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Individualization of Justice

Cover Page Footnote

University President at Harvard

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INDIVIDUALIZATION OF JUSTICE

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FROM the confusion, bewilderment and skepticism of present-day thought, one conspicuous gain seems to stand out: the giving over of the idea that everything must inevitably be one or another, that there is one absolutely right way for every process, that we must of necessity choose once for all between opposites or contradictories; that if we put value on spontaneous initiative and individual free self-assertion, we must see that alone, while if we value co-operation and collective activity we must ignore the values of individual personality. In the recent mode of thought which refuses to be driven to absolute choice between one side of human existence and another, simply because they seem incompatible, we may look for a way out from one of the vexed questions of the science of law about which jurists have quarrelled from the days of the Greek philosophers of antiquity.

Philosophical jurisprudence now frankly recognizes the antinomy in the legal order, something best brought out by the condition of internal conflict which more than anything else interferes with the effectiveness of criminal justice. On the one hand, a body of criminal law is made up of rules prohibiting specific items of conduct. On the other hand, it is made up of checks and limitations on the enforcement of those prohibitions, and so on the activity of those who are charged with enforcing them. But one of these sides of the administration of criminal justice has always proved as indispensable as the other. Both the general security and the individual life have proved to be threatened by unchecked exercise of enforcing authority, as well as by unregulated individual conduct. This antinomy goes back to the twofold task of the legal order in upholding the general security and at the same time protecting the individual life.

All thinking about the legal ordering of society has struggled to reconcile the conflicting demands of the need of stability and the need of change. The exigencies of the social interest in the general security have led men to seek some fixed basis for an absolute ordering of human

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action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests. Accordingly the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law, affording no scope, or at least a minimum scope, for individual wilfulness, with the idea of change and growth and making of new law. It has been how to unify the system of legal justice with the facts of administration of justice by magistrates. More concretely the problem becomes one of adjustment between precept and discretion. It becomes one of adjustment between administration of justice according to settled precept (as far as possible), or at most by rigid deduction from narrowly fixed premises or application of a settled technique to authoritative grounds of decision on the one hand, and, on the other hand, administration according to the more or less trained intuition of experienced officials. The significance of most of the disputes in nineteenth-century jurisprudence lies in their bearing upon this problem in its ultimate form of adjustment between or reconciliation of the general security and the individual human life.

Long as this matter has been debated, the problem has never been solved. Very possibly it cannot be solved. According to a leading philosopher of law of today, the attempt to realize justice through the legal ordering of society is something which cannot be wholly achieved. But he conceives the law must make an effective attempt. The moral ideal has for its symbol the ideal man; justice finds its symbol in the ideal social order. The law (*i.e.*, the legal order) having regard to both, is a more complex idea than justice. Justice he sees as one element; but he sees also the idea of the end of law and the idea of security and order. He conceives that as between an idea of freedom as the end of law, the idea of maintaining and promoting the efficient functioning of the politically organized society of the time and place, that is, the state or nation, as the end of law, and the idea of maintaining, furthering and transmitting civilization as the end, one cannot justify by any form of argument the choice of one rather than another. He holds that there is an inevitable conflict between justice, the end of law, whichever one of the three foregoing is chosen, and security, which at the same time demand and contradict each other. This internal conflict in the very idea of an ordered human society he holds is irreducible. Such thinking today is not confined to the science of law. We are told by another philosopher: "I believe that the universe contains a number of factors or entities separated by irreducible differences."

In another aspect this fundamental problem of jurisprudence takes the form of a question as to the relation of law and morals. Moral principles are to be applied with reference to circumstances and individuals. Legal precepts are characteristically of general, and legal rules

typically of absolute, application. Yet that there is some relation between the two is obvious, and all attempts at a system of law which ignores morals have thus far proved futile. On the other hand, the attempt in the seventeenth and eighteenth centuries to identify the legal with the moral proved no less futile. This question of the relation of law and morals has been a battleground of jurisprudence from the beginning. Many philosophers of law now hold that the content of the legal and of the moral is necessarily distinct, and that you cannot expect either to identify the legal and the moral, or, on the other hand, to differentiate them so thoroughly that one can ignore the other. What perhaps one may do is to unify these elements which seem to be in irreducible conflict by an idea of civilization. We may think of spontaneous individual initiative, on the one hand, and ordered co-operation, on the other, as each conducing to raising of human powers to their highest possible unfolding, to that maximum of control over external nature and over internal nature for human purposes which we call civilization. In this way we may find a place for each in our scheme of human activities, and yet the fact will remain that the two are in constant competition, and that it is necessary somehow to reconcile them in action even if we cannot do so in logical or philosophical theory.

