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A Lawyer Looks at Liberty

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A LAWYER LOOKS AT LIBERTY

CLARENCE E. MANION*

The Law has been defined as "The Perfection of Human Reason." This, of course, is a highly idealized definition. The Law often falls short of perfect reasonableness. Nevertheless reason and logic constitute the warp and woof of the whole fabric of our jurisprudence. In the strict determination and application of the Law, emotion—the natural enemy of reason—plays not part at all. In the courtroom, oratorical pyrotechnics are seldom permitted to obscure the real points that are at issue in a particular case. The trial of a lawsuit is predicated upon the pleadings and the art of formal pleading is as completely logical as the science of mathematics.

Before any trial begins the controversy between the litigants is narrowed by pleas and counter-pleas until the basis of the complaint or petition is brought into the narrowest and clearest focus possible. Thus what the layman has long regarded as legal quibbling is really an indispensably necessary diagnosis of the dispute by a tested and accurate process of elimination. Since the Law is the science of reasoning and the art of applying undiluted reasonable conclusions to individual cases of controversy, we have a right to assume that lawyers are by habit and inclination—if not by their own very natures—*reasoning* men and women. Logic and Law being so inextricably fused together it would seem to follow necessarily that the legal profession stands more or less discredited throughout any reign of popular emotional hysteria. By their own nature and profession, lawyers are committed to the laborious and difficult task of clearing and keeping open the purely *reasonable* approaches to all great public questions and to the related task of guarding these approaches against the destructive floods of sentimental emotionalism. If he is really true to his "Jealous Mistress" the lawyer should be alert to defer the trial of any great public question until all of the issues are properly joined in a small clear compass where some concrete thing is alleged

* An address delivered by Prof. Clarence E. Manion, Notre Dame Univ., College of Law at Fort Wayne, August 23, 1940.

for on the one hand and denied on the other. Such a compass would be water-proofed against the tides of emotion and the issues could thus be debated upon logical rather than upon psychological considerations.

My point is that if there is justification for the system of formal pleading before trial in a courtroom where the effects of the decision are usually limited to the litigants, then there is a clamorous need for such a system where the welfare of the entire country is hinged upon the final determination of the controversy. This suggests the presently burning question of our National defense in the center of a world at war.

It is unfortunate, of course, that formal pleadings cannot be required before resort is had to modern trial by battle between nations. In the absence of balanced pleadings the real issues of war are always hopelessly confused. Emotion promptly disarms Reason and then proceeds to appropriate its vocabulary. At present, it frequently follows this up by relegating Reason into the ranks of the Fifth Column. When mentality has been completely overcome by sentimentality it remains for the historians of subsequent generations to discover what the shooting was really and truly about.

The present war is certainly no exception to the rule. Its development have generated a strong *feeling* of insecurity in and for the United States. I use the term "feeling" advisedly. It is no longer possible to consider the pros and cons of American security with calm philosophic detachment. Each of us has certain well defined convictions with reference to steps that should be taken to safeguard the United States but none can truthfully say to what extent these convictions are based upon emotional impulses as distinguished from purely reasonable deductions from actual facts. It may be impossible to distill a clear solution of reason out of the boiling pot of present controversy but I think that lawyers owe their country the duty, of honestly making the attempt.

I clearly remember the first theatrical performance that I ever witnessed. I remember it for the sole and simple reason that I was then just learning to read and so I laborously spelled out a sign on the wall near the place where I was seated. It read, "In case of fire *walk*—do not run—to the nearest exit." The person who composed that sign well knew the prevailing tendency of human nature to *feel* rather than

think in the face of a terrifying crisis. He understood that the difference between calm calculation and hysterical emotion might easily be the difference between life and death. You will observe that he did not direct the patron to remain in his seat. He advised him to get out—but to do so calmly, reasonably and without the panic-stricken haste that would defeat the primary purpose of a successful escape from the hazzard.

This important lesson packed so compactly into the single sentence of that sign, might be very helpful to all of us in the United States today. I realize that it is difficult to be as calm at the mouth of a cannon as we are at the door of a drawing-room but there is no *reason* why we should be more or less calm in either predicament. We shall not defend America any better by suddenly becoming less logical and more emotional. On the contrary, now is the all important time for cold dispassionate thinking, reasonable analysis, constructive argument and effective work.

We should begin by being ashamed of our tendency to make meaningless slogans supply the deficiencies in our popular patriotic understanding. If we are to build a proper case for the defense of America and Americansim we must first of all know and understand what the real issues are. *We cannot defend what we are unable to define.* We must know that there is a distinctively individual quality about the essence of our American system. That quality is completely unique. It is not shared by any other government, state or nation in the world. It is most emphatically not described by such expressions as "Democracy," "Civil Liberties," "Our Form of Government" and "The Constitution." It is certainly not embodied in that latest current catch-phrase "The American Way of Life."

