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Broad Fields of the Law

John Van Voorhis

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THE BROAD FIELDS OF THE LAW*

John Van Voorhis†

There has never been a time when the lives of people have been governed by so many rules and regulations. Never have there been so many lawyers. Paradoxically, in spite of the existence of so much law and so many lawyers, it probably never was harder for a lawyer to give sure advice to a client. Paradoxically, also, as the people's dependence on accurate analyses of the many laws and kinds of law which regulate their activities at so many points increases, the variety of the work of the lawyer seems to be shrinking. The lawyer is either becoming a specialist, or, if he remains a general practitioner, his work gravitates toward negligence and matrimonial cases, real estate transfers or estates. At least this is true if we are to judge from the kinds of litigation which form the bulk of the calendars of the trial courts in civil cases. Even in the appellate courts, despite the volume of appeals, the stream of litigation seems to be thin when contrasted with the whole field of justiciable controversy in all aspects of life. Agnes Repplier once published a collection of essays under the title "Points of Friction." It has seemed to me that all points of friction in human relationships furnish grist for the lawyers' mill, except some arising from the assertion of naked power, and that the profession of the law and the jurisdiction of the courts should be broad enough to include them. Nevertheless, courts have a way of limiting their jurisdictions, and lawyers tend to restrict their practices to the more lucrative matters, so that one sometimes wonders whether as a profession we may not be getting outside of the main current of the legal life of the people. If law refers to rules or modes of conduct made obligatory by some sanction that is imposed and enforced by a controlling authority, as Webster's Dictionary defines it, it covers more territory than matrimonial or negligence litigation. It covers more than is reflected by the reports of the New York Court of Appeals or the Appellate Divisions or the Federal courts.

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† See Contributors' Section, Masthead, p. 558, for biographical data.

The broad field of law may be illustrated by tracing events which, in the daily life of an individual, are subject to legal control. The master of the house gets up in the morning, in a home which was once said to be his castle. It is a house that was constructed under a building code, with its use, yard area and set back line conforming to the local zoning ordinance and tract restrictions. He performs his toilet with facilities that have been approved by sanitary inspectors under a sanitary code, and with the aid of lotions complying with the Pure Food and Drug Act; he puts on clothes manufactured in a union shop industry, eats meat approved by food inspectors and drinks coffee on which the import duty has been paid or milk that has been required to be pasteurized, contains the requisite fats and solids and has been marketed under the Agriculture and Markets Law. Before crossing the street at the corner so as not to jaywalk, he says goodbye to his wife and children who are bound to him by intricate legal relationships. He drives his registered automobile under his operator's license, or takes a bus in which he pays the fare fixed by tariffs approved by the Public Service Commission. If he is the proprietor of his own business, it may be conducted under a license from some board or commission. If he is an employer, he has to comply with wage and hour laws and factory laws, provide social security in its various forms, abide by union contracts and labor relations board rules and orders, carry different kinds of insurance and be subject to the Workmen's Compensation Board. If he sells securities to raise capital, they will probably need to be approved by the SEC. Depending on the nature of his business, he will be subject to regulation by some administrative body as to prices, percentage of the total business he may transact in the industry, and, always, to the General Business Law. He may need to comply with rules of trade associations exercising quasi-governmental powers, such as the milk producers associations. He must, of course, keep detailed records for tax returns, and, if controversy ensues, be subject to administrative control through the Internal Revenue Service.

If our friend is an employee, he may have to comply with company law, such as the operating rules promulgated by railroads, factories or other large organizations, and be subject to supervision by his union shop steward under the constitution and by-laws of his union. Compliance with the substantive and procedural provisions of labor contracts will be required of him. His wages and fringe benefits, promotion or discharge, may depend upon his close observance of these rules of conduct in a status in some ways resembling that of a public employee under the Civil Service Law. The sanctions making obligatory rules or modes