In the past men have sought at times to put the whole emphasis upon one of these, then by way of reaction to put the whole emphasis upon the other. They have tried solution of the problem in terms of the one and then have turned about to seek solution in terms of the other. Hard as men have tried, they have never been able to suppress either element, or to exclude either permanently from a place in social control. Legal history shows a constant swinging back and forth from an extreme reliance upon systematic administration of justice according to legal precepts, and an unsystematic administration according to the will of magistrates or administrative officials for the time being. When men seek primarily to be secure in their acquisitions and transactions, they rely upon judicial administration of justice according to law; when men seek to act without risk of the upsetting of what they do, they look to administrative guidance. When acquisitions and transactions and conduct of enterprises seem less important to them than the claims and demands involved in single situations and relations, they rely upon administrative determination.

Just now talk is wholly about individualization of justice. Not so long ago, after an era of over-individualization, the talk was of making the judicial and the administrative processes stable, uniform and predictable. There is need to bear this in mind. If the nineteenth century carried the idea of certainty and uniformity too far, it was largely in reaction from a time which had carried this attempt at individualization too far. After so many successive eras of over-systematic, over-rigid

justice, succeeded by a justice too much at large, is it not time that we were seeking some balance, or some better balance, between them?

Let us look at the matter first from the standpoint of the general security. The general security calls for certainty, uniformity, and predictability in the adjustment of relations and regulation of conduct. The first attempt to achieve these things relied exclusively upon rule and form. Later, men turned to reason, expecting to work out a complete and perfect code of detailed rules which, nevertheless, should be both in the details and as a whole so reasonable as to obviate the difficulties which had been encountered by the strict law. Later, when reason was found not to suffice for what had been expected of it, men turned to principles, that is, authoritative starting points for legal reasoning, and conceptions, that is, carefully defined categories into which cases could be put with the result that certain legal precepts would become applicable. Such was the method of the nineteenth century throughout the world. It was assumed that all administrative element could be excluded from the administration of justice according to law. Indeed, a jurist of the last century argued that the activity of government was twofold in character. He asserted that one part of its activity was displayed in administration, which to him meant administrative guidance rather than administrative determination, or, as he put it: "marking out the work of each and all," and "taking such measures as are necessary to secure that the work is really done." The rival agency, he said, was the formulating of general rules addressed to all persons, or to certain classes of persons in the community, and directing their actions in certain ways specified in the terms of the rule. In place of the incessant supervision implied in administration, he said that by the law, "the persons to whom these rules are addressed are left to themselves and only interfered with if the rules are broken." It will be observed that not only did he take a very narrow view of the judicial process, quite ignoring the administrative side as developed in equity, but he took a no less narrow view of administration, quite ignoring what has increasingly become a feature of administrative boards and commissions in the present century. The subject of administrative individualization, which today we think of as the crux of the matter, is wholly ignored.

Yet the nineteenth century law was full of mitigating devices designed to take care of the interest in the individual life. In criminal law, particularly, there grew up a series of such devices extending from the beginning to the end of a prosecution. In the first instance, there is discretion in the police authorities whether to take notice of some particular offence or to ignore it, a discretion in the public prosecutor extending even, in the common law, to refusal to prosecute after indictment, and a discretion in the grand jury whether or not to find an indictment. There is the power of the jury to render a general verdict in the face of the law and evidence if they feel a particular offence ought

