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Josiah W. Bailey

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ON LAW AND LIBERTY

JOSIAH W. BAILEY*

"Men do not make laws. They do but discover them."

CALVIN COOLIDGE to the Senate of Massachusetts.

I have in mind civil, and not moral, or philosophical, liberty; civil law, and not necessity. What do we understand by civil liberty?

What did Cicero mean when speaking to the Roman Senate he exhorted—"Preserve, I beseech ye, O Romans, this liberty which your ancestors have left you as an inheritance"?¹ What did Jesus mean when he said, "Ye shall know the truth and the truth shall make you free"? What did Paul mean when he said, "But I am free born"?² And what did the fathers mean when they declared in the preamble of the Constitution that one of its purposes was to "secure the blessings of liberty to ourselves and our posterity"?

Manifestly our word "Liberty" is susceptible of a variety of aspects, and no discussion in which it is involved will be intelligible without definition with a view to whatever may be in contemplation.

It must be observed that the preamble of the Constitution from which I have quoted does not declare that one of the objects of the Constitution is to create or provide for or promote the blessings of liberty, but to "secure" these blessings—i. e., to make them secure in the present and the future, to give to them permanence. It is one of the objects of the Constitution to form a more perfect union, another to "establish" justice, another to "insure" domestic tranquility, another "to provide for" the common defence, another to "promote" the general welfare, and the sixth and last, to "secure" the blessings of liberty to ourselves and our posterity. Here is capital instance of a nice choice of words, each verb being worthy of an essay upon its import, each speaking more than volumes might of the understanding of the fathers as they wrought out the Constitution.

They proposed to secure in the Republic the blessings of liberty to themselves and their posterity, that is, to make certain and abiding something already existing. The Revolution had not been fought out for civil liberty but for independence—or political liberty. They were conscious of liberty and of man's inherent right thereto. They could not have complained of limitation upon their liberties other

* Mr. Bailey is a member of the Raleigh bar.

¹ Cicero 4 Phil.

² Acts 22-28.

than in the matter of taxation without representation. Patrick Henry's impassioned "Give me liberty or give me death" was rhetorical. He was defying the King and demanding independence—or political liberty. But liberty was the watchword of the Revolution and of its creature the new Republic. In this it found its dynamic, its vital spark. For in this there was appeal to the profoundest instincts. Says Burke,³ "In the famous law of 3rd Charles I, called the Petition of Right, the parliament says to the King, 'your subjects have inherited this freedom', claiming their franchises not on abstract principles 'as the rights of men' but as the rights of Englishmen, and as patrimony derived from their forefathers." And again I quote Burke—, "From Magna Charta to the Declaration of Right, it has been the uniform policy of our Constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity." (Note the plural, "our liberties." Note also "entailed inheritance.")

Liberty manifestly is conceived of as an inheritance from of old, existing apart from the state and prior in time to the state, an object to justify a state's existence, but not to be sacrificed to the State. Our Bills of Rights, underlying every American Constitution, predicate this liberty with a certain precedence over the constitutions and the States themselves, and over the Republic as well. One may soundly argue that, if a State fail to function in liberty, it to a most serious degree forfeits its right to exist. These Bills of Rights are strictly neither constitutions nor laws: They are these, and more than these. They are the limitations upon the social organization, barriers beyond which the sovereignties created by the constitutions may not go, reservations of that which is inherent in men. We will find in these bills the muniments of liberty, declarations by way of reserving and guaranteeing, even against the state dedicated to liberty, certain rights inherited and conceived of as inherent in mankind. For the fathers wisely esteemed civil liberty above political liberty, understanding clearly that while political liberty sounds in the form of government, civil liberty sounds in its character. They fought and wrought for political liberty in the interest of civil liberty.

Burke speaks as an Englishman of English liberty. But he was well aware that liberty is not an English creation, nor an exclusive inheritance of English blood. Paul was tempted to boast of his Roman freedom. Cicero exhorted the Roman Senate to preserve the

³ On the French Revolution.

inherited Roman liberty. Athens' chief prize was liberty. The grand distinction of man in all recorded time is his sense of and his aspiration for liberty. "The struggle," says John Stuart Mill,⁴ "between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar, particularly in that of Greece, Rome and England." The truth is, the human species is endowed with an instinct for liberty, and, though any one of us may have difficulty in defining it and generally is in doubt as to precisely what he is driving at, he knows that he cherishes liberty and he intends always to be moving in the direction of larger realization of it and its blessings.

