Community Prerogative and the Legal Rights and Freedom of the Individual

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THE INDEPENDENCE and unplanned, unregimented freedom of action of its rich and powerful members is not the test of a free society. The test of a free society will be found in the scope of right and privilege possessed by its weakest elements—those who are under the greatest pressure to surrender their independence. These furnish the test. As Franklin D. Roosevelt said in his message to the Congress of January 1944, "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence."

I recognize that progress entails temporary compromises with popular conceptions and that fictions and paradoxes are inevitable until basic attitudes change. Nevertheless, it is important for us to know what is fiction and what is truth. Experts need fixed pillars of principle by which to set their compasses. We need to realize first of all that this combination of security and independence and freedom is possible only through the operation of law. The search for freedom without legal obligation leads to conflict and insecurity and the search for security without legal rights leads to serfdom, or loss of independence and freedom.

Now, as the basis of a claim, law and gratuity are antonyms. He who provides a gratuity is a benefactor. He who must satisfy a legal claim is an obligor. These capacities are antipodal. When you pay your barber and tender him one dollar, saying seventy-five cents is for the haircut and the extra twenty-five cents is a gratuity, he may reply, "Brother, you're no benefactor. The legal charge is one dollar and you're an obligor for the full amount." The challenge is obvious. Then let us be fully aware of the essential challenge in this phrase "the right to security." The agency becomes an obligor and not a benefactor. Presumably this entails a rather basic change of attitude. But in that reversal of capacity the agency will gain immeasurable and much needed freedom for itself within the community. It will find comfort only when it can say "Mister, I do this, and I don't do that, because this is the law and that is not the law."

Public Services Are Not Gratuities

Tradition asserts that economic aid is by nature a gratuity and that the use of the tax power for this purpose makes the community or its government a benefactor. Actually every basic social and civic service, in which the government is not acting in a proprietary capacity, has much the same history as it emerges from a voluntary service to a basis of public obligation and individual right. Police protection is among the first. Fire protection closely follows. Education became more and more a community necessity. Then comes economic security as an early step in preventive services. As laws and ordinances are adopted under which the claim of each and every member of the community to any service will be considered, the service comes to be administered on the basis of the individual's need for it and to be paid for from the general fund. Government properly administers its services on the basis of need. Need thus furnishes the measure of the individual's right or benefit. The service is properly paid for, however, through a scientific system of taxation. If the individual who pays no taxes commensurate with his draft upon the public service can be deemed the recipient of a gratuity in the case of one such service, he must logically be so treated in the case of every other.

The attempt to define the individual's right or benefit in terms of his tax-paying capacity is nowhere more incongruous than in the field of economic need, for economic need is greatest where economic capacity is least. Obviously you cannot ultimately relate benefits to earnings and still relate them to need. To say, however, that this axiom precludes the establishment of economic security as a universal legal right is to deny the efficacy of law in the preservation of a free, balanced society. If constitutionally protected legal rights could not be created except for earners or for consideration, many of us could never acquire rights in proportion to our obligations. Individuals gain freedom and independence when their obligations are geared to capacity and their rights are geared to need. In seeing to it that essential rights are preserved in the absence of capacity, social security helps to preserve a free and resilient society.

This is not the time for any extended analogy. But let me observe that my preference among the reasons for the collapse of ancient Rome was her insistence that the price of economic subsistence was subservience. She never conceived the notion of setting up economic security on a basis of law and right. She thus made wards of her free citizens. Feudalism was thus born in Rome itself. History attests that the search for security takes priority over the search for freedom but that the two are compatible bedfellows only when both are provided by law.

Security Must Rest on Law

The question today is whether we are going to provide security without the sacrifice of individual independence and under conditions that will foster individual freedom, or whether on the contrary the provision of security will continue to foster the feeling of dependency, and the sense of being wards of a benevolent government. The answer to this question depends upon whether we are going to provide security as a matter of law, and this in turn depends on our ability to sever the service of security from the whole train of irrelevances with which it is traditionally associated.

Now this problem that we face is of course one basically of attitude and conception—I might add, of almost legendary conception. If then in comparing traditions or traditional conceptions my words appear biased, take it that I am pleading for law as the essential basis of social security compatible with individual freedom, and offering it as the only ultimately sound expression of community prerogatives. Law is often the only

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effective answer to sporadic views and attitudes that either have not themselves been written into law, or can be shown incompatible with accepted legal principles, even though statutory language is cited in the effort to make them seem authentic.

