

Winter 1970

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Recommended Citation

Jaffee, Louis L. (1970) "A Pilgrimage: Reflections on a Career in Administrative Law," *Indiana Law Journal*: Vol. 45: Iss. 2, Article 2.
Available at: <http://www.repository.law.indiana.edu/ilj/vol45/iss2/2>

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A PILGRIMAGE: REFLECTIONS ON A CAREER IN ADMINISTRATIVE LAW‡

I am here in response to claims upon my esteem and affection for Ralph Fuchs, whose professional career as teacher and practitioner largely parallels my own. That fact has given me my theme—my pilgrimage as lawyer and teacher. I intend to describe not so much what has happened to me but how the world appeared to me in the past and how it appears now.

It all started here in Indiana at Terre Haute some thirty-four years ago. As a lawyer for the recently-created National Labor Relations Board, I was sent into the field to track down violations by employers of their employees' right to organize. I was a zealous son of the New Deal, although not an unquestioning one. My associations were with the left. A few of my closest friends were communists, some known to me to be such. They were, of course, to the left of the New Deal and would say, "We'll give the New Deal six months to deliver." I could never quite commit myself intellectually and emotionally to a revolutionary stance, and so in the end my world view was the view of the New Dealer, what we would call the liberal.

How did we see the world? How did we analyze its predicament? What were the remedies we prescribed? What was our role as lawyers and citizens? Our version was structured primarily in economic terms. Man to us was economic man, the construct of Adam Smith; the utilitarian man, the construct of Bentham; but above all he was the proletarian man, the Marxist man, the victim of an inherently vicious system of capitalist production. We were, of course, conscious of strain and contradiction. Most of us were also students of John Stuart Mill. We held to the credo of liberal democracy; our alliance with the committed Marxist was an uneasy one. But the nature of the emergency, the Great Depression, and our analysis of its causes convinced us—for the time at least—that economics was primary and that valid political organization was a consequence of correct economic solutions rather than a co-equal value.

There was still one other aspect of our experience which we either failed or refused to relate to our active vision which clearly challenged the primacy of economic man and its promise of amelioration. We had become passionately attached to a literature which was basically pessimistic. *Moby Dick*, *The Scarlet Letter*, *Death in Venice*, *The Brother Karamazof*,

‡ Adapted from a speech delivered at the annual banquet of the INDIANA LAW JOURNAL, April 25, 1969.

Notes From the Underground, T. S. Eliot, Proust, Joyce, Pound, Conrad—perhaps even the great Freud himself—had taught us that Man's predicament was irremediable. At the heart of our universe was darkness, evil and indifference. We revelled in this newly-discovered challenge to bourgeois optimism, but we were not willing to see that it offered something of a threat to the Marxist millennium. Nor had there as yet emerged a sociology which challenged the easy rationalism of Bentham and his followers. The lesson of the Depression seemed obvious to the committed New Dealer. The State had failed to curb capitalist exploitation. The State had failed to protect and promote collective bargaining, to provide social security, to control the credit and security markets. These failures had produced widespread unemployment and universal job insecurity. The consequence was personal and social demoralization. For years the the liberals and radicals together had been protesting this refusal to act. They had denounced the Supreme Court's invalidation of such social legislation as had managed to get enacted. The remedy was clear—massive governmental intervention and regulation; the establishment of administrative bodies with a permanent mandate to apply state power to the solution of our economic problems.

I now have come to the point where Ralph Fuchs and I began our pilgrimage, the journey which brought me to Terre Haute in 1935 and both of us to Bloomington in 1969. There may be a bit of poetic license in this figure of speech, since Professor Fuchs was already launched in government as early as 1925 and as a teacher in 1927, and I had been active since 1928. Nevertheless, it was at the time of the New Deal that we found our vocation as practitioners and professors of administrative law, a subject which then emerged as an important element of our program of economic salvation.

