University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School, at 34th and Chestnut Streets, Philadelphia, Pa.

VOL. 79 NOVEMBER, 1930 NO. 1

SOURCES OF TOLERANCE*

HON. LEARNED HAND

I am going to ask you to go with me, not into questions which have direct relation to the law or to government, but to those which concern the mental habits of our people, since these, indirectly at any rate, in the end determine its institutions. This is not an easy, maybe it is an impossible undertaking, but at any rate, nobody can very effectually challenge what you say about such vague things, and you are exempt from the need of citation—blessed exoneration to a judge. It may be worth discussion, if only for discussion's sake. At least it can serve to bring out differences of opinion.

By way of prelude may I then ask you for a moment to go back in our country for nearly a century and a half? We were substantially a nation of farmers; towns were few; cities, as we should now rate them, did not exist. Life was, as we like to believe, simple. Maybe it was not so in fact, for simplicity depends rather on one's inner state of mind; but at any rate it was less pressed and hurried; people did not think so much about how complicated they were, and less dissipated their attention.

The political notions of the time were divided into two contrasting groups which it has been the custom to associate with the

*An address delivered in Philadelphia, June, 1930, before the Juristic Society, a group of younger members of the bar whose aim is to stimulate interest in the academic aspects of the law.

great names of Jefferson and Hamilton. It is easy to associate Jefferson's ideas with those of Rousseau, from whom on the outside they seem to have been drawn. This, as I understand it, is wrong, but he had drunk deeply at the springs of Physiocracy, and in any event he believed in the basic virtue of mankind, once set free from artificial restraints. He found his ideal in a community of independent families, each intrenched in its farm, self-subsistent, independent, needing no regulation, and tolerant of little interference, especially by government. Those who invoke his name today must be shocked at his scorn of the mob of mechanics and artisans, whose turbulence and separation from some particular plot of earth, unfitted them in his eyes for sharing in the Good Life. A nation in which information, or what passes as such, can be instantaneously sent from one end to the other, in which the craving for conformity demands uniformity in belief, which for that reason wears the same clothes, reads the same print and follows the same fashions, amusements and conventions, would have seemed to him scurvy and sordid. He would have found little in the America of today to justify that Utopia of which he had dreamed.

The extraordinary richness of his own nature, his omnivorant interest in all the activities of man, no doubt colored his picture of a life on the land; yet it also enabled him to transmute into a rosy ideal the dumb aspirations of his people, and so they looked to him for their leadership for a quarter of a century after his accession to power, and if we count Jackson as his dubious disciple, for that much longer. Clearly there was something in his outlook which responded to the needs of those among whom he lived.

Hamilton was a horse of another color, always an exotic, succeeding in his statecraft only because of the disorders which immediately followed the Revolution; whose genius needed the cloak of Washington beneath which his real work was hid for near a century. He was no Utopian; he did not believe in the perfectability of human nature. Government was a combination of those interests in the community which collectively would be irresistible; a combination resting upon self-interest. When he secured the passage of the Constitution, it was by means of such

a combination; the landed class, the manufacturers and the public creditors. In the doubtful contest for ratification, as Beard has shown, it was these votes which eventually won, and it was under the aegis of Washington that he managed to carry on for those critical eight years. With the constant movement of the frontier westward, the underlying, but less articulate, aspirations of a rural people finally asserted themselves, after Adams had run off Hamilton's momentum.

The animosity between the two men was well founded and inevitable. They represented, and we are right still to take them as our most shining examples of, two theories of human society: that which demands external control, that which insists upon the opportunity for personal expression. Jefferson's victory seemed to him to be the sanction of all that the Revolution had implied; the liberation of a free people from the domination of greed and corruption, opening vistas of human felicity not theretofore known on earth. For its fuller expression he was willing, forced by a sad necessity, to sacrifice his constitutional scruples and forever compromise his party by the acquisition of Louisiana. To Hamilton, Jefferson's accession was the beginning of the end, the last step in a plunge towards anarchy. The squalid political quarrel for the domination of the rump of Federalism which ended in his death, had for him a deeper significance than the leadership in a party then apparently writhing to dissolution. The Eighteenth Brumaire was five years past, and though the Coronation at Notre Dame was still some months away, recent events already foreshadowed it. In the final breakdown of that Jacobinism which he and his associates thought certain and early, the need would arise for some transatlantic Bonaparte to gather the shreds of society, and build a state upon surer foundations than that weak instrument in which at heart he had never really believed. To prevent Federalism, the sacred chalice, from passing into the obscene hands of a turncoat and a traitor was worth the chance that cost him his life.