Let us get a picture. On the one hand, you reach back to the fact that private groups were wont to concern themselves with specific problems in which they became humanely interested—problems, for example, of children whose parents have deserted them or are incapacitated or are neglectful or cruel. This tradition of problem differentiation was carried over into the public field. In contrast one thinks of law as developing under the aegis of government and therefore as having to develop a science of objective classification of individuals in answer to the challenge: is this legal equality, is this equal protection? Can you square your treatment of this individual with what you have done about that one? Secondly, you have, by tradition, need associated generally with personal inadequacy and moral weakness as well as with mental or physical incapacity. Is there not in this an assumption of irresponsibility, in contrast with which the legal tradition adamantly assumes or premises the mental and moral responsibility of the individual. For example, if lack of responsibility by reason of mental incapacity be established in any case, then it will be supplied through guardianship by operation of law.

Illustrating these points, we have in the process of classification excluded children from a welfare or assistance program among other things because they do not live with a relative or because they live with alien relatives, or because they have been placed with relatives of a different religious faith, or because they are not legitimate, or because of a general disapproval of the home environment, or because they do not go to school. Some of these exclusions violate basic legal criteria of classification, such as constitutional law requires, for the Constitution demands laws that give equal protection to individuals. We have classified our children in terms of the sins of their parents. They are identified in statutes as children of alien, or unmarried, or deserting, or criminal, or drunken, or incarcerated, or otherwise delinquent parents.

As for the adults themselves, there is even more concern about their behavior and attitudes than there is with children. Should one or should one not give assistance to a person who drinks too much—who displays articles of luxury upon which he has set his heart—who is idle—who fails morally—who appears unwilling to do the utmost for himself—who lives in an unsuitable home—who fails to pay his rent when due—who fails to perform his other obligations—who chooses to live in an unlicensed establishment—one, I might add, which the welfare department does not approve but which the government permits to exist and solicit his patronage? Should one or should one not pay assistance to one whose relatives might but don't support him? In these latter cases, we have the wrong individual under our thumbs, to use the withholding sanction effectively.

What the individual does in each case I have listed may be quite legal. The behavior in question has not been outlawed. You may drink unconventionally yet not illegally. You may buy in this country what you wish or enjoy, barring such things as habit-forming drugs or automobiles at too high a price. Though a child, you may live in a home that does not violate ultimate objective standards enforced by the community to protect health and morals. You may even be immoral without violating the law. Idleness standing alone is not subject to punishment. There is a right to strike. Generally speaking, it is not a criminal offense to fail in the payment of your just obligations. Debtors no longer go to jail. All in all, the process of carrying the charitable tradition into the public forum seems to have implied an authorization to public administrators to devise a behavior code of somewhat higher standards than public law has found it feasible to enforce. This reminds me that the law does not wield this sanction of withholding assistance. And in the above situations ordinary legal principles, if applied, would not sanction such a sanction.

Behavior v. *Objective Law*

When I first came across a suitable home provision I found no real difficulty with it because I was legally and not traditionally trained. I simply turned to recent cases in our higher courts to find under what conditions a child would be removed from his home. But I had not reckoned with tradition. Why a child should be allowed to stay in a home regarded as unsuitable, without the means of subsistence, I have not been able to determine. Moreover, if the failure of the parent to accept rehabilitation services disqualifies the child, and you cannot remove him, the situation strikes me as pathetic. Following tradition I cannot decide whether a child "deprived of care and support due to the neglect or depravity of the parent" is rendered eligible or ineligible by these circumstances. One side urges the neglect, the other depravity.

Of course this is not security, it is not equality in any legal sense. This is the kind of thing that has given the word "welfare" an acrid flavor. It has set "charity" over against the "law." It distinguishes "right" from "need." It has made an old-age "pension" acceptable, but old-age "assistance" in the same amount and on the same terms unacceptable. It demands social "insurance" though the only insurable "hazard" is the bare fact of an empty cupboard. These are but words, words, words. No doubt they are also materials for a study in social psychology. In any event they afford clear evidence of the struggle that is going on between human dignity and human need.

There is a delightful subtlety in the question sung by Gilbert and Sullivan: "'Is it weakness of intellect, Birdie,' I cried, 'or a rather tough worm in your little inside'?" Because security is a prime necessity in the life of every individual, for the sake of which most individuals will sacrifice all else, insecurity is an evil independently of its cause in the particular case. Therefore, it is as inconsistent to condition assistance or security upon personal adequacy, whether of mind or body or of attitude or of behavior, as it is to condition it upon tax payments. You cannot, of course, condition assistance upon behavior and still use it as an instrumentality to bolster the individual's freedom of action and feeling of independence. You cannot buy behavior under a democratic ideology.

We obey the law because we have to, or better, because we wish to, but not because we are paid to do so. As for morality, you cannot buy it. You cannot even compel it by force.