These expressions are vain attempts to emotionalize a concept that is thoroughly rational, entirely logical and completely understandable. They are developments of the modern school of advertising which teaches that the way to sell a complicated chemical compound is to call it by a short musical name for the reason that the trade can neither remember nor pronounce the real word. Nevertheless, as many advertisers have recently discovered, such simplified spelling is often used by unscrupulous competitors to palm off substitutes in the place of the genuine article. This is the very real

danger that threatens the success of our case for the defense of Americanism. Because of a pretended similarity of issues we may be deluded into consolidating our cause of action with the distressed cases of other defendants elsewhere in the world. This danger is the compelling reason for the most careful distinction of our own precious case.

For instance the cause of Americanism is certainly to be distinguished from the cause of Democracy, so called. The term "Democracy" has now been broadened out of all reasonable depth. It is quite generally and emotionally used to describe practically every government on earth excepting that of Italy and Germany. In the so-called democratic countries we find caliph and commissar, shah and satrap, knight and king, liege and lord. The only common denominator of this strange and miscellaneous company is a more or less loosely defined system of periodic elections in which varying proportions of the population are permitted to vote for certain persons or certain things. In this group there are a relatively few states in which the government is genuinely popular, that is, states in which the rulers or at least the legislatures are chosen by vote of the people. Nevertheless, none of these democracies has ever attempted to embrace the distinctively unique quality of our American system.

Americanism certainly means more than mere "Civil Liberties." Political science defines civil liberty as the liberty of men in a state of society, restrained or abridged in-so-far as is necessary for the good of that state of that society. Thus civil liberty is a purely relative term. There are varying amounts of such civil liberty permitted in all countries of the world. The fact that a woman may now appear unveiled upon the streets of Angora is evidence of increased civil Liberty in Turkey. Civil Liberty is the freedom of movement allowed to any subject by permission of his government. This is definitely not the type of liberty that we enjoy in the United States. I am at a loss to account for the wide currency of the term "civil liberty" in the literature that has come to my attention during the past year except upon the basis of hysterical misunderstanding. It is possible of course that the watch dogs of these civil liberties so called, wish to protect certain liberties while they disregard all other liberties as unimportant. Nevertheless, there is nothing in the documentation of our American constitutional history

to support the contention that one liberty is any more important than another, or that the condition of liberty was ever thought to be subject to division or classification. The civil liberties drive is consequently off the base of logic and well into the field of emotionalism.

Is "Our Form of Government" the issue in the case for the defense of Americanism? Only to the extent that a bottle might be involved in a dispute over a quart of liquor. The form of our government is very similar to other forms of government in many parts of the world. Twenty years ago it became fashionable for newly established self-styled republics, to adopt many of the features of our form of government, with certain improvements that were theoretically calculated to make these new governments even more democratic than our own. One of these was the Republic of Germany. Be it remembered that Adolph Hitler rose to power under the forms of the new German Constitution and rules Germany under that unamended form of government at the present time. A *form* of government is no insurance against dictatorship. Unless the form has substance and content it may simply serve as a death mask for human freedom.

Those who refer to "The Constitution" as the issue in the case against Americanism should be reminded of the fact that we have more than one constitution in the United States. We have forty-nine Constitutions to be exact. Those who think of Americanism in terms of "The" Constitution are undoubtedly thinking about the Constitution of the United States. They forget that the State Constitution touches the average American citizen one hundred times while the Federal Constitution is touching him once. Not one person in ten of those who write syndicated newspaper columns or who lecture us regularly and sonorously over the radio on the virtues of the "American Way of Life" make any pretense of understanding the Constitutional division of protective responsibility between the State and our Federal government. A Gallup poll would doubtless reveal that not one person in one thousand understands that not one bill of rights, but two bills of right—State and Federal respectively—complement each other in the complete protection of American Liberty, and that for the practical purposes of every-day life, the bill of rights in the State Constitution is far more important

than the first 10 Amendments to the Constitution of the United States.

These elementary propositions of American civil government are not too complicated for the average citizen but they are apparently much too involved for the use of those who mould what passess for American public opinion but which in most instances is American public *feeling*.

