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Repository Citation

Marvin B. Rosenberry, *Law and the Changing Order*, 9 Marq. L. Rev. 38 (1924).
Available at: <http://scholarship.law.marquette.edu/mulr/vol9/iss1/6>

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LAW AND THE CHANGING ORDER *

BY MARVIN B. ROSENBERRY¹

MANY persons are profoundly disturbed by the development which our law has undergone during the period since the Civil War. It is practically impossible for any citizen, unless he be a lawyer, to find the law, and even a lawyer is quite likely to go astray in any field except the one in which he specializes. Not only have legislative enactments been multiplied beyond all precedent, but numerous regulatory bodies have been created with vast powers—partly administrative, partly executive, and at least quasi-judicial. The law has many sources. The lines which separate one field of law and governmental activities from another are dim and wavering. Individual liberty, including the right of free contract, has been greatly limited and circumscribed. Many changes have taken place in the legal order, the significance of which is little understood by those who have not made a special study of the subject. On the one hand there are those who would preserve our law as it existed fifty years ago without change; and on the other hand, there are those who would greatly impair, if not completely destroy, our constitutional system.

Let us consider some of the reasons for these changes. As a basis of discussion and for the purpose of illustration, let us contrast very briefly a cross-section of American life as it was developed a hundred years ago in the Middle West, with a cross-section of the life of the same section of to-day. It is only within the last decade that we have passed from a nation predominantly rural to one predominantly urban. If we examine an average home of a hundred years ago, we shall find that all of the simpler processes of manufacture were carried on within that home. Baking, canning, preserving, weaving, spinning, dressmaking, making of ordinary clothing, and many other simple manufacturing processes were done within its four walls. Upon the farm were produced all the principal articles of food and it supplied most of the raw materials used in manufacturing. The slaughtering of animals, the preservation of meats, the making of tools of the simpler sort, were understood and practiced upon every farm. The family was an economic as well as a social unit. Every member of the family had a distinct responsibility for its success, for upon that depended the supply

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¹ Justice of the Supreme Court of Wisconsin.

of food, clothing and comforts of life for each member. This made for family solidarity, for a unity of family interest, for the upbuilding and maintenance of strong family ties. The home was the center of instruction. The family altar was a reality, not a myth. People lived out of doors more than in the house, and dealt constantly with the irresistible forces of nature. Each family was surrounded by other units whose interests were of the same sort. Between these units there existed a community of interest which rested upon a common experience, common desires and common ambitions. The family was but little dependent upon the adjacent village, though there were to be found the grist mill, the blacksmith shop, the wagon shop, the shoemaker's shop, the tannery and the woolen mill. These institutions, together with the local store through which came the silks, spices and other luxuries and semi-luxuries from the outside world, supplied all the needs of the community, and upon that simple basis society had been organized for hundreds of years. Dynasties might rise and fall, governments might come and go, but life flowed on in a steady, almost unvarying stream. Traditions, both family and national, were strong. The sense of personal rights and political responsibility were keen, sharpened as they were by the action and reaction of the frontier. There were great families who occupied in some respects at least the position of feudal lords, but they were few and far between and their aims, sympathies, purposes and ambitions conformed very largely to those of the entire group. It was for a society such as this that our Federal Constitution and earlier State Constitutions were framed.

Let us observe what has happened to this social structure in the last hundred years with the introduction of improvements in transportation and the coming of the so-called industrial age. One after another the simple manufacturing processes have been taken out of the home and out of the small community, and concentrated in large units, mainly in great centers of population. Even the farmer of to-day depends for his flour upon the great milling centers of the country. Shoes are made not by the village shoemaker, but in specialized manufacturing plants where forty or fifty or even a hundred people may work upon a single pair of shoes. Canning, preserving and baking have been taken from the home and are in the hands of large operators with hundreds and often thousands of employees. Not only have spinning and weaving long since left the home for the factory, but nearly every thing we use is made ready to wear or serve, involving a still greater extension of the factory system. The village blacksmith shop and wagon shop have become the automobile industry, upon which the country spends annually a sum equal to the national debt at the close of the Civil War. The local store

still struggles for existence in competition with chain stores and the catalogue houses. The ancient stage coach has given way to the modern railway train. Great organizations of employees have sprung up able to enforce their demands. The pressure for standardization and mass production is so great that Arthur Pound finds it difficult to say who is master—man or machine.