of conduct, under Webster's definition, may be and often are imposed by other private or semi-private controlling authorities, e.g., corporate charters and by-laws, insurance policies, corporate indentures, wills, trusts, covenants in deeds, and the like. Labor contracts partake of the nature of law, both substantive and adjective, and are usually implemented by broad arbitration clauses which, for practical reasons, are designed to confer upon impartial chairmen the power to legislate in fact if not in name, as well as to find facts or interpret. This kind of law is studied and followed carefully by many a man or woman who never needed to know about the statute of frauds or the rule against perpetuities. It represents what is law to them more than many pages in the statute books. A person cannot die without entailing a host of administrative consequences. These are but a few of the many types of rules and regulations by which people are surrounded, which are vitally a part of what constitutes law and order today.

It is unnecessary to labor the point that law and the practice of law comprise more fields than would have been touched a generation ago. Many specialized forums for the administration of law are necessary. All of these fields are, or should be, within the province of lawyers. Some twenty years ago a prominent lawyer, in an address entitled "Newer and Greener Pastures," expressed the belief that administrative law, although still in its infancy, was where the principal future of practicing lawyers lay. Not infrequently older types of litigation have proved to be less burdensome and more immediately remunerative. Still, if the legal profession means to keep abreast of the times and fulfill its function of guiding and helping people through their controversies in life, its members must embrace these new situations with imagination, courage and, sometimes, with temporary financial sacrifice. What has given prestige to the profession is typified in Bellamy Partridge's biography of his father, where he says that when people in his community had minor troubles they prayed to the Lord, but when they *really* were in trouble they consulted Samuel Selden Partridge. That sort of reputation has made the profession honored and trusted, and if it is to continue, lawyers must be prepared to help effectively and without undue cost wherever people find themselves in danger of being strangled by the intricate web of modern organized society.

If massive buildings and immense areas of floor space are any measure of the dimensions of work, a look at the Pentagon in Washington and a walk along Constitution Avenue or Pennsylvania Avenue toward the Capitol is enough to demonstrate that, physically speaking, these great houses of administrative law dwarf the Houses of Congress and the

United States Supreme Court. The state capitols, and the cities, counties, towns and villages tell a similar tale. Dimensions of floor space are not necessarily an index to the relative importance of the function, but they do illustrate what a huge establishment administration and administrative law have become. This tremendous institution has grown quietly, with little of the sound and fury of political campaigns, until it has come to overshadow the legislative and judicial branches of government. The men and women by whom it is administered, wisely and well for the most part, are frequently and appropriately appointed under the civil service, holding tenure indefinitely during good behavior. Sometimes their functions are quasi-judicial; often they are also quasi-legislative and quasi-administrative. This has been a necessary concomitant of the abandonment of laissez-faire, resulting from increase in population, rapidity in transportation and individual and mass communication, mutual interdependence in industry, automation and from the social trends of the day. It marks, incomparably, the greatest change in the practice of law and the administration of justice in our generation.

Administrative law is not a single system, but a composite of substantive law and procedure operating through agencies often created at random under the spur of public or political necessity, and frequently fashioned to give effect to the will of dominant and often competing pressure groups. The functions of these agencies are so diverse that no single procedural or juridical system can be devised that will serve them all. Common lawyers tend to view this sprawling edifice with disfavor or suspicion. Charles Dickens, more than a century ago, wrote a novel describing how English bureaucracy (which he dubbed the Circumlocution Office) threatened the future greatness of England by its repressive effect upon spontaneity and private initiative. However much we may lean toward what Dickens had to say, modern life is too complex to be conducted under laissez-faire, or for its disputes to be decided wholly according to the method of the common law. Reforms may be in order in the Circumlocution Office, but administrative law has too many valid reasons for existence to be abolished.

A good deal of the trouble which lawyers have when confronted by administrative law stems, perhaps, from an idea that all quasi-judicial or administrative controversies must be tried and decided by the common law method. Very possibly that should be done to a greater degree than would meet the approval of some administrators. The idea that everyone is entitled to a hearing, to be confronted with witnesses with the right to cross-examine and to call witnesses of his own have their origin in common law concepts. Many of these English due process inheritances are

valuable and not basically outworn. But in the haste of our modern civilization it is impossible to be as deliberate as in sixteenth century England. The challenge is now to the ingenuity and adaptability of the American lawyer to devise ways and means of preserving the virtues of the traditional Anglo-American law, without sacrificing the continental innovations which have helped to cope with our rapid, more specialized and more socialized system.