not to be prosecuted. There is judicial discretion as to sentence, or in some states statutory assessment of punishment by juries, which as one may readily see on looking into its results in action, has proceeded in murder cases chiefly on a differentiation between picturesque homicide and homicide without the picturesque element. More recently we have statutory provision for nominal sentence, leaving the nature and duration of penal treatment to an administrative board, and the statutory provision of indeterminate sentence. There are provisions for probation, and provisions for parole. Finally, there is executive clemency. In all these ways the rigidity of the substantive criminal law has sought to be relieved by opportunities for the intervention of discretion at every point in the law-enforcement proceeding. It is significant, however, that there is constant pressure to tighten the administration of these mitigating devices. Many states seek to limit the power of the prosecutor to enter *nolle prosequi* by requiring approval of the court. In England, the court of criminal appeal now reviews sentences with respect to the nature and duration of the penal treatment. Recently there has been much pressure to introduce some sort of check upon probation and parole. The irreducible antinomy of which Radbruch speaks is no less in evidence with respect to the most modern devices for individualization than with respect to the older system of complete judicial discretion as to sentence. Also it should be observed that the discretion of the chancellor, which was a chief mitigating agency on the civil side of judicial justice, has been made use of very effectively in the administration of juvenile courts, none the less so because that discretion had come to be governed by principles which have been found useful checks in the new application of equitable jurisdiction. For it is in the nature of judicial justice to develop checks upon discretion. The summary jurisdiction of a common law court is limited by finality of judicial action after the expiration of the term. The claims of the parties are set forth in a public record which clearly points out the issues to be determined, and in the case of appellate courts the reasons of the decision are set forth in opinions published in official reports and subject to criticism by the profession, and today by law teachers and students. There are no such checks on administrative action, and the personal character of administrative determinations naturally enough is marked. It is the fashion just now to decry checks and balances as "outmoded" and "illusory." The believers in economic and psychological determinism conceive that such things are futile and that in the nature of the case judicial behavior is determined by extra-legal considerations and given an appearance of conformity to the authoritative grounds of decision by specious legal reasoning. But this conception of the judicial process, derived from thinking of the application of legal standards as the type of judicial administration of justice, is refuted by the whole history of civilization, by the development of legal institutions under which the judicial administration of

justice has progressively become more certain, more uniform and more predictable, while at the same time securing a continually widening circle of interests. If judicial justice does not always and everywhere come up to the picture of it which we painted in the last century, to escape from the unhappy features to which putting the bench in politics has exposed us in this country by turning to executive justice, is to escape from the frying pan into the fire.

Chiefly the over-rigidity of nineteenth century judicial justice was due to the nineteenth century theory of law as an aggregate of laws, and the isolation of the science of law resulting in a want of team play with the social sciences. This led to an over-narrow view of the problem of adjusting relations and regulating conduct. There was too little scope for individualization in the nineteenth century judicial process.

Conceding, as we must, that individualization is a required element in judicial justice, the lawyer instinctively asks what are to be its limits. Is there perhaps to be a partition of the field of justice between the judicial and the administrative? This has been suggested, and I have argued on other occasions that inheritance and succession, interests in property and the conveyance of property, and matters of commercial law and the creation, incidents and transfer of obligations, with respect to which the social interest in security of transactions is particularly strong, have proved at all times a fruitful field for effective legislation, and in consequence especially adapted to judicial determination. Where, on the other hand, the questions are not of interests of substance, but of weighing of human conduct and passing upon its moral aspects, legislation has accomplished but little and standards calling for the administrative element in the judicial process have come to be relied upon increasingly. It has been said in criticism of this suggestion of a partition of the field, that all questions which come before tribunals are questions of conduct. In a sense this is true. But in one type the conduct element is significant while in the other it is not. Making a promissory note and not paying it are items of conduct. But they are not the significant items in a matter which primarily involves the economic order. Failure to come up to a standard of due care while pursuing some course of conduct in one's daily activities involves a valuing of the particular item of conduct as the primary question. No one has ever suggested applying a standard either to the validity or the collectibility of a promissory note. All attempts to subject negligence to detailed rules of law have simply failed.