This change in our national life has come upon us with overpowering swiftness. Some indication of the rate of change is indicated by the fact that more iron and steel have been produced and used since 1900 than in all the previous history of the world. In the Middle West it has come with perhaps the greatest speed. We have passed within the span of a single life from a frontier agricultural community to a complex industrial society. The dominant note of the life of our day is struck not upon the farm, but in the city.

Let us examine a little more minutely what has happened to the family unit with the taking of all of these processes out of the home and rural community and into the factories. First of all, we must note that with the processes there have gone the members of the family who formerly did the work in the home, to do that work in the factory to which it has been transferred. As a consequence, the home no longer functions as it did a hundred years ago. One member of the family goes to work in one field of effort and another in a different field. There is, therefore, much less family solidarity. Diversity of occupation makes for diversity of interest. Family ties and restraints are much weakened. The shift from the home to the factory has resulted in the creation of a new set of human problems. These relate to education, social welfare in all its manifold aspects, the creation of character building agencies to supplement the home, the promotion of public health, and like matters.

With the increase of population and the increasing use of machinery, there has developed a change in the nature of our problems. Consider a single illustration. Under the conditions of a hundred years ago, the earnings of the family were received and distributed by the head of the family. While the earnings were the product of their joint effort, the family was so far a unit that its earnings belonged legally to and were in fact actually received and distributed by its head. If others not members were employed, all obligation to them was discharged when they left and their wage was paid. Those who were permanently members of the family expected ultimately to share the accumulations of the group through inheritance or by devise. The home is no longer, except in a very limited sense, a producing unit. It has become instead a disbursing unit. The processes of production are carried on elsewhere. The earnings of the individual members of the family are brought to

the home and they are there disbursed. Consequently the division of the proceeds of productive effort no longer rests with the head of the family, but with the management of the corporations which carry on the productive enterprises in which the members of the family are engaged. The struggle for a just distribution of these funds has created the wage question, which in its larger aspects is often denominated the struggle between labor and capital. This change or shift has created an entirely new set of relationships as to which there was no standard or tradition, and the consequent necessity for regulatory legislation of many kinds and sorts. The new relationships are in many particulars analogous to the old, but they are not the same. Under the old system, when a member of the family was injured, the duty of caring for him devolved upon the family and it was done at the expense of the family. At first the factory system made no provision for accidents to one of its family, so to speak. Consequently, within recent years, workmen's compensation laws have been enacted in most of the states to meet the situation. In the same way laws relating to payment of wages, establishing minimum wages, fixing hours of labor, prescribing working conditions, have been enacted in an effort to adapt ourselves to a life organized upon an industrial basis.

In view of the fact that we have to a considerable degree lost one social and racial tradition and have not as yet had an experience sufficiently long to gain another, it is not strange that there is in the public mind much confusion, that there is much misdirected effort, and in many instances, a total failure to visualize the situation as it in fact exists. Races and peoples have a strong tendency to carry forward the standards and traditions of the past. An example is the shaking of hands to bind a bargain, which has probably never had, certainly not for some hundreds of years, any legal significance, and yet every one of us would feel that a bargain upon which the parties had struck hands had a stronger sanction than it would otherwise have. So our people as a whole have a strong tendency to think in terms of the past rather than the present. While many of the leaders of political and social thought have quite clearly recognized the fundamental character of the trend of our time, it is only dimly apprehended by the great mass of our people. It may be said without disparagement that some of those whose apprehensions are quite dim, occasionally find their way into legislative bodies and into public offices. There they endeavor to force a complex industrial society into the legal and social traditions applicable to a rural agricultural society. To be wholly frank, it must also be said that many industrial managers have not yet realized the change in relationship and still regard their business as having no other than a private significance.

In an effort to readjust society to these fundamental changes, there has been the greatest outpouring of statutory law the world has ever seen. Statute is piled upon statute, administrative agency upon administrative agency, and to the great body of statutory law has been added a mass of administrative orders, with the force of law, until in the general confusion we have almost lost our place. The enactment of these various laws and the making of these various orders have given the world the most remarkable exhibition of the trial and error method ever seen. As a people, we are quick, inclined to be impatient, and somewhat superficial. We are not willing to wait for results and are restive under restraints, even though they have been set up by ourselves for our own protection. The crucial period in this process of readjustment will come no doubt within the next fifty years. No one can now regard the adjustment as nearing completion, nor can we be certain that the fundamental principles upon which it is to be finally worked out are as yet clearly marked out.