Of course the Constitutions—State and Federal—and their respective Bills of Rights are important collateral issues in the case that we are defending. But neither *the Constitution* nor the *Constitutions* are the direct issue in this case. The Constitutions are collateral issues in the same sense that a fence or wall would be an important issue in any attack upon a house which the fense or wall surrounds. Like the fence, our Constitutions are not ends in themselves. They are merely the methods and means for the protection and achievement of the real end. If you were looking for the master of the house you would not expect to find him living on the fence—and by the same token when you are looking for that much misunderstood, unique quality of our American System which is the real master of our establishment, namely American Principle, you will not find it in the Constitutions.

By this time I daresay that your patience is entirely exhausted. If American Principle is not to be found in any of the popular misconceptions that I have attempted to dissolve in the acid of lawyer-like logic, then where in Heaven's name *is* American Principle to be found, how is it defined and what is it called?

The word principle should give us the clue—principle comes from a Latin word "principium" which means "a beginning." If we are to find the principle of any thing we must go to the beginning of that thing—and if we wish to find the principle of government in this country we must go back to the beginning of the United States. When we arrive at the cradle of our republic we may see and examine its birth certificate. It is a strangely familiar and a, *now, deliberately forgotten document*, known as the Declaration of Independence.

Before any United States Constitution, State or Federal, was written—before these or any other forms or methods of American government were determined upon or seriously considered, the Fathers of this Republic told the world in

unmistakable terms just what the *objectives* and *ends* of all American government were to be. In other words, before they chose the form of the vehicle or the roads they were to travel over, they first decided and told the world just *where* they were going. Vehicles and roads might be subject to change with time and circumstance—but objectives are fixed and unchangeable. It is the fixed and unchangeable *objective* of a government that constitute its principle, and in the case of the United States this principle and objective likewise constituted the reason for the American Revolution from England.

Here is the objective—the principle of American Government—its object and its end as it was stated with the first breath of the new life of this Republic: “We hold these truths to be self-evident—that all men are created equal—that they are endowed by their creator with certain unalienable rights—that among these are life, liberty and the pursuit of happiness—that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed.” Here is the most profound, the most deeply philosophical crede of all political science. Here are the self-evident truths that distinguish the American Constitutional System from any other government on earth. Here for the first and only time in human history is man properly and officially oriented with respect to his creator, his fellow man and his government. It is altogether impossible for me to pronounce the self-evident truths of the American Declaration of Independence deliberately and thoughtfully without a subconscious acknowledgment of their divine inspiration. Unlike many of the passages in Holy Writ, these Declarations are subject to but one interpretation—namely, that in the United States, government is man’s democratically chosen agent for the protection of God’s gifts. If Hitler should read the self-evident truths of the Declaration of Independence, he would understand why his political theories are so abhorrent to us, for one cannot subscribe to the self-evident truths of the Declaration of Independence and hold that man is the mere creature and servant of the State. Totalitarianism, which considers men and women as mere bricks, mortar and materials to feed the construction of a bigger and more powerful state organization, runs head-on into this fixed, imperishable American principle. This is the *reason*, and the

only rational logical lawyer's reason, why we must spend every effort and exert every energy in the Defense of America and Americanism from *each* and *every* form of Alienism. No other nation on earth has ever been bold enough to officially and humbly acknowledge God's creation of the individual soul, and dedicate its government to the protection of the God given rights of God's creatures. Consequently, in no other country on earth does the individual citizen have rights that his government is bound to respect. In no country on earth, except the United States, can there be such a thing as a law—a decree—an executive order or command that is void for the reason that it trespasses upon the God-given unalienables of the individual citizen. This doctrine of unalienable rights, as set forth in the Declaration of Independence, is the root and stem of judicial review—indeed it is the *spirit* of our entire American system of government.

It is these same self-evident truths of the Declaration of Independence that give *substance* to the form of American government—State and Federal. From the principle established and declared in those truths comes the poise and purpose of our entire system of laws, public officers and institutions. Here is not civil liberty merely, but the full complete God-given liberty of each person restricted only by his God-imposed duty to respect the equal God-given liberty of others. Here is not merely the American way of life. Here is the American why of life. Here, in brief, is the issue in our precious case, stripped of all surplusage and emotional irrelevancies. The way to defend it seems plain and logical. Every American must reaffirm his faith in these declarations and dedicate himself to the cause of their complete protection. Those of us who lack faith in the purpose and end of this government can hardly be sincere in their professed devotion to its forms and methods.

If by any unhappy chance the people of our country no longer believe these truths to be self-evident, then in that case we are certainly doomed and all of the emotional false faces that we can put on will not save us from the chaos of a mad materialistic stampede. But for myself, I have every confidence that now as in 1776, the American people are ready to defend the truth of these declarations with their lives, their fortunes and their sacred honor. In any event the time has come for all of us to stand up and be counted.