On the whole, the advantages of judicial justice even where the administrative element is involved seem to be in its combining the possibilities of certainty and of flexibility better than any other form of administering justice; in the checks upon judicial action which do not obtain or are ineffective in case of purely administrative officials; and particularly in the training in, and habit of seeking and applying, prin-

ciples when called on to act, and the sensitiveness to the expert criticism to which judicial decisions are subject, which enable judges to stand for the less clamorous and less immediately urged, but often more significant, social interests, against insistence in particular cases on individual claims. After all, forms and rules, by compelling deliberation, guard against suggestion and impulse and ensure application of reason to the cause.

Having considered how the individual life fares in the judicial process, we must ask next how does the general security fare in the administrative process; how about security and predictability in that process? I will leave out the question of administrative individualization in view of the common law doctrine of the supremacy of the law because our question is a universal one not to be tried by the peculiar institutions of any one system. Undoubtedly, our nineteenth-century views of the relation between law and administration were colored with unfortunate results by the idea of the law as standing between the individual and the tendency of politically organized society to oppress him which was a legacy of our Anglo-American legal and political history. Nevertheless, the more one studies administrative determination in action, the more it is borne in upon him that something more than history was involved in our inherited attitude toward administration. An example of administrative determination in action may be seen in the revoking of permits for industrial alcohol under the regime of national prohibition. Courts in reviewing such action were compelled to say many times that "revocation must be based on something more substantial than mere suspicion and speculation." They found administrators acting on the basis of questions having "no relation in point of fact or time to the granting of a permit." They found themselves compelled to point out that findings had been made "based on information which came to the permit authorities from some unknown source, and not upon facts disclosed at an open hearing." They found more than once that controversies over permits grew out of "the failure of the administrator to recognize the limitations upon his powers." We must bear in mind that the courts went very far in upholding administrative action in these cases. The Supreme Court of the United States said: "The dominant purpose of the Act is to prevent the use of intoxicating liquor as a beverage, and all its provisions are to be liberally construed to that end." Yet courts proceeding to carry out the policy indicated by the Supreme Court had to point out that administrative action seemed to have been dictated by a hope to push the limits announced by the Supreme Court still further and thus obtain for the administrative authorities "a power just a little broader." When it is remembered that the reviewing courts, under the decision of the Supreme Court, only had authority "to determine whether upon the facts and law the action of the commissioner was based upon an error of law or was wholly unsupported by the evidence, or was clearly arbitrary or

capricious," it will be seen to what lengths the zeal of the administrator was urging him to go. Such things need to be borne in mind in view of the constant pressure of administrative officials to escape from any judicial review, especially to escape from review of their findings of fact. Such things as putting a dictagraph in the hotel room of a licensee and having a conversation between the licensee and his attorney taken down, and acting on the basis of the applicant's using a hard name in speaking of the administrator, are but too characteristic of unfettered administrative discretion.

Such things are not due merely to the personality of individual administrative officials. They inhere in the system itself which calls for speedy action and treating of each instance as unique, and seems to put the attainment of some object in a particular situation so much in the foreground as to eliminate the general security from consideration. Say what one will about the artificiality of some of the rules of evidence, the common law hearing of a case as a whole on evidence before the tribunal, and not on reports made by inspectors who act behind the backs of the parties and without opportunity to examine them, is a great guarantee of objective ascertainment of the facts, and indeed one for which no substitute has been found. We have had a striking example recently in many jurisdictions in the work of probation officers and parole boards characterized by perfunctory, capricious, politics-dictated action, which is at least no improvement on unreviewed judicial discretion as to sentence. Undoubtedly better personnel, better training, taking of administration out of politics, longer experience of the administrative process in the common-law world, and better equipment will do much to obviate such things. Also it must be admitted that discretion is never absolutely at large. Judicial discretion is controlled by the whole training and habits of the judge. Administrative discretion is controlled to a certain degree by standards which develop in the course of experience. But what governs administrative discretion is seldom as determinate and predictable as the operations of the principles governing the exercise of the chancellor's jurisdiction; and even with those checks, no one who has followed the administration of equity jurisdiction over specific performance as governed by the doctrine that the court will not enforce hard bargains, can fail to be aware how great, after all, is the margin for subjective elements in decision of such cases. How much more is this true when there are no determinate checks. In judicial action we have the guarantee of objectivity in the stabilizing effect of a taught tradition and of authoritative received ideals. It is likely to be a long time before schools of public administration can create such traditions and formulate such ideals. To assume that uncontrolled administrative discretion will be guided by "a constant and unceasing will to render to everyone his own" postulates ability to know intuitively what is each man's own. It is much to be feared that those who are loudest in urging

uncontrolled discretion and most skeptical of checks and legal precepts are skeptical also whether there is such a thing as any one's own.