It cannot be truthfully said that all lawyers or even all judges have perceived the fundamental nature of our problems and guided themselves accordingly. The social trend of our time is fundamental rather than superficial. We are, so to speak, turning a corner in social development. We are in the process of passing from one great tradition into another. We are endeavoring to adjust the political and social concepts of an age predominantly rural and agricultural to one which is predominantly industrial and commercial. Human relationships have been vitally altered in many ways. If industrial society is to continue on its present basis, those who have gone out of the home into the factory must there have the safeguards, the guidance and the fair share of the proceeds of industry which they formerly enjoyed as members of a small economic unit, because no form of society can long exist which does not do substantial justice to its members.

We cannot crowd the present industrial order into the legal molds which gave the rural agricultural order its permanence and stability. They are two different things. The process of adjustment, however, must follow some legal principle. Before the process is completed, we must make a final choice as to the fundamental underlying principles upon which the new order is to be based, and we are to-day as a people engaged in doing that very thing. The choice will not be made at one time. It will be partly a matter of judgment, partly a matter of development and growth. The ultimate choice lies between our constitutional system which upholds the right of private property even under an industrial order, and a more or less speculative untried system, which in one form or another lodges complete control over our liberties and our

property in the state. It makes no difference by what name you call this second concept—names are immaterial. Nor does it matter how respectable a disguise it wears. Under our Constitution and the old order, we had attained to the highest degree of personal liberty and personal rights that has ever been enjoyed for any considerable time by any people within the historic period. We had escaped from the bondage of feudalism, from the tyranny of kings and parliaments, and safeguarded ourselves against the whims and oppressions of majorities. In face of the fact that with the coming of the industrial order, society has tended again to rearrange itself in classes, with those having the greatest financial power at the top and those having less financial power at the bottom, in a general way typifying the old feudalistic order from which we struggled so hard to release ourselves, there has again sprung up a demand for a release from constitutional restraints, and a return to parliamentary supremacy. It is calmly proposed to depart from a government of laws to a government of men.

One of the anomalous things is that although the Revolution of 1776 was as much a revolt against the tyranny of parliaments as against the tyranny of a king, it is now proposed to lodge in Congress, which is a parliament, the supreme power to do the very things which the Constitution was set up to prevent Congress from doing. The Revolutionary War was brought on as much by the Stamp Act, the Search and Seizures Act, and the Taxation Acts passed by Parliament, as by the Orders in Council made by the King and his ministers. While the Declaration of Independence was addressed to the King and Parliament was not specifically mentioned, Parliament was equally, if not more responsible than he, for the conditions which drove the colonists to action. It is now solemnly proposed that we return to the system, our escape from which we have supposed for one hundred fifty years to be our greatest blessing.

Whence comes the demand for this change of system? It is not too much to say that it comes from those who, having a clearer vision of the nature of the change which society is undergoing, are impatient because this change cannot be effected at once and completely. They are not willing to wait until the beginnings of a new tradition have been established. They wish the transformation to be made immediately. They wish to pull up the plant now and then to see if it is growing. Conceding that their motives are of the best and that they are actuated solely by a desire to promote the general welfare, can it be said that they act wisely? If here and there measures designed to aid in the process of adjustment to the new order are held to be in violation of constitutional restraints, that is no reason for throwing overboard the whole constitutional structure.

Many articles have been written to show that the power of courts to declare void laws which contravene constitutional limitations is derived from the Constitution itself. Certain it is that power is the only thing that distinguishes in substance our constitutional system from the parliamentary system of Great Britain. Whether we shall abandon our own system and return to theirs in whole or in part is a political question, a discussion of which is not germane to the matter which we are considering. It is not strange that among the most thoughtful and patriotic of our people there are differences of opinion. The deep-seated tendency which causes us to carry forward our traditional concepts of social and legal relations is so strong that it is difficult in many cases for us to distinguish between these concepts and fundamental constitutional principles. It is charged, and not without reason, that courts have in certain instances declared laws unconstitutional because they contravened the social and legal concepts of the judges rather than constitutional principles.