We, James Landis, Kenneth Davis, Nathaniel Nathanson, Walter Gellhorn and ever so many more both generalists and specialists devoted ourselves zealously to spreading the gospel of the administrative process. We beat down the attacks of the American Bar Association and the courts. We broadened and developed the theories; we defended the Labor Board and the Securities Commission and anything else that called itself an administrative agency. There is at present an easy contempt for the agencies. We pronounce the word "expertise" with a sneer, but it is foolish to forget that the administrative process chalked up powerful victories. The Labor Board worked a revolution in American labor relations; the Securities Commission effected a tremendous reform in the securities markets. These victories are now forgotten by many, even indeed by some who won them. We Americans are polarized by the

enthusiasms and hates of the moment. We are notoriously lacking in the historical sense. This is a strength because we are remarkably sensitive to new ideas and willing to put them into action. And it is a weakness because we accept each new enthusiasm as a panacea and fall into sullen disillusion when it lets us down. I have recently been presented with a striking example of this. You will recall that in 1954 as a result of the Supreme Court's decision in *Brown v. Board of Education*, we became completely convinced that integration was the key to effective education for the blacks. It has not worked as we had hoped. Now there is a group of students in the Harvard Law School who are working on a plan for restructuring government services in Boston. They have concluded that only when a black is among his own will he feel secure enough to learn effectively! And so we glorified the administrative process. We worshipped a mechanism, a procedure. We abstracted the idea of expertise and supposed that it was an autonomous force that could go on solving problems quite independently of the political forces of the day. The revolution worked by the Labor Board was possible because the industrialists were demoralized and discredited for the moment. The forward wing of labor seized power and improved the occasion to the point of no return.

The administrative process with its concentration of means and its procedural break with tradition was a magnificent tool. It cannot operate without a power mandate, but it continues to be a great tool when the occasion arises. It can also be used in the interests of reaction. In the fifties and sixties the political roles of agency and court were reversed. The agencies often expressed conservative, sometimes reactionary, power. The courts now used their authority to curb reaction where before—at least until the forties—they had hobbled the progressive impulses of the agencies. In our obsession with the moment, we should not forget that the administrative agency continues to have a potential for good and for bad. It has its times of strength and its times of quiescence. It has its day-to-day jobs and its opportunities for extraordinary achievement. This is a way of saying that the potential of the agencies is a function of the way in which at a particular time we analyze our predicament and organize our forces to deal with it.

How do we see our predicament today, particularly those of my generation who started down the trail in the New Deal days? There has not since then been so acute, so uncomfortable and so baffling a challenge as there is today to our capacity to understand our world. One of the current clichés is that the thinking of the liberal is obsolete. He is scorned—so we are told—by the right and the left. I do not believe that liberalism is obsolete, but we must concede that the vision of 1933 is no longer

adequate. It was much too simplistic. Its almost single concentration on material improvement does not solve all the problems of the human predicament and may even intensify them. We might have learned that lesson from our favorite authors, but in any case we did not know what to do with it—we still don't—and so we kept it for after-dinner conversation. As T. S. Eliot told us in *Prufrock*:

In the room women come and go
Talking of Michelangelo.

Now we in America still have an economic predicament, and there is a sense in which it is worse than ever, and I shall get to that; but we are now witnessing novel and disturbing expressions of man's troubled psyche which have very little to do with economic distress. Most of the students at Harvard, Columbia, and Sarah Lawrence who wear their hair long, who shout obscenities and occupy university buildings on what seems to many of us insufficient provocation, have never had a moment of financial anxiety, and are assured of good jobs when they finish being students. I suspect that it's this very freedom from financial anxiety which is one of the factors of the immediate problem. The need to earn one's living by the sweat of one's brow is one of mankind's great discipliners. Where that need is at the center of daily concern, it channels effort and structures the program for reform. It leaves little time and energy for the more obscure anguishes of the soul to emerge. My analysis may seem to imply that, because the human predicament is irremediable, there are no objective reasons for protest and concern. Perhaps it does; and at bottom, that may be what I believe. Eradicate one source of anxiety, and another will take its place. But I would not be a lawyer or a twentieth century man if I operated on so radical a premise. Simply to live amicably with one's fellows, we must have respect for their anxieties and do what we can to help them and let the anxieties of tomorrow be faced at that time. The least we can do is try to understand the causes of our present discontent.

In the last few months, I have been thinking about this and have heard and read much that has struck me as valid and some which has struck me as silly. Margaret Mead tells us that the younger generation has learned that we have made a botch of the world and that we must retire and let them set it right. Could there be a better example of an expert—and of all things an anthropologist—talking superficial nonsense when she pontificates outside of her discipline? Of course, we have made a botch of the world—as have all prior generations and as will the younger generation in its turn. No generation can write on a clean slate; none can escape the dilemmas of the given.

