

necessary to resign the claim to industrial lawlessness : the alternative is socialism.

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II.

THIS is a question in speculative jurisprudence. In old times we never should have thought of debating such a question. It is, however, far from being a silly question in the times on which we have fallen. It brings out, upon the arena of debate, the major premise of a number of projects and doctrines which are now advocated ; and we know that the fallacies lurk most in the assumptions of the major premise. It is also a significant fact that we are forced to discuss speculative questions where speculation has no business, just when speculation is condemned in its proper domain, and when the true uses of history are ignored by those who want to use history out of its sphere.

Status and contract, regulation and freedom, combination and competition, are the jurisprudential, the constitutional, and the economic facets of the same thing. Each couplet is complete in itself, and its parts are entirely complementary, as much so as heat and cold. Hence, if we narrow the field of contract, we shall extend that of status. We shall create new rights derived from the new status, either for all citizens or for the classes affected (e.g., the poor, debtors, employees, tenants), to which there will be no corresponding obligations ; and we shall correspondingly extend the range of torts. We shall in like manner shift the adjustment of freedom and regulation now existing in our constitutional law, diminishing individual responsibility, and increasing collective responsibility, in the same degree.

What, then, are the facts upon which we are invited to enter upon such a reconstruction of the whole body of jural relations on which our society is built ?

For the last three hundred years the best thought and labor of civilized men has been devoted to the effort to produce civil institutions which would guarantee to each individual the exclusive use of all his own powers for the pursuit of his own ends ; i.e., happiness, as he understands it, and the equality of all before the law. Such a thing as an economically free man cannot exist, because our life on earth is held in conditions which we can modify only within narrow limits at best. The last hundred years, however, have seen a growth of our power over the harsh conditions of life by a development of the arts, which we never tire of glorifying. This development of the arts has made necessary a new and very wide

organization of mankind for industrial purposes : it has produced a great demand for talent in the way of organizing and executive ability, and it has given enormous importance to capital (plant, tools, and machinery). The new organization is necessarily impersonal, automatic, and mechanical. The effect of liberty, combined with the new development of the arts, has been to surround every man in our society with a great range of new chances, from the chance of becoming a gang-boss to that of becoming a great captain of industry. Formerly a man might rise, it is true, but the chances of doing so were limited to soldiers, priests, and royal favorites. A century ago, of two weavers, one might be a better workman than the other. He could profit by his superiority only within narrow limits. To-day one might remain an operative, and the other become a great manufacturer. The modern state has, in effect, thrown open the chances of success to all, in the faith that thus the maximum of industrial power would be developed for all, and that the maximum of individual happiness would be attained for each.

In large measure the aim of fifty or a hundred years ago has been realized ; but when we aim to go on and realize it still more completely, by a fuller realization of liberty to win, and security to have and hold, we are met by a reaction. We are told that liberty does not produce an ideal society, and that there are yet thousands of poor, unfortunate, and unhappy. There are no pure and unalloyed results of this so much boasted progress. If liberty has opened chances of wide improvement and advance for the better and the best, it has opened chances of deterioration for the weak and unfortunate, equally great and as terrible as the others are glorious. If society has offered chances and given security to the captains of industry, it has only created a new order of nobles — plutocrats, in fact ; and the effect of the development of talent has only been to bring control of the industrial organization into the hands of a few powerful men, who can readily combine to seek selfish ends, and supplant competition by combination.

Everyone knows that there is some measure of truth in all this. It is by no means strange that it should be exaggerated and enhanced by the partial interpretations and incorrect generalizations which are sure to be made under such circumstances. How could it be expected that the world should go on at the rate of the last century, and that some should not get dizzy and frightened at the speed ? How could it be expected that all should keep their heads cool, and their judgment sound, so as to interpret correctly all

the confused and perplexing phenomena of such a period of transition and confusion? We are on trial, really, as to whether we can appreciate and deserve our inheritance of institutions, rights, powers, and opportunities. The great test problem of our time is whether we can now, after overthrowing all the old privileges, hold steadily the balance of truth and justice, so as not to create new privileged classes in the new rulers of society. The impatience and derision with which the most sober appeals, and the most justifiable demands to know what is meant and whither we are being led, are met, is not re-assuring. The phrase-makers and the sentimentalists seem to have the control for the moment.

It is true that men have attached hopes of easy and universal happiness to progress which were doomed to disappointment. It is true that the new development brings new tasks and new difficulties. All development will do so to the end of time. It is true that the great plutocrats and captains of industry have now great power, and that, like all others who have ever held power, they may abuse it. It does follow, truly, that appropriate developments of our institutions will be called for to meet the new difficulties. The proper solution of all such cases must be found as they arise one by one. It is a vicious and mischievous procedure to anticipate them, to speculate about them, and to lay down broad principles in advance by which to solve them. It is as vicious in political science as casuistry is in morals.

There are three very common assertions in regard to the effects of modern improvements which I hold to be incorrect in fact.