Nevertheless, the tendency of administrative tribunals to become courts administering something very like judicial justice is sometimes marked. This is especially true in the case of the Interstate Commerce Commission, and of some state industrial commissions. It should not be forgotten that the court of chancery was in origin an administrative tribunal, and yet it became an ordinary court.

Let me be understood. I would not for a moment advocate a return to the nineteenth-century situation when the courts attempted to do the work of administration, or where they sought to tie down administration by injunction and judicial review so as sometimes at least to paralyze the executive side of government. Our problem is to achieve a workable balance between the judicial and the administrative processes which will be effective for the ends of the legal order.

Three regimes have been believed in and argued for. One is an extreme of detailed rule; a fixed rule for every kind of dispute whether provided by legislation or arrived at by a process of judicial exclusion and judicial inclusion through judicial finding of the law. A second is an extreme of individualization by administrative justice, that is, by a specialized technique of individualized justice, but not necessarily according to law. A third is an extreme of offhand adjustment by some agency for each particular case without settled technique and without law. Although the third is argued for today more than one would expect in a highly organized economic society, the real problem must be to find a balance between the first and the second, or else to apportion the field between them. What then is the ideal field of administration? What is the field in which it can function better toward the ends of the legal order than can adjudication?

At this point we encounter the well known doctrine of separation, perhaps better called distribution, of powers in relation to administrative justice. But so far as our American constitutional separation of powers is concerned, the lines seem now reasonably well established. Where there are powers of doubtful classification, legislation may assign the power to either of the appropriate departments of government. Where powers analytically or historically, or from both standpoints, might be regarded either as legislative or administrative, as in rate making, legislation may properly assign them to an administrative body. Where a power analytically or historically, or both, might be regarded either as judicial or as administrative, as in the case of administration of standards, legislation may constitutionally assign it to administration. In these cases the question is one of relative adaptation to the ends of the legal order. There is an obvious advantage in administrative over legislative rate making. Standards of reasonable service, of reasonable facilities, of reasonable incidental facilities to be provided by public utilities, obviously

are best confided to administrative application. There is an obvious advantage in administrative determination in advance over judicial determination after the event in an action by some aggrieved patron. But how about application of legal standards generally? One possible line is between action in advance of wrong or injury, as for instance, by inspection to see that building laws and the like are obeyed so as to prevent injury, and proceeding after injury or wrong to establish liability for it. We might wait for experience to draw a workable line, or resort to our legal history to anticipate how it will probably be drawn. The fashion just now is to set up and multiply administrative boards and commissions resulting in as complex a scheme of administrative tribunals as the scheme of courts described by Coke in his Fourth Institute. The general tendency in the beginnings of any system is to set up specialized tribunals for every type of case which attracts notice. With the tendency to refer everything to administrative commissions one should compare the no less marked tendency not so long ago to refer everything to the courts. For example, in the 60's of the last century one state committed the regulation of crossings of one railroad by another at grade to courts of equity. In the beginnings of irrigation in the arid states there was an attempt at what was called "adjudication of streams" by proceedings in equity. But in these cases the need is chiefly of preventive action. Administration is clearly better adapted, and this was soon found out. Moreover, nineteenth-century American procedure did not lend itself to such cases as cases for judicial action. These cases did not necessarily prove, therefore, any inherent advantage in administrative over judicial application of standards generally.

One might say that rules of law, that is, precepts attaching a definite detailed legal consequence to definite detailed states of fact, are best applied by courts. The habits and dispositions of judges lend themselves peculiarly to application of rules. Probably principles are best developed by courts, that is, their training and habits fit them peculiarly for development of authoritative starting points for legal reasoning by an authoritative technique. Likewise, legal conceptions are probably best handled by courts. The real question, then, is as to legal standards. Courts have long applied such standards as that of due care and of fair conduct of fiduciaries. Administrative boards have applied standards of reasonable service, reasonable rates, and reasonable facilities on the part of public utilities. Today fair competition is a standard applied both by courts and by administrative tribunals. But here, again, courts act after injury to economically advantageous relations, while commissions act preventively to forestall injury.

