habits and practices of, perhaps, millions of American people.

The penal code is necessary in order to deal effectively with the anti-social creatures who live in our midst, but they constitute a very small part of the total population. While law is the most effective device for controlling such individuals, it is an error to assume that the habits and practices of people generally may be altered at the

law giver's command. The idea that human behaviour can be suddenly changed by mere legislative fiat, has resulted from a failure to appreciate the relation of moral precepts, and social conventions, to the field of positive law.

There are many laws which neither involve questions of morality nor seriously interfere with human desires. The traffic laws afford an example. Many of the rules of commercial law are of the same nature. It is not so important what the rule is, so long as there is a rule. Such laws are generally accepted by people without objection. Then there are laws which affect only a very small proportion of the population. The heavy surtax on large incomes is a law of this type. Such laws seldom arouse strong opposition on the part of the great masses of people and enforcement is usually not difficult although the law is regarded as unjust by those who are affected. Moreover, there are many laws which deal only with the organization of government. Such laws rarely involve moral questions or disturb prevalent customs and habits of people. But our experience has been that a prohibitory law, which actually touches the liberty of people generally, has little chance of enforcement unless it is supported by the generally accepted precepts of morality or the actual conventions of society.

The social reformer has too often overlooked the importance of this fact. Having decided that particular habits or practices of people should be stopped, he has seized upon the device of law as a means of accomplishing his purpose without first having created a predominant public opinion in favour of the reform. Not only is such procedure likely to fail in the accomplishment of its purpose, but it is very apt to produce social consequences which are worse than the evil sought to be destroyed. That there must be laws needs no argument. But the law should further human desires rather than thwart them. The law should accord with the precepts of morality rather than contradict them. If we would change man's ways, we must first change his habits of thought; we must first revise his code of morals; the law will follow.

Much has been written, and more has been said, about the lawlessness and corruption which have followed the adoption of the Eighteenth Amendment to the Federal Constitution. Those opposed to this law have pointed to this state of affairs as conclusive proof that the law is intolerable, immoral and should be repealed. On the other hand, those responsible for this law have attempted to shift the blame for the existing conditions by accusing their opponents of aiding and abetting in its violation. Whatever may be our opinion on this question, it is a fact that thus far the prohibition

law has proved incapable of enforcement in many sections of the country. The violation of this law has steadily increased since its adoption, and there is no indication that the present deplorable state of affairs will cease at any time within the near future. It is a significant fact, however, that obedience to the Volstead Act in different sections of the country has varied in proportion to the extent to which people in the various localities had already come to regard the use of intoxicants as a social evil and, therefore, morally wrong.

The popular belief that a representative democracy is government by the majority has led many good citizens into the error of thinking that a legislative enactment, or a constitutional amendment, is *ipso facto* an expression of the public will. When it is recalled that considerably more than half of the population entitled to suffrage do not vote, that perhaps a majority of those who vote are not in fact expressing an opinion on particular social legislation, that legislation involving important changes in the law is often passed by a bare majority of the legislative body, the illusion that the voice of the legislature is the voice of the people vanishes into thin air. Under our political organization legislative bodies not infrequently reflect the desires of an active and well represented minority, with the result that important interests which are not strongly represented are frequently ignored. It is possible for well organized groups within the state to have enacted into law, and thus foisted upon an unwilling people, all kinds of burdens and restraints. Too little consideration has been given by law making bodies to the question whether the clamour of the propagandist, the reformer and the lobbyist, is inspired by the selfish interests or mistaken beliefs of small groups, or by the interests of the public at large.

One of the most important aspects of social legislation is the question whether the control of particular matters may be best handled by the national or by the state governments. At a time when a very large part of the population was engaged in agricultural pursuits, when industry and business consisted chiefly of small traders and manufacturers who served the local needs of a particular community, the social policies of one state were of slight importance to people in another and the laws of one state had little effect upon people in another. Under these conditions state regulation of business was a workable plan. But as commerce and industry spread across state lines, and people in one part of the country became more and more dependent upon people in other parts of the country, the multifarious laws of the different states became a serious obstacle in the path of the commercial and industrial development of the nation. A widespread demand that the Federal Government should

act for the purpose of unifying the law resulted in an extensive exercise of Congressional power based upon the commerce clause of the Federal Constitution. But the movement to nationalize the law has not stopped with interstate commerce. There is an increasing effort to procure the enactment of Federal laws dealing with all kinds of matters, many of which are properly matters of local concern. While there are many commercial and industrial problems which, because of their interstate character, can be effectively dealt with only by a national law, it does not follow that all reforms should be nationwide in scope. In a country as large as the United States, with such diverse interests, that which may be a desirable law in one section may be quite undesirable in another. A law which may promote the social and economic well being in one section may prove to be ruinous to another. A law which may easily be enforced in one section may produce lawlessness and corruption in another.

Another cause of the perplexing difficulties which now confront us is that laws have been passed too freely without consideration of whether there existed the necessary machinery for their effective administration and enforcement. It must not be forgotten that the most desirable law may utterly fail to accomplish its purpose if suitable means are not provided for its proper administration. For some time we have been attempting to use the agencies for the administration of law which were devised by our fathers a century ago to perform much simpler tasks than those required by the complexities of modern life. We have grossly neglected this aspect of law making because we are relatively ignorant of the science of administrative law. Our universities have for years engaged in a study of the principles of substantive law, but have paid little attention to the problems of law administration. Millions of dollars have been spent through governmental and private agencies in discovering and pointing out social evils, but little has been spent for a scientific study of ways and means of curing them.

Before we go further with the expansion of the domain of positive law, we should give more thought to the limitations of law as a device for social control. We should more carefully distinguish between matters calling for national regulation and matters of local concern. We should make a more scientific study of the various devices for law administration with the view of adapting them to the tasks at hand. If properly employed, law may be made to better serve human interests, but it is a dangerous instrument in the hands of men who do not know how to use it.

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