Each man would have said that he was the champion of liberty, and each would have been right. To one the essential condition of any tolerable life was the free expression of the individ-

ual, the power to lead his life on his own terms, to enjoy the fruits of his industry, to garner the harvest of his hands and brain, without subtraction by a horde of office-holders, locusts who laid waste the land and spread the venal doctrine of their right to eat what others had sown, the blight, the virus, of a society of honest men, enjoying the earth which God, at least in this blessed country, had patently spread out for their satisfaction. The other saw in all this no more than the maunderings of a toxic dream. What was the assurance of man's capacity to deal with his own fate? Was it not clear that virtue and intelligence among the sons of Adam was as rare as physical prowess, indeed much rarer? Liberty could not rest upon anarchy; it was conditioned upon an ordered society, in which power should rest where power should be, with the wise and the good, who could be at least presumptively ascertained as those who in the battle of life had already given some signs of capacity. It was an empty phantom to assume some automatic regulation by which without plan and direction public affairs manage themselves. The concerns of a great people are not all individual; they have collective interests without which their life can scarcely rise above that of savages, each shifting for himself, without comfort, security or the leisure which alone makes existence endurable. Jacobins might bawl of liberty, but really they meant no more than the tyranny of their own domination over the mob.

Placed as we now are, with an experience of over a century behind us, we can say that the future was apparently to justify Hamilton as against his great rival. Our knowledge of the ways of Nature, our command of her energies and the materials which she has set so freely at our hands, has made it no longer possible to think of a society of families, isolated and non-communicating, each weaving its own fate independently of the rest. We have fabricated a nexus of relations which makes even rural life impossible as Jefferson understood it. The motor, the airplane, the telephone and telegraph, the radio, the railroad, the linotype, the modern newspaper, the "movie"—and thrice horrible, the "talkie"—have finally destroyed it. Liberty is irretrievably gone in any sense that it was worth having to him. A farmer must have

complicated machinery; he depends upon markets thousands of miles away; he will win by a crop shortage in India, and lose by a fall in industrial shares. He must "listen in" on Amos an' Andy, have camping places in the National Parks and tour in the Ford in winter. So be it; I welcome his larger life, but it has its price; he is tied to all men, as all men are tied to him, in a web whose threads no eye can follow and no fingers unravel.

Nor would there still be many, though doubtless some there are, who would deny that government must be the compromise of conflicting interests, as Hamilton supposed. While there lingers in political platforms and other declamatory compositions the notion that each man, if only he could be disabused of false doctrine, would act and vote with an enlightened eye to the public weal, few really believe it. We know well that an objective calculus of human values is impossible, and if it were available, would be so thin and speculative that men would not accept it. For any times that can count in human endeavor, we must be content with compromises in which the more powerful combination will prevail. The most we can hope is that if the maladjustment becomes too obvious, or the means too offensive to our conventions, the balance can be re-established without dissolution, a cost greater than almost any interests can justify. The method of Hamilton has had its way; so far as we can see must always have its way; in government, as in marriage, in the end the more insistent will prevails.

Liberty is so much latitude as the powerful choose to accord to the weak. So much perhaps must be admitted for abstract statement; anything short of it appears to lead to inconsistencies. At least no other formula has been devised which will answer. If a community decides that some conduct is prejudicial to itself, and so decides by numbers sufficient to impose its will upon dissenters, I know of no principle which can stay its hand. Perhaps indeed it is no more than a truism to say so; for, when we set ourselves this or that limitation, religion for example, we find that we wince in application. Who can say that the polygamy of the Mormons was not a genuine article of that faith? When we forbade it in the name of our morals, was it not an obvious subterfuge still to

insist that we recognized religious freedom? Should we tolerate suttee? If we forbid birth-control in the interest of morals, is it inconceivable that we should tax celibacy? We call that conduct moral about whose effect upon our common interest we have unusually strong convictions. We do not hesitate to impose this upon those who do not share our views; and tolerance ends where faith begins. Plato may have been right about the proper relations of the sexes; we should not allow his experiment to be tried. I do not see how we can set any limits to legitimate coercion beyond those which our forbearance concedes.