Shall we say, then, that preventive justice is the domain of administration? Not necessarily. Long experience of declaratory judicial proceedings in the Roman law and the modern Roman law shows that some features of preventive justice are well adapted to the methods of

courts. But the genius of the Roman law is administrative as definitely as the genius of the common law is judicial. Much can be done in judicial preventive justice in the common law world as we get away from the notion that a judicial proceeding, in the nature of things, must be something of the type or on the analogy of an action for damages after the event. Rules, principles and conceptions are employed typically in the legal securing of interests of substance where the questions are questions of property or of legal transactions. Standards are employed typically where the questions are of conduct rather than of property. Of course, in a sense the law always has to do with conduct. Questions of title arise because of the conduct of a disseisor. But in such case the conduct of the disseisor is not the significant thing but rather the claims to the property where the disseisin took place. So in trover, conversion is conduct. But the significant thing is not the item of conduct as such but the relation of the parties to the thing with respect to which the conduct took place. We may therefore distinguish the field of the legal order in which property and legal transactions are the significant things—the field where the economic order is involved—from the field in which conduct is the significant thing—where conduct is held by law to come up to some standard and so may be regulated administratively by that standard or subjected judicially to liability for failure to come up to it. In administration the tendency is to put the highest value on getting things done; in adjudication the tendency is to set the highest value on getting them done right. So offhand action is more felt to be a sin in the judicial process and over-caution and over-deliberation, and so dilatoriness, to be a sin in the administrative process. It must be considered therefore in any apportionment of the field how far, on the one hand, immediate preventive action is a chief consideration, or, on the other hand, a careful adjusting of the legal limits of the standard to the case in hand.

Administration has the advantages of directness, expediency, concreteness, freedom from the bonds of traditional rules, and power to act upon the everyday instincts of ordinary men. In such things as probation and juvenile delinquency, indeed in the whole field where social work and the law come into contact and must co-operate, we must use administrative agencies and methods. But the problem of human relations here is very different from what it is where the security of acquisitions and security of transactions are involved; from cases where the economic order is affected. In judicial justice we may find a combination of an exact administration where rule is called for, and a systematized individualization where rule will not do the work of justice. The difficulty in the latter type of case has always been that the systematized individualization tends to become perfunctory and rigid through continual contact with the application of rules. In administrative justice there is no such contact with application of rules and the tendencies to be

combated are, on the one hand, to get in the rut of a perfunctory routine, and, on the other hand, to operate with a complete lack of system. What is needed to be developed in administration is a combination of respect for and adherence to the limits of administrative authority, and a technique which will insure full development of all sides of controversies and equal ascertainment of facts, with a flexibility of relief, especially of preventive action, which is the real justification of administrative justice.

In any appraisal of administrative individualization we must not overlook the tendency of administration to fall into a perfunctory routine in which all real individualizing is lost. In Dr. Young's recent book this is shown as an unhappy feature of much of the work of probation officers, particularly in connection with juvenile courts. It was shown markedly in administrative granting and revoking of permits under the National Prohibition Act. In one case the administrator made it a rule of exercise of his discretion to measure the sufficiency of equipment in every instance by the fixed sum of \$5,000. The court pointed out that this arbitrarily fixed requirement was manifestly inapplicable to every case. "Cases differ in location, costs, and personnel and requirements differ with them." Small businesses and even the beginnings of big businesses call for relatively little equipment. As the court said, if "the minimum financial requirement" [could be fixed] "at a sum so large as to be prohibitive . . . that would be a bureaucratic regulation of industry rather than a departmental administration of the national prohibition law."