For instance, in *Adkins v. Children's Hospital* (43 Supreme Court Reporter, 394) the minimum wage law for women enacted for the District of Columbia was held unconstitutional because in the opinion of the court there was no ascertainable relation between the health and morals of women and their wages. In criticism of that decision, it has been said that whether or not there was such a relation was a question of fact, the determination of which was primarily for the legislative branch. Chief Justice Taft dissenting said:

With deference to the very able opinion of the court and my brethren who concur in it, it appears to me to exaggerate the importance of the wage term of the contract of employment as more inviolate than its other terms. Its conclusion seems influenced by the fear that the concession of the power to impose a minimum wage must carry with it a concession of the power to fix a maximum wage.

It is difficult to see how it can be said that statutes regulating hours of labor, working conditions, times and method of payment of wages, all of which limit freedom of contract, are valid and constitutional, and that a law which fixes a minimum wage is a "naked, arbitrary exercise of power," that cannot be allowed to stand under the Constitution of the United States. If what the Chief Justice says is true, the minimum wage law under consideration in the *Adkins* case was held to be unconstitutional because it contravened the traditional concepts of the rights of individuals held by the judges concurring in the opinion rather than a constitutional principle.¹ In some cases the court could see the rela-

¹ See Groat, *Economic Wage and Legal Wage*, *Yale Law Journal*, March, 1924, p. 489.

tion dealt with by the legislature; in the Adkins case it could not. The fact that an act of Congress or of a legislature may be held invalid by a court for some reason other than the plain violation of a constitutional provision, exhibits no doubt the greatest weakness in our system.

But what is the proper remedy? Because imperfection crops out here and there, shall we destroy the entire system? While it is at times charged that judges are ultra-conservative, reactionary, behind the times, and not in sympathy with the ideals of the majority, yet it is not charged that they are seeking power for their personal aggrandizement as executives sometimes do, or that they are playing politics, and shaping their decisions for their personal political advantage as legislators have been known to do. Are our hundreds of years of experience under the parliamentary system such as to warrant the people in conferring upon our legislatures—state and national—unlimited power? Has any other system over any considerable period of time produced better results than has ours? Conceded that courts have here and there erred and have mistaken their own legal concepts for constitutional principles, yet that constitutes no justification for a change from the constitutional to the parliamentary system. The Constitution itself provides a method by which mistakes may be corrected. Experience shows that the Constitution is not difficult of amendment, for the conscience of a people is not bound by a decision which contravenes its ideas of justice. Whatever system is adopted or devised, it must in the end depend upon the wisdom and capacity of the men who administer it, and therefore perfection should not be expected.

That the transition from the older more individualistic order to the newer more complex industrial order is well under way is indicated in numerous ways. A comparison of the laws enacted more recently in the exercise of the police power and for the regulation of individual and group activities with those enacted in an equal number of years in any prior period, makes the truth of this at once manifest. The order of development is of interest. First came a marked increase in the development on the material side, the production of consumable goods. At first increased social pressure was not noticeable, due no doubt to our constantly expanding frontier, which for a time equalized it. With the closing of the frontier, however, which is said officially to have closed in the last decade of the nineteenth century, greater and greater adjustments have been necessary and by statute and decision there has been a conscious effort to facilitate and direct the process of adjustment; hence the rapidly increasing mass of statutes in the last thirty years, which marks the second phase of the transition.