And yet, so phrased, we should all agree, I think, that the whole substance of liberty has disappeared. It is intolerable to feel that we are each in the power of the conglomerate conscience of a mass of Babbitts, whose intelligence we do not respect, and whose standards we may detest. Life on their terms would be impossible to endure; of their compunctions we have no guarantee. Who shall deliver us from the body of this death? Certainly there was a meaning in Jefferson's hatred of the interposition of collective pressure, though he extended it to so much of what we now accept as government. We may believe that his emphasis was wrong; that it required a great war eventually to clear away the centrifugal tendencies that underlay it; but shall we not feel with him that it is monstrous to lay open the lives of each to whatever current notions of propriety may ordain? That feeling was the energy that lay back of the first ten amendments to the Constitution which were really a part of the document itself. Impossible though they be of literal interpretation, like a statute, as counsels of moderation, rather than as parts of our constituent law, they represent a mood, an attitude towards life, deep rooted in any enduring society.

Jefferson thought that they could be made to prevail by weakening the central power, but he was too astute an observer to rely upon political device alone. It was in the social, not in the political, constitution of his society that real security lay. For it was impossible to sweep a community of small eighteenth century farmers with mob hysteria. His dislike of cities was in part at any rate because they were subject to just such accesses. He did

not, and he could not, see that time was to make rural life as susceptible to moral epidemics as the city mobs which he feared and mistrusted. He set his faith upon isolation and isolation in the end has failed him. The shores are no longer studded with rows of solid columns to break the waves of propaganda; they are not studded with anything whatever, and the waves sweep over them without obstacle and run far up into the land. The question I wish to put before you, which all this introduction is to prepare, is this—which I trust you will forgive me for putting in colloquial form—how far is liberty consistent with the methods of the modern "high-power" salesman? If it is not, what is to be done about it? Being Americans, we are not likely to agree that nothing can.

It has always interested me to read of the observations of those patient anthropologists who associate intimately with our cousin, the chimpanzee. I know a woman who endured the embrace of her son's pet for two hours, lest if disturbed in its caresses it might furiously strangle her. Devotion could scarcely ask more. We may learn much of ourselves from what are now, I believe, called the "conduct patterns" of the anthropoids, but it will not interest me so much as if the study could be of the herds. What I want to know is, why we have become so incurably imitative. I can improvise reasons, but you know how worthless that kind of anthropology is, so I shall spare you. But you will agree about the fact I fancy; you will agree that ideas are as infectious as bacteria and appear to run their course like epidemics. First, there is little immunity, nearly all individuals are susceptible, so that the disease spreads like a prairie fire. Next, a period where the curve of infection, as the pathologists say, remains level; this may last a long time. Last a decline of the curve which, so far as is known, nothing can check. The virus has lost its potency, or some immunity has established itself in a wholly mysterious way.

Ideas, fashions, dogmas, literary, political, scientific, and religious, have a very similar course; they get a currency, spread like wildfire, have their day and thereafter nothing can revive them. Were the old questions ever answered? Has anyone ever proved or disproved the right of secession? Most issues are not decided; their importance passes and they follow after. But in their day

they rack the world they infest; men mill about them like a frantic herd: not understanding what their doctrines imply, or whither they lead. To them attach the noblest, and the meanest, motives, indifferent to all but that there is a cause to die for, or to profit by. Such habits are not conducive to the life of reason; that kind of devotion is not the method by which man has raised himself from a savage. Rather by quite another way, by doubt, by trial, by tentative conclusion.

In recent times we have deliberately systematized the production of epidemics in ideas, much as a pathologist experiments with a colony of white mice, who are scarcely less protected. The science of propaganda by no means had its origin in the Great War, but that gave it a greater impetus than ever before. To the advertiser we should look for our best technique. I am told that if I see McCracken's tooth-paste often enough in street cars, on billboards and in shop windows, it makes no difference how determined I may be not to become one of McCracken's customers, I shall buy McCracken's tooth-paste sooner or later, whether I will or no; it is as inevitable as that I shut my eyes when you strike at my face. In much the same way political ideas are spread, and moral too, or for that matter, religious. You know the established way of raising money for the School of Applied and Theoretical Taxidermy. One employs a master mind in group suggestion, with lieutenants and field workers. The possible "prospects" are bombarded with a carefully planned series of what for some unknown reason is called "literature," leaflets, pictures, pathetic appeals, masterful appeals, appeals to patriotism. Shall American animals suffer the indignity of inadequate stuffing, having themselves given their lives to the cause? Will not you as a loyal American do your bit too; they having made the last supreme sacrifice? Taxidermy is a patriotic duty; are you for taxidermy? If not, you are against it, a taxidermical outlaw at best, at worst a taxidermical Laodicean. Brother, show your colors, join some group, at all costs join, be not a non-joiner, a detestable, lily-livered, half-hearted, supercilious, un-American, whom we would exile if we could and would not pass if he sought entrance.