Let me speak for a moment about the younger generation, particularly in our universities. I believe that student activism is symptomatic rather than representative. The student is sensitive to social ills and anxieties which are not felt by the society as a whole. He is sensitive to injustice and critical of obliquity in high places. This sensitivity is very valuable. It flags problems which must be met. But if the student over-reacts, as he is doing today, he brings down upon the universities the wrath of organized power which is mightier than he. Yet clearly the students do have power. Our society cannot do without universities and without students to be trained by them. The students can impair its function. They can, up to a point, enforce their demands by persistent harassment. For a time at least, they can refuse to accept the services of the university. Very probably they will bring about changes. Some of those may be improvements. The most important changes, at least as we see it today, will be those bringing students into the decision-making process. We can see this as an application of democratic theory. We can see this also as bringing into the process relevant experience which will improve it. We can see it finally as a response to demands which must be met if students are to be convinced of the legitimacy of the process. I have been sitting this year with a law student-faculty committee, and I have been impressed with the wisdom and competence of the students. If students can work within the premises of the university system, if they are prepared to accept the limits of their experience and to recognize that they are junior partners, participation will be a net gain; but these limiting premises are under attack. Students who accept them are charged with being "coopted," and so there is as yet an unanswered question whether participation will be a net gain. There may be changes which are very different from, even contrary to, those which the students are seeking or at least think they are seeking. The net result ironically may be the strengthening of the technical and professional at the expense of the liberal arts. Scientific techniques are central to our social and economic organization. They have a rigor which is better able to resist pressure than the liberal arts. Students demand relevance; they demand participation in decisions concerning expenditure and course content; they demand political accountability. The climate generated by these claims is hostile to the free atmosphere needed for the liberal arts. Greek, English, and History may not be able to vindicate their claim to relevance. Of course, the left is correct when they assert that universities basically reflect the status quo. It cannot be otherwise, and the more financial support they demand the more it will be so. But the liberal university has managed to build in a haven for critical analysis of the system. If the critics and students of the left insist on overt politicizing of

the university, they will be playing the game of the Birchers, of narrow business and military interests and of demagogic politicians. These characters are only too happy to see the university politicized and then to become the beneficiaries.

I am convinced that the character of our present distress is determined by characteristics of our society, some of which are irreversible. I refer to a society and a world order or world disorder resting on the application of science to production and health. That means world population already of unprecedented magnitude which is still multiplying at an enormous rate. These populations are not distributed equally. They are crowding into the unmanageable and cancerous megapolis. Rats crowded into small spaces go berserk and eat their young. We internalize our anxieties and eat out our hearts. These populations require vast and complex productive machinery to keep them alive. This machinery interlocks with a governmental machinery of similar character. We probably exaggerate the comparative impersonality of our society. There have been urban societies before this one. I would not have supposed that the New York slum-dwellers in 1900 participated very effectively in decision-making, although it is said that the old-fashioned city boss enabled one to feel that he was part of a family. Furthermore, local group action and participation has never ceased to be a significant factor. But I think one must still concede that money and power flow more and more to the center, that tasks are designed in terms of solution by machines. Local centers, neighborhoods, and organic social entities still have a life, but they must always reckon with Albany and Washington. Neighborhoods are destroyed; creeds collapse; superficial rationalism breeds frustration, desperation and violence. Human nature is stripped of its traditional supports and illusions and is reduced to a bundle of ganglia of will and appetite.

Power into will, will into appetite
 And appetite, a universal wolf
 Must make perforce a universal prey
 And last eat up himself.

Insofar as our populations and our own society rest on this system of production and government, our capacity to modify its impact on our psyche is limited. Our defense, if we are to have any defense, must be in our reaction to it whether you wish to call that reaction religious or philosophic. Arnold Toynbee has recently said that no society can hold together without a religion; I suppose he means an organized way of taking man and his universe which recognizes their irreducible characteristics and adjusts to them. He believes that the fact that

organized religions are now prepared to sink their differences is a recognition of our current need and offers hope. Organized religion, if it is viable, is but one form of a philosophy and is an expression of the fact that the society has a philosophy capable of protecting itself from despair.