1. It is often asserted that progress has made the poor poorer, and that it has crushed down those who are worst off to a position worse than that which they formerly occupied. This is an historical assertion, and is quite different from the other assertion with which it is often connected, that our least well-to-do classes are not ideally well off. The advance-guard of our society is far ahead of any grade of physical well-being which men have ever before enjoyed, and the distance between our advance-guard and our rear-guard is far greater than ever before; but the rear-guard is far ahead of any position which the rear-guard ever occupied before. From this statement the victims of industrial folly or vice must be excluded. At no time has any large mass of men enjoyed such command of the conditions of material welfare as is now enjoyed by the mass of men in the great civilized states. This is the only proper measure of social achievements, not any ideal. If anyone thinks that this could be gained without any alloy of incidental trouble and

difficulty, he must have little experience in the observation of human affairs.

2. It is sometimes asserted that the chief result of progress is to offer more chances for gambling speculation. On the contrary, the result of the improvements in production and transportation has been to reduce the irrational element in trade and industry to rationality. There are no speculators in the United States to-day who are any bolder than Bingham and the two Morrisses, and the merchants of the commercial war period, and the land speculators of old times. It is erroneously asserted that the great gains in wages of superintendence come from speculation. If that were true, they would, like all gambling gains on pure luck, ultimately average zero. The great gains of the superintendent, which are popularly called speculative, come from reducing the irrational element of luck to rationality, by investigation of facts, sagacity in judging the market, and calculation of probable results.

3. It is asserted that progress has given the captains of industry control of the labor market. Taking good and bad times together, it is impossible to say who has the control of the labor market, employer or employee, because neither of them has it. Each needs the other. As the times change, the need of one for the other may become greater, and one or the other becomes stronger in the market accordingly.

Having thus cleared the ground and got the case before us, let us attempt a more specific reply to the question proposed.

1. The great use of history is to verify and rectify our deductions by a continual reference of them to facts of observation; but a further use of history and sociology is to train the judgment to an instinct or sagacity for the estimate of the conditions under which, and the limits within which, we can take measures for an end which we judge expedient. This instinct or sagacity can be expressed in certain maxims, but the maxims are inelastic, and fail to carry the very element which is most important. The finest example of this is the maxim *laissez-faire*. For purposes of instruction, and for those who are not in the way of forming the instinct described by independent study, the maxim is of the greatest value. In any case, and for anybody, the lessons of history take form in general habits of thought, points of view, and prejudices. Now, if I read history aright, it warns us against all such rash and empirical interferences with rights, interests, and institutions, as are proposed under our question. The cases, if let alone, develop their own corrective forces, or what we thought a great danger proves to owe all its terror to our short-sighted misjudgment.

Will not the confusion solve itself? Will not our interference only intensify the confusion? The case which we are discussing stands before us as one especially calling for stern common sense. The problem has already been made far worse by rash and ill-trained speculations about it. False notions have been scattered, and impossible hopes excited, making ultimately successful and fortunate solution far more difficult.

2. If I understand the teachings of history and sociology, they show that it is not possible for any civil authority to select points at which, or narrow lines upon which, it can act upon the social organism only once, or only from time to time, and thereby impose upon the energies of the people a direction toward ends selected by the political authority, and diverging somewhat from the ends which self-interest would have led the same people to choose; self-interest being nothing but the rational procedure which leads a man to make up his mind what he wants, and to try to get it by appropriate means. If a political authority tries to do this, its subjects try to save their interests, and defeat its purposes, if they can. Hence, either the state fails of its purpose, or it has to constantly extend the scope of its control. I hold that an interference with freedom of contract would either fail of what is attempted by it, or would force a restoration of all that coercive power and comprehensive regulation in the state which it has been the work of three hundred years to break down. The socialists describe competition as the war of all upon all, — a description of it which has neither truth nor sense; but, if the course which I have just described should be taken by a modern democratic state, it would realize the tyranny of a majority over the individual, — the true socialistic tyranny, the most powerful, far-reaching, cruel, and terrific tyranny that could exist amongst men.

3. Any interference with free contract would lower the existing organization of society, because it would render insecure those manifold relations of rights and interests by which the organization of society is kept up. Society, however, keeps up its present rate of production only by virtue of all the existing organization. If the organization should be lowered, the production would be lowered. If the relations of landlord and tenant, lender and borrower, employer and employee, are rendered insecure or indefinite, and if a man who enters into those relations may jeopardize his property and his rights, or find his contracts subject to revision by outside and irresponsible interference, few persons will venture to enter into those relations. Industrial power to-day depends upon the subdivisions and combination of

all these relationships. To destroy or impair them would be to lower the efficiency of capital, diminish production, impoverish us all, and, finally, either lower the population, or reduce a large part of it to distress.

If there is to be any interference with freedom of contract, it may be brought to bear either upon the making of the contract or on the interpretation and solution of it.

Generally speaking, a man does not want any interference with the formation of his contract. When two men make a contract, they do it because both of them expect to gain by it. One of them would therefore be just as much opposed to any interference with it as the other. If, however, one of the parties felt himself weak in the negotiation, and desired the intervention of some third party in his behalf, it is plain that it would be necessary to add some coercion to make the second party to the contract consent to go into it at all on the imposed terms. The usury law is a case in point. It has always been impossible to make it work successfully, because there is necessary to its successful operation a further stipulation, that anyone who has capital shall lend it to anybody who wants it at the prescribed rate. So with regard to arbitration on wages. If it should attempt to decide what wages ought to be paid, it would still be necessary to enact that the employer must employ the employee at those wages.