Mr. Blackstone in his famous lectures on the Common Law of England sought—and with no little success—to define this liberty. One of his editors, Lewis,⁵ declares of Blackstone's definition that "it is one of the very few intelligible descriptions of liberty which have hitherto been communicated to the world. Though declaration and eloquence in all ages have exhausted their stores upon this favorite theme, yet reason has made so little progress in ascertaining the nature and boundaries of liberty, that there are very few authors indeed, either of this or any other country, which can furnish the studious and serious reader with a clear and consistent account of this idol of mankind." And now for Blackstone's definition:

"The absolute rights of man," says he, "considered as a free agent, endowed with a discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought fit to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the

⁴ On Liberty.

⁵ Blackstone's *Commentaries*. Lewis' Edition, Vol. I, Pages 125-126.

absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political,⁶ therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.”

Such is the accepted definition of civil liberty. We may, however, proceed briefly to make more specific the definition by stating the recognized limitations upon the restraints of human laws, for as I have pointed out, in our country at any rate, we understand civil liberty in the sense that there is a sphere with which the government shall not interfere. We hold certain rights as established, as existing independent of the States or the Union; that the States may serve these but these may not be sacrificed to even the States or the Union. These rights are summed up as follows: I. The right of personal security; II. The right of personal liberty; III. The right of personal property;—and to these, as handed down from the Mother Country, Chancellor Kent wisely declares that a fourth has been added by our Republic, to-wit: IV. The right of free exercise and enjoyment of religious profession and worship, this being peculiarly the trophy of our civilization. These are our liberty or our liberties.

Is there conflict between law and liberty so defined?

Our answer, we will discover, will depend upon what we understand by “law.”

Law may broadly be defined in terms of its function as the means whereby organized society regulates or restrains its members in the interest of the whole. The precise definition of Law has not as yet been agreed upon. The familiar definition of Law by Blackstone,⁷ “A rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong,” though accepted by law students generally, is questioned by his commentators. The difficulty here lies in the conception of the nature of law, and of its origin. Demosthenes conceived of it as somewhat to be discovered—as custom.⁸ Cicero conceived of law as somewhat to

⁶ Blackstone failed to distinguish political from civil liberty.

⁷ Introduction to his Commentaries—*Of the Nature of Laws in General*.

⁸ Oration I, Cont. Aristogit.

be prescribed—as force.⁹ Justinian¹⁰ takes the view of Demosthenes. Jeremy Bentham¹¹ follows Blackstone. John Coolidge Carter¹² supports Demosthenes. And it is both interesting and important to remark that our President Coolidge is on the side of the great Athenian. I quote from his most famous speech, “Have Faith in Massachusetts”:

“Men do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority. They must rest on the eternal foundations of righteousness.”

These are great and timely words, worthy of a President. I think we may find in them the key to the problem set for us in the present apparent, and in a sense real, conflict between Law and Liberty.

The difference in the definitions is that in the one view Law is prescribed, it comes from the supreme power down; in the other it is discovered—it comes from the governed, up.

Unquestionably there has been and is deep and menacing confusion in this matter. Law by its nature is an interference with absolute individual liberty, and its tendency is to interfere with civil liberty. Nevertheless, in a world of men and women without law there is neither personal nor civil liberty. Law limits liberty, and by limiting it ought to make for liberty, but often it does not. Says Bentham, “without law there is no security”—no security even of liberty. “Where there is no law,” says Locke, “there is no freedom.” The individual conceives of himself as free, but he knows that of necessity he must be under law; he looks to the law for liberty. And in another moment of his experience he realizes that law is depriving him of liberty—even civil liberty. Society is dedicated to the rights of man—to liberty. But society is fundamentally conscious of order; and whereas the individual is conscious first of liberty, society is conscious first of order. We have here a paradox.

It was Sir Oliver Lodge¹³ who remarked that in all departments of science the existence and perennial vitality of paradoxes—by which, he explained, that he meant the rational establishment or elaboration of impossible and untrue propositions—“is always the index of something wrong, or at least foggy, in the system of thought,

⁹ Cic. de Leg. Lib. 1 c. 6.

¹⁰ *Institutes*.

¹¹ Bentham, Works, Vol. I.

¹² *Law: Its Origin, Growth and Function*.

¹³ *Modern Problems*.

some dislocation between the prevalent mode of apprehending things and the things themselves. And it was with the object of upsetting some prevalent orthodox doctrine that paradoxes were invented. When the right point of view is attained, the paradox disappears."

If I follow Sir Oliver, we must seek the right point of view in order to resolve the apparent and increasingly real conflict of law and civil liberty, and primarily we must seek the right point of view of law. We must settle the controversy between Demosthenes and Cicero, between Bentham and Coolidge!

I shall now digress in order to show the immediate necessity for this settlement.