To achieve its objective of promoting the individual's self-confidence and independence, security must be provided as a matter of law. The great value of law for this purpose is its bland objectivity. Under law, behavior is attacked within feasible limits only by direct and positive action. Legal rights do not depend on behavior. Law never seeks to buy behavior. It seeks to give rein to moral law. It seeks to allow the individual to benefit or suffer from his choices and sacrifices as freely as possible. This is quite inconsistent with the idea that behavior should enlarge or diminish legal rights. Law insists that the free exercise of rights is essential to democratic equality.

I would follow this principle to its limits. I prefer compulsory school laws to conditioning assistance on school attendance, and support laws to bargaining for it through public assistance. If we get to the point of underwriting a minimum standard of living throughout the country, presumably, for obvious economic reasons, we will have accompanying medical care and rehabilitation facilites. The ultimate question, therefore, is whether as a practical matter it is necessary to differentiate employable and unemployable persons on an authoritative basis. I should hope not. The program differentiation should, I think, follow from the mere fact that different individuals need and hence demand different things.

Traditionally, however, public assistance has concerned itself with the individual's behavior but has been relatively unconcerned with the fact that he who seeks security as a suppliant must master the arts of beggary. The individual may still fare better by an appeal to conscience than by an appeal to law. Public assistance has even varied the amount of its benefits in relation to the expenditure choices of the individual, forgetting that this of necessity involves the agency in dictating the limits of those choices and perhaps in guaranteeing the results. I think of moral law as indicating the power of the individual to make decisions and choices provided he accepts the inevitable sacrifices that his choices entail. The voice of prejudice asserts that economic assistance in some way alleviates the sanctions imposed by this moral law or saves the individual from its consequences. I am afraid that traditional practice has tended to lend encouragement to this point of view. Obviously if it were true in any sense that public assistance protected the individual from moral retribution, it is all the more important that we should be able to lay its foundations firmly in human law, for law inherits its ideals of objectivity from moral and spiritual sources.

Browning's Pippa, you remember, was not like

"All other men and women that this earth
Belongs to, who all days alike possess
In readiness to take what thou wilt give
And free to let alone what thou refusest";

but Pippa was grateful for whatever came her way:

"Oh, Day," (or should we say, Oh, check) "if I squander a wavelet of thee,
A mite of my twelve hours' treasure
(Be they grants thou art bound to or gifts above measure)
(Be they tasks God imposed thee or freaks at thy pleasure)."

Pippa, you see, could least afford to await the fall of the dice; she could risk nothing but a dead certainty—that certainty and universality which moral law exemplifies and which the efficacy of human laws and dispensations (especially those intended to provide security) demands.

Obviously the social work profession who have justified for themselves that faith in the individual upon which the whole undertaking rests are gradually making headway against tradition. Convinced that the individual's conscious belief in his own security is of vital importance amid the irresistible economic currents of this day and age, they point out that merely seeing to it that human beings do not lack the requirements of decent living is by no means the ultimate objective. They realize that social security, to fortify the hearts and minds of men, must be established on a basis of legal and financial certainty. It must be conceived as a part of our normal legal environment and not as a smug social prescription for the faults and failures of its protégés or of their relatives. We must regard the quality of legal rights quite as highly as the quantity of economic rights. Rights that give mental and emotional security must be firmly founded in law.

As a people we gather basic strength from the reign of law. There are two quaint Americanisms that succinctly express our feeling on this matter. The first is the phrase: "I got my rights!" The other is its corollary: "I ain't never had nothing that wasn't mine by rights." On these two stalwart declarations hang all the law and the prophets. They are keys to our morale.

In addition, in order to maintain a free society under modern conditions, security must be framed in terms that respect one's sense of autonomy. Individual choice must remain uncontrolled, unprejudiced, and free. We require the type of assurance that fortifies, but does not seek to govern, our wills.

Basic Legal Guarantees Must Be Applied

Now when we speak of right and law, let us be clear about one thing: we are talking of law on its home grounds. It is generally true that law has not been applied to welfare enterprises. Oh to be sure, welfare enterprises have always been highly esteemed by the courts for their useful and benevolent undertakings; but because gratuities and legal rights stand in opposition to one another, welfare enterprises have not been regarded as the law's concern. Of course courts are seldom appealed to in welfare. The appeal of a general relief recipient to the courts would still cause one to blink with surprise. He would fear to lose what security he has. He would not be so fearful, however, if he was standing on his rights and not asking favors.