I submit that a community used to be played on in this way, especially one so large and so homogeneous as we have become, is not a favorable soil for liberty. That plant cannot thrive in such a forcing bed; it is slow growing and needs a more equitable climate. It is the product, not of institutions, but of a temper, of an attitude towards life; of that mood that looks before and after and pines for what is not. It is idle to look to laws, or courts, or principalities, or powers, to secure it. You may write into your constitutions not ten, but fifty, amendments, and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law. It is secure only in that *constans et perpetua voluntas suum cuique tribuendi;* in that sense of fair play, of give and take, of the uncertainty of human hypothesis, of how changeable and passing are our surest convictions, which has so hard a chance to survive in any times, perhaps especially in our own.

There are some who, looking on the American scene, see remedy in trying to introduce and maintain local differences. Especially in matters of government, let us be astute to preserve local autonomy, not to concentrate all power in our capital. There are reasons enough for this in any case, but as a relief from the prevalent mood it seems to me a delusion. That served very well in Jefferson's time; it will not do today. We cannot set our faces against a world enraptured with the affluence which comes from mass production; and what has served so magically in material things, is it not proved to be good for our ideas, our amusements, our morals, our religion? The heretic is odious in proportion as large industry is successful. Rapidity of communication alone makes segregation a broken reed; for men will talk with one another, visit one another, join with one another, listen collectively, look collectively, play collectively, and in the end, for aught I know, eat and sleep collectively, though they have nothing to say, nothing to do, no eyes or ears with which to enjoy or to value what they see and hear. You cannot set up again a Jeffersonian world in separate monads, each looking up to heaven. For good or evil, man, who must have lived for long in groups, likes too much the warm feeling of his mental and moral elbows in touch with his neighbors'.

Well, then, shall we surrender; shall we agree to submit to the dictation of the prevalent fashion in morals and ideas, as we do in dress? Must we capture surreptitiously such independence as we can, "bootleg" it, as it were, and let the heathen rage, the cattle mill, the air resound with imperious nostrums which will brook no dissidence? Maybe it will come to that; sometimes I wonder whether to be a foe of war, for example—which might be thought a blameless disposition—is not a stigma of degeneracy. Again I have pondered on what it is to be a Bolshevik, and once I learned. There was a time when Congress thought it could reach the salaries of my brothers and myself by an income tax, until the Supreme Court manfully came to our rescue. A judge of much experience was talking with me one day about it; I was wrong enough in my law, as it afterwards turned out, and disloyal enough in temper to my class, to say that I thought the tax valid. "Do you know anything about it?" he asked with some asperity. "No," said I, "not a thing." "Have you ever read Taney's letter?" "No," said I again, for I was innocent of any learning. "Why, they can't do that," said he; "they can't do that, that's Bolshevism." And so it turned out, to my personal gratification, since when, freed from that Red Peril, I have enjoyed an immunity which the rest of you, alas, cannot share. Far be it from me to suggest that there are graver thrusts at the structure of society than to tax a Federal judge. Properly instructed, I have recanted my heresy, and yet there hangs about "Bolshevism" a residual vagueness, a lack of clear outline, as of a mountain against the setting sun; which only goes to show, I suppose, that a fundamentally corrupt nature can never be wholly reformed.

As I say, we may have to lie low like Bre'r Rabbit, and get our freedom as best we can, but that is the last resort. Perhaps if we cannot build breakwaters, we may be able to deepen the bottom. The Republic of Switzerland is cut into deep valleys; it has been a traditional home of freedom. Greece is made in the same way; to Greece we owe it that our civilization is not Asian. Our own country has not that protection; and in any event, of what value would it be in these later days, when Fords climb Pike's Peak and Babe Ruth is the local divinity at once in San Diego and

Bangor? But what nature has not done for us, perhaps time can. I conceive that there is nothing which gives a man more pause before taking as absolute what his feelings welcome, and his mind deems plausible, than even the flicker of a recollection that something of the sort has been tried before, felt before, disputed before, and for some reason or other has now quite gone into Limbo. Historians may be dogmatists, I know, though not so often now as when history was dogma. At least you will perhaps agree that even a smattering of history and especially of letters will go far to dull the edges of uncompromising conviction. No doubt one may quote history to support any cause, as the devil quotes scripture; but modern history is not a very satisfactory side-arm in political polemics; it grows less and less so. Besides, it is not so much the history one learns as the fact that one is aware that man has had a history at all. The liberation is not in the information but in the background acquired, the sense of mutability, and of the transience of what seems so poignant and so pressing today. One may take sides violently over the execution of Charles the First, but he has been dead a long while; the issue is not bitter unless we connect it with what is going on today. Many can of course do this, but that in itself requires considerable knowledge of intervening events, and those who can achieve a sustained theory are almost entitled to their partisanship, in reward of their ingenuity. After all, we can hope only for palliatives.