We must recognize what it is which has brought about the movement for what may fairly be called administrative absolutism. In the first place, we have been turning to administration to get away from the expensive, cumbersome, dilatory legal proceedings characteristic of nineteenth-century justice in America. Our legal procedure has steadily improved, but is still backward. Secondly, we have been seeking to get away from the legal tradition where it has become out of line with the ideals of the time. A comparison of workmen's compensation as administered by commissions with employers' liability as administered by courts in the last century, or of claims against public utilities with respect to rates and service, as enforced by actions at law in the last century, with the disposition of such matters by public service commissions today, will suffice to make the point. Third, business men have turned to administration to avoid the risk of acting at their peril on predictions as to how the conduct of an enterprise or undertaking will be looked at judicially after the event. In such cases as this, and in preventive measures in the interest of public safety, such as health statutes, factory acts, and building and fire escape laws, administrative inspection and enforcement is at its best. But, fourth, it must not be overlooked that some are turning to administration and urging it in order to get away from the

generalizing tendency of the law and its insistence on equality of treatment, since they hope for some special advantage which may be had through political pressure on administrative agencies, which the courts would resist. All but the last of these causes of a turning to administration proceed on defects in the substantive law and procedure which are curable, and indeed are in process of cure.

Those who urge administrative absolutism, that is, argue that we must set administration free from legal bonds and trust it to organize its behavior on some basis of intuition developed by experience, are for the most part in reaction from the extreme tying down of administrative action by judicial review and injunction in the last half of the nineteenth century. For a time, almost every item of administrative action was held up by an injunction. Traditional suspicion of executive action was carried to an extreme, at the same time that our archaic procedure and organization of courts prevented the courts from doing what they would not allow the executive to do. But we must recognize the dangers involved in this administrative absolutism, as indeed danger is involved in all extremes.

It is a mistake to suppose that objectivity in the judicial and in the administrative processes is demanded solely by the exigencies of the economic order, or by the requirements of the general security. Until a social and legal millenium gives us super-administrators, both in quality and in quantity, beyond anything in human experience, those who are charged with adjusting relations and ordering conduct by means of administration, since in modern society the volume of work to be done precludes their administering in person, will be driven by the rooted human antipathy to having one's will subjected to the arbitrary will of another, to require their administrative agencies to carry on their function according to law. Just now it is fashionable to look for great things from administrative absolutism, in reaction from the extreme of reliance on rules of law and distrust of administration in the nineteenth-century common-law world. Those who are simply skeptical of judicial justice, without any special belief in administrative absolutism, give up our problem and say that a government of laws or of men according to law is a psychological impossibility, and so hold that whether carried on by judges or administrative officials all we can have, after all, is a disguised official absolutism. Partly, however, one may suspect that this skeptical psychological determinism represents a wish for such a regime as is pictured, based on belief that under such a regime a class autocracy may be set up.

Civilization is not, and has not been maintained by a doctrine that law is whatever is done officially, but rather by one that what is done officially may be, and ought to be, carried on according to law. Administrative absolutism is connected with the threat theory of law. There are those who hold that law is only a body of threats of what those who

wield the authority of politically organized society may do on certain states of fact or in certain contingencies. It follows that the judicial process is one of carrying out of threats in case that, or so far as, the judge in the case at hand and for the time being is moved to do so. On such a theory of law there is no matter whether the threat enforcing agency is court or administrative tribunal. The judicial process and the administrative process from this standpoint are at bottom the same.

The fallacy in the threat theory of law is in assuming that law is no more than a body of laws, and that if a law in the sense of a rule of law can be looked at as a threat (as indeed it can from the standpoint of the citizen called on to consider at the crisis of action what course he will take) it follows that law is only a body of threats. Hence all a judge has to do is to consider whether and how far to make the threat good in a particular case. But if a law is a threat, the technique of applying the threat is governed not by a threat but by law. What this threat theory leads to in action is illustrated by the doctrine of the late juristic adviser to Soviet Russia, that in the ideal society there is no law; there is only one rule of law that there are no laws but only administrative orders.

A legal system succeeds as it succeeds in attaining and maintaining a balance between extreme of arbitrary authority and extreme of limited and hampered authority. This balance cannot remain constant. The progress of civilization continually throws the system out of balance. The balance is restored by the application of reason to experience, and it is only in this way that politically organized societies have been able to maintain themselves enduringly.