Last of all has come a willingness on the part of the great masses of

our people to adjust their thinking and conduct to the new situation. Here the tendency to carry forward the standards and traditions of the past is most strongly exhibited. Industry is manned by individuals who are yet thinking in terms of the old individualistic order. Whatever they are willing to do or say or have done or said as to the duty of others, they refuse to conform in their own affairs to the demands of the newer order. Our material growth and legal development have in many respects outrun the ability of the people to adapt their thought and action to the changing order. The development of statutory law cannot too far precede the acceptance of the new order by the people. If it does, there is consequent loss and reaction and the ground must be traversed again with greater difficulty than in the first instance. Witness the progress of laws to regulate the hours and wages of labor. In order to demonstrate that the process of adjustment is proceeding by the application of fundamental constitutional principles to the relations growing out of the new order, it is only necessary to refer to the great mass of decisions of recent years holding valid legislative enactments regulating hours of labor, wages, conditions of employment, sanitation, housing; laws prohibiting the adulteration of foods and drugs; zoning laws, trading stamp laws, decisions impressing property engaged in public service with a public use, and many others. Many people feel that in thus adapting our legal system to the demands of the newer order, we have departed from the fundamental principles of the Constitution. That is not true. The law deals with legal relations. We have altered our legal concepts so as to make applicable fundamental principles to relationships which did not exist before. For instance, the law of master and servant under the old order embodied the principles which now govern and will continue to govern the same relationship in the new order, but under the new order there was no tradition which threw upon the economic unit in which the individual was employed responsibility for injury and death. Therefore, the law has attached to that relationship responsibility on the part of the master in that respect. This works no change in principle but adapts the general principle which had operated under a similar social order to the conditions as they exist at the present time, and compels industry to bear the burdens properly and necessarily incident thereto as a part of the cost of operation. This in the main it had done in one way or another through all previous time.

The development has proceeded to some extent in a fragmentary and illogical way, but nevertheless it proceeds in accordance with certain underlying fundamental principles. Referring again to the relationship of master and servant, there has been an attempt to carry over into

the new order in the form of written law those duties and obligations which the master and the servant recognized and were accustomed to discharge as a matter of tradition under the old order. For instance, the safe place statutes are designed to insure for every workman in industry the same protection the head of the family would have felt it necessary to provide for his children and employes under the old order. It is because the change from the home to the factory broke the tradition that regulation of the situation by law became necessary. A new relationship was set up which had no such tradition. The beginnings of a new tradition are apparent. Profit sharing schemes, representation of labor in management, industrial insurance, plant organization of various kinds, are indications of an attempt to solve the problems of adjustment by mutual effort rather than by more rigid coercive statutory measures. The underlying principles along which development should proceed are indicated by Dr. Carver in his *Essays in Social Justice*² as follows:

It may as well be admitted that the old liberalism erred in assuming a general harmony of interests and in concluding that government control and regulation should be limited to mere protection from violence. The new liberalism must correct this error by recognizing the conflict of interests and extending the control of government to all cases where individual interests conflict. The new gospel of individualism must therefore proclaim three things: 1. The absolute necessity for the suppression of all harmful methods of pursuing one's self-interest. 2. The absolute freedom of the individual to pursue his self-interest in all serviceable ways. 3. The absolute responsibility of the individual for his own wellbeing, allowing those to prosper who, on their own initiative, find ways of serving the community, and allowing those who cannot to endure the shame of poverty.

If the process of adjustment proceeds along these lines, there is no reason why the purpose of the Constitution to promote the general welfare and to secure the blessings of liberty to ourselves and our posterity should not be achieved in an orderly way under constitutional restraints.

In this transitionary period, we are more and more thrown back upon fundamental principles. The difficulty is that many persons seek to apply these principles to the new order in exactly the way they were applied to the old order. If the change from the one order to the other had come more slowly, the adjustment would have been much easier. In no field is the maxim "make haste slowly" more applicable than in the development of the law. However, we must meet conditions as they are and not as we would like to have them.

We must adapt our thinking and our conduct to social facts as they

² Page 159.

exist. We may some day free ourselves from the influence of some of the fallacious political concepts of the eighteenth century. While in a very real sense government rests upon the consent of the governed, the activities of man are limited or governed in innumerable ways to which he is never asked to consent. The compact theory of society should never have had a place in our juristic thinking. It may have served a useful purpose, but many unwarrantable inferences are derived from it which have no application to modern life, if indeed they were ever applicable at any time. We are members of one body and we must, in the face of that fact, take up and discharge our appropriate functions. We are not unattached individuals, wandering in social space, giving our consent here and withholding it there. What we need in the field of jurisprudence is more thinking with reference to the facts as they exist and less exposition of eighteenth century philosophical concepts. We need a clearer apprehension of what is necessary to do justice under the present order and less vindication of the concept of natural rights under the old order.

We must restate our ideals in terms of our present day experience. Above all we must not substitute restraint and oppression for liberty, exploitation of class by class for justice, or, in the name of equality, restore class privilege under the law.