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BAR ASSOCIATION

Bolitha J. Laws Appointed Associate Justice

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Address by the Honorable Robert H. Jackson, Solicitor General of the United States

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The Enlarged Jurisdiction of the Federal Trade Commission

JULY, 1938

WASHINGTON, D. C.

Address of the Honorable Robert H. Jackson*

Solicitor General of the United States

I shall tread but lightly, even by invitation, upon ground that is in possession of Pi Gamma Mu, a National Honor Society in social sciences. Over the years my profession, as a whole, has shown so little hospitality toward those other learnings which may be grouped as social sciences, that I would not be surprised if, in retaliation, you barred all lawyers from your gatherings.

In early American life when our people had thrown off the discipline of George III, the only group in their midst who had studied or thought carefully about forms of social or political organization were the lawyers. Frontier life had made those early lawyers not only students of the past, but bold thinkers about the future. They, better than any other group, comprehended both the experience of the past and the hopes and aspirations of their day, and they became natural leaders in framing a new government. Their dominance in shaping governmental policy so built up their prestige that the law outstripped all other social sciences in influence and in the number and prosperity of its followers.

But in the course of time the lawyers became the victims of their own over-specialization. They over-refined the law as the dominant philosophy of government. They forgot that at its roots jurisprudence is a social science dealing with the behavior, the movements, the mistakes, and the aspirations of human beings. Instead of viewing law as a social science, the

* Delivered at the District of Columbia Province Dinner of Pi Gamma Mu, held at the Catholic University on May 8, 1938.

Judge Laws is married and has four children ranging in age from five to sixteen; he lives in Chevy Chase, Maryland, and is a member of the Maryland Bar, as well as of the District of Columbia and the State of New York. He has taken an active part in civic and church affairs, and is a Steward and Trustee of the Mt. Vernon Place M. E. Church, where he has taught a Bible Class numbering 160 men for the past five years.

The JOURNAL extends heartiest congratulations to Judge Laws and predicts for him a brilliant career on the bench.

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lawyerly habit of thought tended to cut loose from human realities and to submerge itself in an abstract sort of legal logic. Lawyers arose who thought in geometric terms. They tried to determine whether a statute "squared" with the Constitution, and whether a contract fitted into a statute, and whether the angles of a derelict's conduct "squared" with the criminal law. These inquiries were intellectually stimulating, abstractly interesting, but they left out of account many of the factors which determine human conduct and which must be considered in a government based on consent of the governed.

Under this school of abstract legal philosophy, American government has lagged, not only in its advancement of the social sciences, but even in its recognition of them. This was particularly true of federal statesmanship, for it deemed itself surrounded by imaginary boundaries which limited its vision, as well as its power, in many directions. For several generations, with a few brief interruptions, such as the administration of President Wilson, Federal statesmanship founded its economics on the trickle theory. It was delightfully simple. If government took care of the rich, the rich would take care of the poor. That conveniently limited the field of federal action to providing adequate tariffs and a taxing system which would bear mainly on consumers, and a banking and currency system which would meet the needs of those who benefited by the tariffs. Sociology, or a vision of what was going on in the life of the masses of the people, was entirely foreign to statesmanship in the nation. Social reform was relegated to strictly local affairs and there usually left to the support of philanthropists. In those days we were still living on the fat of our national resources. Our economic system thrived under the constant stimulus of expanding national and world markets—markets which were found ready to hand and did not need to be created. In such a period the results of national carelessness and national ignorance about what mattered most to the nation did not become intolerable.

Today we have awakened to find that we have been living in a fool's paradise. Under the rule of a cold and abstract legalism we tarried to discuss theories of law when pressed by problems of life. We fell behind Scandinavian countries, Germany,

Austria and England in the matter of housing. It was only within the last three or four years that the New York Court of Appeals settled the argument whether housing was a matter about which state or municipal government might concern itself. The issue was decided rightly, but the strange thing is that we had to wait so long to clear our thinking of such doubts. We were late among the nations to consider unemployment insurance. Students of social trends have been observing the effect upon the problem of dependent old age of industrial policies restricting employment to those under about forty-five years of age, but legal doctrine excused the statesman from considering it. Under the doctrine of the law it was first of all a family matter, and there was a liability on relatives for the keep of a dependent person. If it got beyond family control, there was the town poormaster and there was the county poorhouse over the hill. It was not a matter about which Federal statesmen need bother. It was local, according to the geometrical abstractions which dominated legal thinking. Students of course knew that crime and lawlessness had a distinct relationship to poverty and they knew that poverty had a relationship to wage levels. But there was a legal concept of due process of law which cut off Federal government from such social considerations. Minimum wages and maximum hours and collective bargaining were outside the field of statesmanship because they were unconstitutional.

We are going through in this country, belatedly, social struggles that other nations resolved earlier and before they had become so intense. There is little doubt that our constitutional theories, as well as our peculiarly fortunate economic situation —of which the theories were in great part an outgrowth, repressed certain social conflicts for a considerable period of time. During the period of delay the conflicting forces gathered volume and bitterness. Efforts at social reform were smothered in constitutional arguments. Lawyers debated precedents instead of social needs and both court and bar showed great resistance to the influence of human needs in the solution of problems of due process of law or other legal tangles. It was against this door so inhospitably closed that young Louis Brandeis knocked when he filed with the Supreme Court a brief

that not only discussed the law and the authorities, but unconventionally brought to the attention of the Court a great array of facts and statistical information bearing on the social effects of legal doctrine.