Certainly there are controversies in the courts where the traditional system should be almost entirely preserved. On the other hand, other controversies are better adapted to being decided by administrative law or arbitration. Perhaps even in the courts themselves abbreviated procedures could be used for some cases. The City Court building in Rochester was once surmounted by a statue of Mercury. The god of speed was, on the whole, a satisfactory symbol. Speed in the decision of some kinds of controversy, especially in the case of small claims or certain commercial disputes, is more important than abstract justice, and speed need not mean that justice goes awry. Even in the case of arbitrations and administrative proceedings, which are supposed to be, and sometimes are, more expeditious than court procedure, the training of the lawyer can be of immense value in the enforcement and protection of rights by the formulation of a streamlined practice combining speed with fairness and throughness.

Lawyers are noted for their ability to face realities. Our work makes us realists. Thus we should realize that administrative law is not just a permanent institution. It is increasingly likely to become the main stabilizing force in our organized society. Newspapers are called the fourth estate. If we were to reclassify the other three estates as being the chief executive, the legislative branch and the judiciary, then those responsible for the handling of administrative law would at least be entitled to be called the fifth estate. And this fifth estate is moving upward in the scale.

The elective franchise is greatly cherished and praised in the United States. I do not minimize its importance. But the theory underlying representative government is that the people understand the functioning of government, and know what is good and what is bad for the commonweal. If the ramifications of government become too intricate for the voter to be able to understand what belongs to the public good, or if the electorate confines itself mainly to voting on a selfish personal or group basis, the foundations of representative government are undermined. Regardless of written constitutions or election procedure, such a condition is bound to divorce the management of public affairs from the electorate. It necessarily means that elective officers are chosen with

less attention to what they will do in basic matters after being elected, and also that the functions of government will be increasingly exercised by appointive officials and employees. These developments have been accelerated in recent years. It is an inevitable trend which adds to the power and influence of administrative officials holding tenure during good behavior. As the political, economic and social fabric of the country has become more complex, it has become so difficult to understand that the voter has almost given up trying to analyze the deeper and the long range effects of public measures or policies on the whole body politic. It is so hard to know what is best for the country or even the locality that, except in times of war or other stringent emergency, the average person concerns himself mainly with attractive slogans or with how he thinks what government does will affect his personal or class interest. The tendency is to concentrate on short term measures. Public spirit is not dead but bewildered. It stands to reason that increasing strains have been, and will be, placed upon what Lincoln described as government of the people, by the people and for the people, if, as time goes on, effective appeals to voters bear increasingly less relation to the operative facts of government or the true national or local interest, and consist more and more in appeals to prejudice or other irrelevancies. One may say for courts and administrative tribunals, that the arguments concerning the problems presented there are usually addressed to the real merits of the controversy.

Our people have been noted at times for showing genius in government. Perhaps the development and increasing stature of administrative law has been assisted by an intuitive realization by the people that it is needed to maintain continuity and stability in areas of government that are less touched by the elective franchise. The familiar cry that certain bodies or institutions be removed from politics is equivalent to saying that they should be removed from the reach of the elective franchise. If administrative law extends increasingly beyond the reach of the elective franchise, that furnishes the greater reason why it should not be beyond the horizon of lawyers and of courts.

Observing the fickleness in past years of French politics, and seeing cabinets rise and fall there without settled purpose, one notes the election of General DeGaulle, and wonders how it could have happened that France has staged what has been described as the most notable economic recovery in Europe since the Second World War. Such a recovery, impossible without more stability in government than has appeared in the headlines of the newspapers, seems to have been under a governmental framework furnished mainly by the French bureaucracy. The United

States is not as volatile as France, but even here our elective officers may come to be overshadowed by the American bureaucracy.