4. If the interference is to be exerted on the interpretation and solution of contracts, it must be general in its terms, and apply to specific anticipated groups of cases. No such legislation can be framed which will not be harsh and mischievous to a great degree. The bankruptcy law is already a case of it, and no bankruptcy law has ever been devised which does not work with great friction and great injustice on the special cases to which it is applied. The only excuse for a bankruptcy law is the otherwise insoluble nature of the case.

5. I have debated the question as if an interference with freedom of contract for adult men was possible; but the argument shows that it is not possible. If there are any difficulties already clearly defined as consequences of modern improvements, they consist in chances for combination. The correct inference is, that what is needed is to take measures, if any, to restore free competition. What we want is not less of it, but more of it. Our welfare lies in maintaining it, and warding off interferences with it. If we introduce any form of interference with it by law or by administrative intervention, we shall open the door to all sorts of corruption. There is no possible rule or principle of interference. Interference has no tests or guaranties. It must necessarily

degenerate into patronage, favoritism, sycophancy, and intrigue. It is only necessary to notice the doctrines which are affirmed and the propositions which are put forward now, by the advocates of interference, to perceive the full extent of this danger. The views and propositions to which we are treated contain all possible assumptions as to facts, and all conceivable variety of views, whims, and fads, about social affairs. Which of these schools or tendencies would get the upper hand, if our laws and institutions allowed anybody to impose his notions on his neighbor's interest? Any system of interference is necessarily arbitrary, and puts terrible power in the hands of the administrative authority, whatever it is. The value of *laissez-faire* and free competition is not that that system gives any guaranties of ideal result, or promises to fulfil any optimistic expectations, but that it throws out arbitrary action, and leaves rights and interests to be adjusted by their own collision and struggle, until they find their true resultant in the facts and conditions of the case. This is said to develop egoism in each of the parties to the struggle; but, if history teaches any thing, it is, that, under the system of interference, the regulator, whoever he is, develops his egoism at the expense of both the original parties to the struggle. A democratic or socialistic committee will surely prove no new device in that respect.

6. If it is true that we are going through a social evolution which is about to produce great transformations in society, especially as regards the distribution of political and industrial power, that is the strongest possible reason why all the people who are ready at once with their notions about what this evolution is going to produce, or ought to produce, should be most carefully prevented from meddling with it; and why, on the other hand, the evolution should be allowed to work itself out freely, that we may see what it is, or is to produce.

7. I believe that it is a complete mistake to interpret the course of things which we see as moving towards more regulation. The one supreme characteristic of our time is the thirst of the individual for material comfort and luxury. The socialists themselves bear strongest witness to it. The whole motive of their doctrine and work is that some people have not succeeded in this great pursuit of all. They demand a share, or a bigger share, in what? Nothing but the material enjoyments won by modern industry. The destructive work which is on foot is all aimed at the vested interests which secure some in enjoyment of goods, although they contribute no present work to the productive effort of society. But that

very temper which leads to, or allows, that destruction of vested interests, will support all rights which are based on contribution to the productive effort. The result will be 'the survival of the fittest' in its most pitiless form. The contest which is often described as between labor and capital is really between those who have and those who have not. Plenty of laborers are to be found amongst those who have.

8. At the very time when it is proposed that our legislatures shall widen their functions, and assume more and more of the duties and responsibilities of the old police and bureaucratic despotisms, those legislatures are showing themselves less and less fit for such functions. While the tasks grow larger and more complicated, the legislatures are less fit by their membership and organization to deal with the tasks, and every indication is that they will become still less so. They fall more and more under the dominion of plutocrats; and, the wider the functions they have, the more will it be possible for plutocrats to attain their ends by legislative corruption. Hence greater governmental functions would simply enhance the greatest evil we have to fear. Our legislatures also depart constantly more and more from the character of great councils, deliberating for the public and general good, and tend more to the character of assemblies of the representatives of local and industrial interests, who are compromising and adjusting their conflicting interests, by a method which simply consists in combining for their own advantage against those who are not on hand to fight their battle on the legislative arena. Such, in a higher degree, would be the only effect of subjecting more interests to legislative control.

It is one of the fashionable fads to suppose that there is in the community an active principle of 'distributive justice' which is available to take the place of supply and demand in regulating rights and interests. It is sufficient to point to political affairs as a test of the force, value, and availability of such a sentiment. If a jury cannot do justice in a petty criminal case without all the apparatus and procedure of the court to instruct and guide them, how can a popular and unguided sentiment be available to decide the most delicate questions of rights and interests?

There is one direction in which modern progress has already developed a need for new institutions or the modification of old ones; that is, to connect with liberty suitable and equivalent guaranties of responsibility. It may not be going beyond the limits of the subject to point out, in closing, the line upon which fruitful reform effort may be made by those who desire to work for reform.

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