We are living in an age of law. Society has become, thanks to many inventions, to much commerce, and to increased populations, quite complex. Heirs that we are of the Norman genius for law, we have come into an universal habit of invoking it. Under self-government we have felt secure—there was no danger, we argued, of self-governing peoples over-doing the matter of law-making. Here in the United States we have from the beginning thought of liberty in terms of the form of our government rather than in terms of its character. It was quite out of the question that we should suffer ourselves to be overwhelmed with laws and our liberties to be impaired. But we forgot that legislating is just the chief temptation, the besetting sin, of self-government; that republics and democracies are much more liable to resort to legislating as a sovereign remedy than tyrannies. In short we have been lulled into sleep by the false assurance that the form of a government is in itself a guarantee of liberty—an assurance due in part to the fact that in the Revolution liberty was interpreted in political form rather than in terms of civil rights. And so we now have, in addition to the common law as elaborated and adapted by some fifty courts of final appeal from day to day, thousands of statutes made by Congress and the State legislatures. We are engulfed in laws so called—and, what is worse, the legislating habit has possessed us. Of late one hears very little of liberty, but much of welfare. There is an incessant and ever-increasing tide of legislation. There is a strident cry throughout the land for laws, and, of course, for law-enforcement; but, save for the turgid generalities of the Fourth of July, whenever does one hear a word for liberty unless it be from some politician of the wet persuasion? And we all suspect that liberty is not the object of his quest! There were long ages in which liberty was the

object and the test of the human struggle, and laws were a last resort. But now the demand is for law, and the test is the will of the majority. I would have apologized for taking such pains to restate the accepted definition of liberty, had I been writing for the United States of a century ago, but I owe no apology on that account now. We all of us, intoxicated with political liberty as we are, require the restatement in order to perceive the meaning of civil liberty.

And so, under the influence of conditions that are new, demand for law has all but swamped the ancient aspiration for liberty. Nevertheless liberty is, or ought to be, the object of law; for law is not in itself an end, while liberty is. Liberty is the priceless possession and the grand objective of civilization. Law is at best only a means, a minister. It represses, it restrains, it directs, it guides mankind; but liberty is its own reward. It is a principle of individual and national life the enjoyment of which is self-sufficient.

Yonder in Italy is Mussolini preaching another gospel—"Liberty," he declares, "is not an end, it is a means. Now is the time to speak of force. . . ." "I beg of you to show me in all the course of history a government that based itself entirely or exclusively on the consent of the governed, and removed all forms of force. Such a government there never was, and never will be." With the Italian Dictator, the State is the end. Order is the objective; law is supreme. It is the doctrine of the tyrant in all ages.

Mussolini and his doctrine of force is a symptom of the times, a symptom and a culmination.

And there was Lenine, and Trotsky with his Red Army providing, so they said, freedom with guns! Napoleon as a liberator cut a better figure.

And has not a secret society recently sprung up over-night throughout our land dedicated to force—either actual or by intimidation? A society that denies religious liberty, that arrests without warrants, and condemns without hearing and punishes under the mask? That proscribes on account of race or religion? If one questions whether we have lost the sense of civil liberty in America, let him meditate upon the acquiescence of our millions in this reversal, this flare back to the ages before Magna Charta. Let him contemplate our political parties catering to such an organization.

It is no wonder that under such circumstances there should arise a sense of the conflict of law and liberty, a realization that notwith-

standing all fine theories, the fact is, Law is interfering with instead of ministering to liberty.

To such a degree have we lost our sense of liberty as a national principle and aspiration, that so far I have nowhere observed so much as a remark upon the astounding fact that the Eighteenth Amendment to our Constitution is the only one abridging liberty, and one of the few such instances in all history. I mean, of course, no protest here. It is not in contemplation that I shall take any view of the question directly involved. What astounds the student of history is that we should have enacted an Amendment for the first time abridging liberty without extensive comment upon the fact. And I may remark that we now have submitted to the States a twentieth Amendment also abridging liberty, but there is no argument against it on that account. We are told that it will be detrimental to industry and that it is an interference with State's rights, but I hear nothing said in behalf of personal rights, which are of much more importance. I am merely citing evidence that we have ceased to think in terms of civil liberty.

I cannot, of course, in this paper undertake to enumerate the laws tending to impair our liberties in recent years. I may mention as typical the recent attempt of the Congress to declare that newspapers shall not publish certain public information, the innumerable inquiries into private affairs under authority of statutes, and the interminable series of laws regulating civil conduct; and by no means least the Tennessee proposal to regulate teaching. Nor may I forbear to mention that in the last election nearly five million votes were cast for a Presidential candidate who proposed to give the legislative power unlimited authority, by the expedient of enabling it to over-ride the Supreme Court. This implied the overthrow of every Bill of Rights! The evidences are too manifest to require elaboration.