I am speaking of law with absolute realism. The courts, in the absence of express legislative mandate, have abstained from the welfare field. They have not applied the basic legal guarantees either of legal procedure or of equal protection. When confronted with the issue the courts have said that the provision of assistance

is in the nature of a charitable provision or gratuity—as Browning says, a gift above measure, that is, above the measure of the legal right of the individual. In this attitude the courts mirror social conceptions. Legislation has so far failed to refute effectively this conception. Even as I wrote these words I picked up the Regional Attorney's report of a decision in a State court of last resort in an assistance case. It read: "It will be noted that the court cited the case of *Lynch* v. *U. S.* and concluded that as the Government had set up provision for a gratuity given as a matter of grace it has full power to vest in an administrative agency authority to determine whether the requisite conditions are met and to deny resort to judicial review."

Now what does this mean? First it means that welfare administrators and their programs have not been brought within the purview of our common law. Welfare administrators are still regarded as wielders of a general delegation of responsibility to represent the social conscience in relation to various groups of unadjusted humanity. Their activities are a kind of administrative appendage to our legal economic system. Public assistance bids fair to come within this general classification. It has not been saved by relationship to the rest of the social security program, for other security programs have by one emphasis or another sought to avoid the gratuity stigma.

It means that procedures essential to ensure equitable or equal treatment are not legally requisite. The programs are cut off from procedural expertise, for law is expert in procedure. The Social Security Act specifically invoked the judicial hearing requirement as a means of countering this situation. But this provision has literally fallen before traditional attitudes and preconceptions and the lack of objective standards. The equal protection principle has not been applied either. The door has been opened wide to those who would arbitrarily select the worthy beneficiaries of their largess and yield to political pressures. It has been possible to define covered groups capriciously and to treat eligibles unequally. The courts have not questioned this process.

What is true of eligibility is even more true of treatment. It often happens that an individual in need may be made the beneficiary of cash while another in like circumstances from the legal standpoint is either wholly excluded or is merely furnished orders for groceries or other commodities or some other service. Bills are drawn to divide blind individuals into two groups, one of which would include those who have some private resources, and the other, those who have substantially no resources. On this basis it was proposed to grant a monthly pension to individuals in the first group in a uniform amount without relation to the varying amount of their private resources, while each member of the second group would be required to establish his particular need for every cent allowed him on the basis of an individual investigation. The purpose of this novel idea was to secure Federal participation in the payments made to members of the latter group, while relieving the more affluent group from investigation of their need.

In the third place, welfare statutes themselves have not obtained judicial interpretation. Many provisions retain their traditional nonjudicial interpretations. These meanings are based on social preconceptions; for the human mind works that way. It is quite impossible for a lawyer to say what these discretionary provisions mean. If you wish to know what a welfare statute means, you will learn more from an experienced social worker than from a lawyer.

Security the Business of Government

A community provides itself with a government. Having organized a government, it is elemental that it should speak and act through that government. Its government commits the community both to procedure and principle, and that to which the community commits itself is law. The community does not easily or lightly commit itself. Law is born amid travail, but when law is born it properly displaces both benefaction and malefaction. It provides for us the simple phrase or answer, "Mister, it's the law." There you have the present dilemma. Law, not having been established in our field, the community still speaks directly and not through its duly constituted authorities. Now when the community speaks directly it speaks with a confused, discordant voice. Prejudice sounds off with as much apparent authority as though it were law, for law remains silent. That, I take it, is the real reason for a session such as this in which we are engaged, for the social work profession is asking what answer it can make to the community when it cannot say "This is the law." We are suspended in parachutes supported by atmosphere and borne down by currents we are not empowered to resist. We can get no footing from which to support our clients. We come into contact with law only at the dead level of the ground, I mean the police power, where logic and reason are less in evidence and law itself is most arbitrary and authoritative. The profession no doubt would find great relief in the thrill of a high-powered legal debate on some of these basic issues of rational classification before our higher courts of justice.

We demand solutions. We must recognize that the conflict arises between conditions essential to real security and traditional conceptions and attitudes. We must live through this era of fiction and paradox before we can outwardly proclaim the truth. But there are some things we can do.

First, we can deliberately discard one by one these traditional interpretations that are not required by law but grow out of our own involvement with tradition. These are not legal or judicial interpretations. They are not consonant with judicial criteria. Obviously we are as free under law to discard them as we were to adopt them. For example, we can certainly insist that a home is suitable for assistance so long as it is suitable for the child to stay there. This is just common sense.

In the second place, we can refuse to exercise a discretion given by a statute when the exercise of that discretion would involve moral judgments, that is, supra legal or supra judicial judgments of people. Moral judgments are authoritative judgments. Penal law is authoritative, but the more authoritative it becomes the more objective it seeks to be. We can avoid being subjective and authoritative at the same time. Sub-

jectivity is all right for diagnostic purposes, for it is the method of research. Objectivity is essential to administration.