Administrative law should be regarded with the utmost seriousness, first, because it has come to occupy the center of the field of law as it affects the public. Second, it should have our best attention because there are few institutions which cannot be improved, and it certainly is no exception. James M. Landis, the first chairman of the Securities Exchange Commission, which has been considered to be one of the best and most useful of the administrative agencies, once wrote that an administrative agency ought to have a bias in favor of the kind of function it was created to perform. One can understand and agree, in a sense, with what was meant. But now that Mr. Landis is no longer Dean of the Harvard Law School or Chairman of the SEC and is a busy practicing lawyer, one wonders how he might supplement that comment after being confronted (as every practicing lawyer is) by conflicting rulings of different administrative bodies established at the instance of conflicting pressure groups which are animated by conflicting "biases" concerning what ought to be done. Another difficulty in this field is how to check the spread of that progressive disease known as "Parkinson's Law." Similarly, delicate questions constantly arise where it is claimed that bureaucratic action impairs constitutional rights, privileges or immunities. Lawyers and judges should direct their most discriminating attention toward these problems, rather than relieve their feelings by heaving broadsides against administrative law or ignoring it altogether. Otherwise we are likely to find that the laws which affect most intimately the greatest number of people are being fashioned and administered with scant regard to legal values or tradition.

The more fundamental and final the decisions of these bodies are, the more necessary it is that they be integrated by supervision or review. That can only be accomplished if it is accompanied by an understanding of the problems with which the administrators are required to deal. They sometimes complain that if administrative decisions are reviewable in court, the courts will be likely to insist that they conform invariably to common law standards which may not be adapted to the purpose at hand. The courts themselves, often sympathetic to the administrators' point of view, have frequently taken a hands off attitude, leaving everything to the board or commission. There are some matters which courts cannot possibly review. On the other hand, courts should not renounce jurisdiction, as they sometimes have in spite of statutes seemingly to the contrary, solely because the dispute arises in the field of administrative law, any more than they should endeavor to review everything within the

competence of such tribunals. In France, the birthplace of administrative law, there are courts whose function is to supervise or review under the principle of *stare decisis* the performance of the functions of administrative officers, in so far as these dispose of private rights including property. It is not a case of reviewing all or nothing. Perhaps special tribunals should be established in the United States in more instances, such as the Tax Court or the Court of Customs Appeal. But whether the power of supervision or review be confided to specialized courts or to the regular courts, adequate procedures should be applied. Thought should be devoted to attaining greater coherence in this field, to avoiding conflict or competition between different agencies, and to relieve such tribunals from the embarrassment of outside intervention or importunity which can hardly be a satisfactory substitute for review.

It is an interesting paradox in English legal history, that judges who, in the beginning, were sent out by the King to establish uniform laws common to the realm, should have built the foundations upon which private personal and property rights have come to depend. The Court of Chancery later went through a similar metamorphosis. So, it may be hoped, our administrative tribunals, although wielding sovereign powers as part of the executive branch, may come to be pillars of essential private rights and liberties in the tradition of the great judges who were sent out under royal authority to subdue their country to the will of the King, and who ended by establishing the English common law and chancery. The content of the common law and chancery decisions is altered, but their method and spirit are not dead. Socialism cannot exist without bureaucracy, but a well ordered bureaucracy does not need to spell socialism. It remains to be seen whether the genius of the American people, aided by American administrators, judges and lawyers, will be able to repeat in different form in the modern world what was accomplished in England in the great days of the formation of common law and equity.

In all of the broad fields of law that I have mentioned, of which administrative law is perhaps the most far reaching, the public deeply needs the intelligence, experience and stamina of lawyers. But law is not the private property of lawyers, nor is life carried on for the sake of the law. The purpose of law is not to stifle, but to order and adjust human relationships so that, with due regard for custom, people may have life and have it more abundantly. On that hangs all the law in the corpus juris. To promote it is the dedicated function of bench and bar.