The growing student demand for abolishing grades reflects, I think, an attitude which is at bottom a philosophy. It is a reaction to the feeling that our society is atomized and dehumanized. Competition intensifies the feeling of isolation. Meritocracy exalts competence at the expense of community. Abolish or moderate competition, say the students, and we can live together in love and cooperation. We probably have overvalued professional competence and exaggerated its capacity to deal with problems. Some relaxation of the tensions created by meritocracy may improve our sense of community with possibly no significant loss of efficiency. But there are dangers. Love and cooperation shade into cronyism and corruption. Demagogues can operate more easily in a society which abandons objective measures of performance and may league themselves with technocrats who will be more resistant to attack on their professional standards.

I do not confine myself to a purely passive position. I accept our tenets of social justice, and by those standards there are nasty injustices in our present system. It is at this point that the traditional liberal, rationalist approach based on a model of economic justice is still valid and indispensable. Our black population has in some respects made important gains in the last few years. The improvement in their legal position was a necessary first step. Those who write it off as a purely formal gain are historically myopic. Furthermore, the opportunities for upward mobility have increased tremendously. There remains a degree of degradation of large masses of blacks which is frightening and which may indeed be intensifying. There is a failure of elemental living conditions and education in the face of which we seem nearly helpless. As long as this situation persists, it will continue to provide fuel for the most dangerous social disturbance. It is in part responsible for student unrest and widespread educational maladies. The critics of our system believe that we cannot and will not make the redistribution of wealth and power necessary to solve these problems. As matters stand today, I think that they are right, and I see nothing in the immediate future to suggest that we are prepared to make the massive public expenditures or the great redistribution of populations and power which are needed.

Nevertheless, we as lawyers and citizens must keep our minds focused on these problems and do whatever we can to solve them. This is true of a range of problems which are perhaps a shade less intractable, such as resource destruction, pollution, and consumer vulnerability. For the

solution of all these problems we shall need government as much or even more than ever. That means Presidential leadership and imagination, a hard-working Congress and the administrative process. We simply cannot by phrase-making or wishful thinking rid ourselves of big government. But we should at least try to do what we can to bring more people, more organizations, more power centers into the act. The fashionable cry is for participation. It is a valid cry if we do not in our American way make a fetish of it. In his recent Littauer Lectures, John Gardner has said that lay participation is not dependable over the long run. We can never dispense with the professional politician, the man who likes to lead and talk and expose himself to the public. But whatever individuals are prepared to do, we should encourage them to do. Black parents should be provided with an incentive and a machinery to play a role in the education of their children, in the control of their police, in the design and operations of their housing. Consumer groups should bring constant pressure on government to improve products, depollute the air and protect homes from vast eruptions of concrete roadways. But let us have as few illusions as possible. Those who protest air pollution by automobiles may be the first to remove gadgets from their cars if the gadget interferes with speeding. Homeowners will be as anxious as the next fellow to drive at eighty miles an hour on superhighways. Americans used to easy living will not basically alter their situation in favor of the depressed masses of Asia. I detest reformers—the demonologists—who indict the “interests,” the car manufacturers, the banks, the military. The fault, dear Brutus, lies not in our stars but us. We want cars and roads and jobs and money. So let us by all means strive to deal with our problems—but honestly, humbly and civilly. Let us stop shouting, name-calling, and issuing ultimata.

We lawyers must charge ourselves with special burdens of representation. One of the most satisfying developments of the last few years is the growth of legal services for the poor and the disadvantaged. This service is being financed by government assisted by the law schools and the Bar. It offers a variety of opportunities to lawyers who can take it on as a career or who, if they do not wish to stay with it for a lifetime, can take it on as a limited tour of duty, particularly when they first come out of law school. The contact with tough social problems should be a great educator of the Bar. It should dispose lawyers to continue throughout their lives to serve private, semi-public and public bodies engaged in public interest representation. There is lots of trouble ahead. We are trapped in a world we never made and always will be. We are terribly aware of our predicament and on edge with the sense of it. We must fight now to save our emotional and intellectual balance. We must not let frustration and hate

erode our sense of justice. We must stand up to the challenge with courage and hope.

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