Psychiatric findings of mental incompetency should be submitted to a court before they are authoritatively used. Certain public agencies have caused individuals to present themselves to a court and to ask for guardianship, as the condition for receiving public assistance. Such an individual must allege that he is mentally incompetent, or at least wasteful, through idleness or debauchery, following the words of the governing statute. One is tempted to ask how, being incompetent, he knows he is incompetent. If he does not but the agency does, then how can one say he is voluntarily conceding the issue of his competency.

Legislatures may be relied upon at present not to compel traditional practices inconsistent with a body of statutory law which is constantly becoming more objective. A number of assistance laws today contain only objective criteria of eligibility, and at least one such law actually writes in a definite authorization to the administrator to classify all eligible individuals in accordance with objective factors that necessarily affect the cost of a given living standard. It simply was not done.

In the third place, we should seek by every means at our disposal to get into our assistance statutes, expressly and specifically, the statement that the benefit is not to be construed as a gratuity but as the creation of a right socially and economically justified and subject to judicial review and interpretation and to the constitutional guarantees of due process of law and equal protection of law, as any other right. Now would not that be something! The effect of this would of course be to delete the type of discretion that lays administrators open to community comment, and to open for them the doors of the court. All in all would one prefer to be tried by a court or by the community?

In the fourth place, we can work for basic certainty and objectivity in all assistance administration. This will be obtained if standards are framed in accordance with costs determined on as broad a basis as possible, a basis wholly unrelated to individual expenditure patterns. Only thus will we secure really valid standards. Then in the application of these standards we should see that no variations are made except in terms of classifications developed on the basis of objective factors, wholly independent of individual choice or volition, and significant only as variants essential to provide the equivalent of the standard in a given type or situation. You will thus force individual choice and volition back upon the individual, where it belongs, and bar it from a public agency, where it does not belong.

For another thing, we need to recognize that this whole issue of behavior is symbolized by the idea of public wardship, and that the role of a guardian responsible for another's behavior is authoritative, not professional. Anglo-Saxon law avoids governmental management of individuals. It leaves them to manage their own affairs unless found incompetent in a judicial proceeding. In that case personal supervision is provided for by guardians amenable to the courts because responsible for another's behavior.

If the individual is actually as important as we conceive him to be in a Christian democracy, must he not be assured of the legal capacity to realize upon the rights and opportunities which democratic law makes available to him? There are only a limited number of incompetent people in any group, and there is no fiscal reason why they should not be classified for assistance purposes on a basis which will provide for them the legal services to which they are entitled. The relief of physical handicaps is known to be expensive and the treatment of mental handicaps must be regarded as even more so. The mentally handicapped are entitled to judicial as well as medical service. Only in this way will the social work profession maintain its professional status throughout and avoid being considered guardians merely because they are social workers. It is not democratic to leave the duties of private guardianship to government officials and employees. The State has many relations with the individual citizen and their respective interests are not always in true harmony—unless of course we adopt the fascist point of view. The State can in a sense act as guardian of all of us—it can be a parens patriae—but the State cannot in a democracy properly act as a guardian of particular individuals, not without forfeiting our hope of a fundamentally free and independent society.

I realize, however, that the provision of private guardianship for those who otherwise lack legal capacity will involve basic changes in social practice. Parentless children are still widely dealt with in a manner wholly unbefitting their dignity and importance as individuals. The custody and cultural development of tens, nay hundreds, of thousands of children are still assigned to people, such as foster mothers and keepers of boarding homes, who do not assume a legal responsibility for the child commensurate with the trust reposed in them. Reliance is placed upon the continued supervision of the representatives of public agencies who treat him as a ward of the state. The child has no champion of his individual rights and interests, no one who cherishes him above all others. Under the circumstances the purposes of social security in giving the child an independent income are not realized, and he remains a public ward and lives under an institutional regimen. I think every child who has no natural guardian should have its legal substitute. The institution of private guardianship is one of the cornerstones of a free society.

This is the issue today as I see it. We must make mankind and his security the business of all branches of government, executive, legislative, and judicial, and stop delegating our consciences to "Superintendents," be they "of the poor." "Business," cried the Ghost, wringing his hands again, "Mankind was my business. The common welfare was my business . . . The dealings of my trade were but a drop of water in the comprehensive ocean of my business." In closing I pay my tribute to social work skills and to social work as a profession. God knows there is need for greater skills than we yet possess. But how you gain the law and how you adorn the law when you gain it is the challenge I must leave with you.