In consequence of the excesses of legislation or so-called law-making we discern a rather voiceless or leaderless restlessness. The masses feel themselves circumscribed and hampered. Business complains. Here and there is an outcry against centralization, against bureaucracy, against too much government. One hears now a demand for State's rights, and again a plea for a return to local self-government. And, to be sure, there is a rather respectable protest in behalf of personal liberty. Whatever the form this restlessness takes, in fact it is the reaction of the spirit of liberty against a rapidly

accelerating encroachment of law. And so we realize the necessity for a restatement of the principles in which these forces may find a just reconciliation.

A further consequence of this excess of legislation is the breakdown of law, that is full of menace. Quite recently the Attorney-General¹⁴ of the United States (in an address reported by the Associated Press November 24, 1924) gave utterance to his sense of this breakdown, in the following paragraph:

"We disregard the principle that there is a point beyond which the restraints of positive law can not be carried without placing too great a strain on the machinery and agencies of law enforcement. We leave out of account the true relationship of the law to be enforced to the machinery for enforcing it. We build up our administrative machinery with ever-increasing powers and authority in administrative officers at the expense of individual liberty and freedom." To this testimony I may add that of the Governor of Pennsylvania that "the country is in the grip of contempt for and defiance of law."¹⁵

Be it remembered that the Attorney-General is the administrative head of the Department of Justice. He knows as no other what it means to place "too great a strain on the machinery and agencies of law-enforcement." He realizes the hopelessness of the task of enforcing laws "at the expense of individual liberty and freedom." The fact of his utterance, in the midst of many demands for law-enforcement, is of itself highly significant, but the fact that so little note has been taken of such an utterance from such a source at such a time is even more significant. It is likewise evidence that we have yet to realize the impotence of mere legislation.

I offer the view that our difficulty lies almost wholly in the misconception of legislation, in the confusion of the power to legislate with the law-making power. We ascribe to legislation a function that it is not equal to. We impute to it a character that is foreign to it. We look to it for consequences that it is incapable of. We have followed Blackstone and Bentham and Cicero, when we should have followed Demosthenes, Justinian, Carter and Coolidge. Law is not force; and force is not law. Law is custom, and custom is law.

Law as force has no place in a land of liberty—of freemen. It is to be discovered, not made; declared, not invented. Legislation

¹⁴ Mr. Harlan F. Stone, now an Associate Justice of the Supreme Court.

¹⁵ Address reported in Associated Press, November 9, 1925.

as the exercise of a State's normal functions is well enough; but legislation that seeks by force to regulate society is no better than the decrees of tyrants. Tyranny of a democracy or of a majority is tyranny as fully as though it came from a Czar and is no more to be tolerated. There will be no conflict of law and liberty where law is conceived of as custom, not force. When legislatures seek to discover laws rather than to make them, the cry for law-enforcement will die out—there will be no occasion for it. Doubtless we have imputed too much to the wisdom of the majority, we have conceded too much of power to those who could in one way or another get the most votes. We have been impatient for results, only to discover that our impatience has counselled us ill. We have overthrown the tyrants and taken their sceptre. Instead of breaking it, we have tried to make it stronger. But sceptres become tyrants only—they are awkward in the hands of republics, and not unlikely to destroy them.

“Men do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority. They must rest on the eternal foundations of righteousness.”

The only abiding law is the common law—the unwritten, living body of standards whose dwelling place is not the statute books but the hearts of men, whose origin is not in elections but human experience. It was the soul of England. Little else did the founders and fathers bring across the Atlantic, but they did bring the English Bible and the common law and an understanding love of liberty; and with these they erected our great Republic. The common law was not enacted or prescribed. It was not of force. It was of custom, and being of custom, it was vital, a living, dynamic thing of incomparably more power than legislation and arms or soldiers. Liberty and order and progress dwelt within it and proceeded out of it. In this common law dwelt and still dwells, not just a respect for liberty, but liberty itself. There is no paradox here—no conflict of law and liberty: The two are one. As we move toward the idea of the common law, as we seek not to make laws but to discover law in custom, in experience, we will find the way to vitalize law and to secure the blessings of liberty to ourselves and our posterity. In a word, whenever we shall become wise enough and patient enough to seek out our laws in the hearts of the governed, in which liberty is native, rather than in the whims of majorities, we shall discover that there is, despite all appearance, no conflict between civil law and civil liberty; that the two are one. It was under this conception of

law that English liberty took root and flowered. And I venture the opinion that under no other conception may we hold out the hope that either order or liberty will thrive. We have wandered unawares far afield, but once it is perceived that we are sacrificing our liberties to legislation, and gaining naught for the sacrifice, we may doubt not that the ancient vitality will burgeon out. The spirit of liberty may pass into eclipse but it will not lose its vitality. If force has today its supremacy, tomorrow liberty will retake her citadel as the "eternal spirit of the chainless mind."