With history I class what in general we call the Liberal Arts, Fiction, Drama, Poetry, Biography, especially those of other countries; as far as that be possible, in other tongues. In short, I argue that the political life of a country like ours would get depth and steadiness, would tend to escape its greatest danger, which is the disposition to take the immediate for the eternal, to press the advantage of present numbers to the full, to ignore dissenters and regard them as heretics, by some adumbration of what men have thought and felt in other times and at other places. This seems to me a surer resort than liberal weeklies, societies for the promotion of cultural relations, sermons upon tolerance, American Civil Liberty Unions. I know very well how remote from the possibilities of most men anything of the kind must be, but good tem-

per, as well as bad, is contagious. And today in America vast concourses of youth are flocking to our colleges, eager for something, just what they do not know. It makes much difference what they get. They will be prone to demand something they can immediately use; the tendency is strong to give it them; science, economics, business administration, law in its narrower sense. I submit that the shepherds should not first feed the flocks with these. I argue for the outlines of what used to go as a liberal education—not necessarily in the sense that young folks should waste precious years in efforts, unsuccessful for some reason I cannot understand, to master ancient tongues; but I speak for an introduction into the thoughts and deeds of men who have lived before them, in other countries than their own, with other strifes and other needs. This I maintain, not in the interest of that general cultural background, which is so often a cloak for the superior person, the prig, the snob and the pedant. But I submit to you that in some such way alone can we meet and master the high-power salesman of political patent medicines. I come to you, not as an advocate of education for education's sake, but as one, who like you, I suppose, is troubled by the spirit of faction, by the catch-words with the explosive energy of faith behind them, by the unwillingness to live and let live with which we are plagued. It is well enough to put one's faith in education, but the kind makes a vast difference. The principles of a common pump are in my opinion not so important politically as Keat's Ode on a Grecian Urn, to crib a phrase from Augustine Birrell.

May I take an illustration nearer to the field with which you are especially concerned? I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not

gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

This is only an illustration of the much wider question of our political life at large. I submit that the aim is not so fanciful as it may seem; though at the moment I agree the outlook is not promising. Young people are not much disposed to give their time to what seems like loose browsing in the past. Though there are signs of a turn, of the significance of the insignificant, I shall try no forecast. All I want to emphasize is the political aspect of the matter, of the opportunity to preserve that spirit of liberty without which life is insupportable, and nations have never in the past been able to endure.

Jefferson is dead; time has disproved his forecasts; the society which he strove to preserve is gone to chaos and black night, as much as the empire of Ghengis Khan; what has succeeded he would disown as any get of his. Yet back of the form there is still the substance, the possibility of the individual expression of life on the terms of him who has to live it. The victory is not all Hamilton's, nor can it be unless we are all to be checked as anonymous members regulated by some bureaucratic machine, impersonal, inflexible, a Chronos to devour us, its children. We shall not succeed by any attempt to put the old wine in new bottles; liberty is an essence so volatile that it will escape any vial however corked. It rests in the hearts of men, in the belief that knowledge is hard to get, that man must break through again and again the thin crust on which he walks, that the certainties of today may become the superstitions of tomorrow, that we have no warrant of assurance save by everlasting readiness to test and test again. William James was its great American apostle in modern times; we shall do well to remember him.

Surely we, the children of a time when the assumptions of even the science of our fathers have been outworn; surely we

ought not to speak in apocalyptic verities, nor scourge from the temple those who do not see with our eyes. All the devices of our ingenuity, all our command over the materials of this earth, all the organization and differentiation of our industry and our social life, all our moral fetiches and exaltations, all our societies to ameliorate mankind, our hospitals, our colleges, our institutes,—all these shall not save us. We shall still need some knowledge of ourselves, and where shall we better look than to the fate of those who went before? Would we hold liberty, we must have charity—charity to others, charity to ourselves, crawling up from the moist ovens of a steaming world, still carrying the passional equipment of our ferocious ancestors, emerging from black superstition amid carnage and atrocity to our perilous present. What shall it profit us, who come so by our possessions, if we have not charity?