Much water has gone over the dam since that time. In the argument of constitutional cases today, the government never fails to bring to the attention of the Justices a full exposition of the social objectives of legislation that is under review by the Court, of the problems that it is designed to reach, and of the social or economic effect that is anticipated. And he who runs may read in the Supreme Court decisions a growing hospitality to ideas that are not strictly legal, a growing willingness to turn from musty precedents to the life of the community to find standards by which to declare the law. To my mind this is all to the good. It broadens the base of our legal learning.

I would think that those of you whose primary interest in the social sciences is in other branches than jurisprudence might read happy omens in the recent work of the Supreme Court. I would think that you might find some grounds to believe that the Federal statesmanship of the future will face social and economic problems that have heretofore been avoided because of constitutional limitations. I would expect that you would feel a growing importance of economic knowledge and research, and of sociology and of other of the so-called social sciences.

Federal legislators and national political parties and their representatives, as a result of Supreme Court decisions, find new responsibilities on which their constituents are likely to expect that they be informed and sympathetic. It might be worth our

while to mention certain fields in which the Federal Government has long been excused from action because of supposed constitutional limitations or equally effective constitutional doubts, and where now these doubts are removed.

The reward to labor, we know, has a definite relation to living standards and social conditions and also to purchasing power and economic conditions, as well as an effect on many other social problems. In the Kentucky Whip and Collar case, the Supreme Court declared that "the Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor." It made this declaration in holding that the Federal interstate commerce power could be brought to the aid of State legislation excluding prison-made goods.

In the Parrish case, the Court overruled its former holding that minimum wage laws for women were unconstitutional and took such course because "economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration." And the hospitality of the law toward the social sciences is definitely indicated in the opinion of the Chief Justice, who gave liberty as protected by the Constitution a more than merely legalistic meaning when he said: "But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community, is due process."

This decision was followed by those decisions sustaining the Labor Relations Acts, establishing collective bargaining between employer and employees in industries and employments that affect interstate commerce. Taken together, these decisions bring into the purview of Federal policy the entire relationship of employer and employee and the problems of minimum wages,

maximum hours, and probably the problem of child labor, insofar as they affect interstate commerce.

Unemployment and the uncertainty of employment have long haunted the fireside of every working man. Its grave consequences in wiping out savings and equities in homes, in lowering standards of living, and in denying educational opportunities were well know to all who saw life as it is lived. The Supreme Court refused to hold that this problem was beyond the reach of the State or of the Federal Government and held that its relief was a public purpose within the powers of the separate states and also that its relief affected the general welfare of the United States so as to be within the taxing power of the Federal government. The extent to which we can relieve the workman of the burden of unemployment and the practical means of accomplishing it will continue to vex the government, but it can no longer be said that the science of jurisprudence has foreclosed the government from seeking the aid and counsel of other social sciences as to the manner of dealing with the problem.

Likewise, the Supreme Court opened new fields, or perhaps it would be more accurate to say, refused to close new fields, to Federal action in deciding the old age benefit case. In sustaining it, the Court pointed out that "Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare." And it reviewed the evidence of social and economic conditions that had been assembled and sustained the contributory system of old age benefits. There would seem to be little reason to doubt that upon a similar showing of social and economic justification, other fields of social insurance are open to the Federal Government by this decision.

We are acutely aware of the vexing problems of concentration of wealth, of monopoly, of exploitation of natural resources, and other ills relating to the financial controls of industry. We know that problems of poverty are counterparts of the problems of centralized wealth. The constitutionality of the rather loose generalities of the antitrust laws was long ago sustained. But the Supreme Court has recently sustained the power of the Federal government to require a registration system for those who would engage in interstate commerce and

to prohibit those who do not register from executing service contracts, purchasing assets, or selling securities through the mails or channels of interstate commerce. This implements federal power to control our growing concentration of wealth and leaves upon our legislators a more definite responsibility for failure to bring exploiting aggregations of wealth within the law.

Our dealing with economic and social problems has long been complicated by difficulties of cooperation between different units of the Federal Government. Many held the notion that our system of federation required a perpetual conflict of power between state and Federal government. It was the view of many legalists that subjects within the power of one could not be aided by the other, and that opposition, rather than cooperation, should govern the relation between state and nation. This impaired the efficiency of government and too often led to a separation of the two spheres of power by a no-man's land in which neither could act. In the unemployment compensation case, and more recently in sustaining the Municipal Bankruptcy Act, the Supreme Court has rejected this old doctrine of clashing sovereignties and has encouraged and pointed the way to a cooperative federalism. In both cases it held that the states and the nation may cooperate, by each furnishing part of the power necessary to accomplish ends and objectives that might be beyond the power of either one acting alone.

In all of these fields of power, jurisprudence has shown a new deference to the conclusions and researches of the other social sciences. It has shown less of the intellectual arrogance which would pronounce conclusions upon its own specialized and abstract logic. It is more mindful that the source of law is in life itself. Its greater regard for the average sense of justice and its lessened emphasis upon its precedents is in the best tradition of the legal profession.

There is an old story that upon the establishment of one of the Eastern European nations the authorities sought one of the most venerated of Eastern scholars to write for it a code of laws. Upon accepting the mission he did not retire to research in the cloisters or among the books, but instead went out to live among the common people and sought to deduce the principles of law

for his code from their daily lives. Thus he would find an acceptable and enforceable standard of justice.

It is not feasible for our Justices and law-givers to postpone their labors while they go out among our people to seek for the standards of justice and of interpretation which would be consistent with our ways of life. But it is the privilege of those who are engaged in the social sciences to bring to a hospitable science of jurisprudence the problems and necessities of those diverse groups who constitute our organized society, and thus to keep a developing jurisprudence in step with the advancing standards of our way of life.