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A TRIBUTE TO PROFESSOR JACOB D. HYMAN

LOUIS L. JAFFE*

I hesitate to commence a tribute to Professor Jacob D. Hyman with a truism. But I cannot escape the overwhelming rightness of the proposition that with Professor Hyman the style is the man. There is a remarkable congruity of his scholarship and his character. In both the basic qualities are precision, continuous alertness to the large implications and the smallest subtleties, balance, modesty, humanity and elegance. The overall effect is what I believe the Romans called *gravitas* but without any particle of stuffiness, inflexibility or humorlessness. There finally is also, I feel, a certain sadness, a sadness that the world is not better than it is. He has a great yearning that there be both justice and charity, and yet an awareness that these two aims may be antithetical and that neither is easily realized. However, in his recent article "A Response to Perry," a veritable *cri de coeur*, he makes clear that he will not give up hope and tries once again in this short but intellectually very inclusive piece to construct a prolegomena for a better world of law.

Ever since his article in the first volume of this *Review*, *Judicial Standards for the Protection of Basic Freedoms*,¹ Professor Hyman has sought to establish an objective basis of justification for the creative activity of the courts. His motivation, I am sure, is two-fold. His is the professional concern of the dedicated lawyer that the law be perceived by the community to have a high mission. His more particular concern is humanitarian. He wants to convince the community and his professional colleagues that recent judicial activity maintaining and expanding what he has called "basic freedoms" or "preferred freedoms" is derived from "the law" not from the judges' political predilections. If such a demonstration succeeds, these decisions cannot be rejected as an exercise of political power by a small, unrepresentative fraction of the elite. His effort is directed, of course, against those who have attacked judicial innovation though this attack has not been so much against innovation generally as it has been

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1. 1 BUFFALO L. REV. 221 (1952).

against the innovatory decisions of the Warren Court. There are however, implied in this attack two rather different, almost contradictory postures. One, the more "radical" at least in terms of jurisprudence, is that judicial innovation is inherently and inescapably policy choice and as such is undemocratic because the judges are a small non-representative elite. Professor Hyman has directed himself to this problem, particularly in his most recent article in the *Review*, *A Response to Perry: Judicial Method and the Concept of Reasoning*.² The other form of the attack asserts that though there can be a jurisprudence which is both creative and objective, the Warren Court has sinned precisely because it has substituted preference for objectivity. This attack has been mounted in some measure by professors and lawyers but also I would say by non-lawyers. This charge too, Professor Hyman seeks to answer, though in terms of general notions rather than by defending particular results.

There are, he argues, certain "preferred freedoms." If the Supreme Court has maintained and expanded these freedoms it has been not because of judicial preference but because the Constitution and our generally received political and moral philosophy accords them a special place in our Pantheon of Values. In the splendid article, *Standards for Preferred Freedoms: Beyond the First*,³ written by him and Professor Newhouse, the first amendment with its specific protection of free speech and freedom of worship is taken as the prototype of the preferred freedom both for its expressive content and its degree of protection.

"[T]he high constitutional regard for the First Amendment freedoms rest not alone on the political values derived from a stress on representative self-government, but also on the postulate that the worth of the individual *qua* individual is fundamental to our tradition and society. This personal value finds expression in, and is reinforced by, concern for the dignity of the individual as revealed by other constitutional developments. A prime example is that aggregate of constitutional safeguards designed to insure a fair trial"⁴

2. 19 BUFFALO L. REV. 247 (1970).

3. 60 NW. L. REV. 1 (1965).

4. *Id.* at 55.

These safeguards go beyond those expressly stated in the Constitution, and are validated under the aegis of the due process clause. Sometimes the extension is derived from an express guarantee; sometimes, as where it is held that a state cannot compel children to attend public schools, (*Pierce v. Society of Sisters*)⁵ there is neither express nor implied warrant. When a challenged action, one for example asserted to be necessary for national security, comes in conflict with a preferred freedom, the challenge must prevail unless the necessity is clear and no lesser action will suffice.

I agree with this thesis both as an abstract proposition and in most of its applications. But it does seem to me to achieve an easy victory by over-simplification. In the first place the authors are self-serving in their choice of "preferred freedoms." Indeed, they are sensitive to the fact that the Court does not elevate economic interests to the class of preferred freedoms though admittedly some economic security is as necessary to life as speech or other freedoms. They are quite right in their partial answer that economic laissez-faire has no necessary relation to individual economic security. Regulation of business practices involving as it may limitations on freedom of contract does not ipso facto offend due process. It is enough if the regulation is "reasonable" and it would be a rare case where a legislature is not "reasonable" in its belief that there is an evil to be remedied. In such cases constitutionality is "presumed." But the individual freedom to enter trade and professions is, as the authors admit, basic, yet except in instances where other "preferred" freedoms—speech and association—are involved the claim is not given special preferred status. However, that is not as I shall show my major criticism.

In his first article Professor Hyman speaks of an "unthinkable popular demand for security at any price."⁶ No doubt there have been such demands but criticism of the Warren Court's expansion of criminal procedural protections implies neither an "unthinking demand" nor "security at any price." To treat it as if it does, obscures two basic questions which are unexplored in these articles. First: to what extent does the community share these "preferred freedoms"? Second, and perhaps not distinct

5. 268 U.S. 510 (1925).

6. Hyman, *Judicial Standards for the Protection of Basic Freedoms*, 1 BUFFALO L. REV. 221, 222 (1952).

from the first: to what extent even if these values are generally accepted do they provide a basis for their more or less continuous *expansion* by the Warren Court? If economic security is important, psychic and physical security is even more so. Few of us feel free to exercise freedom of speech or even of locomotion if he is afraid of deadly assault. The very springs of well-being may be poisoned by the threat of physical insecurity. I do not make the usual argument that increased protection of accused persons increases crime. It cannot be proved and I doubt that there is any connection. The demands of the parents of those killed in the Kent massacre is felt as a demand for "justice," a demand that society show its concern. Continually to surround the accused with more and more safeguards in a period of rising crime strikes a vast number as an insensitivity to the claim to be free from anxiety.

This is a way of making my more basic point that though most of the community set a value on procedural protections they do not set anywhere near the same value as do certain elites and thus they reach the point of conflict with competing values much more quickly. Therefore if the inquiry is to be deadly serious it will not do to appeal generally and exclusively to the "dignity and worth of the individual." The victim's dignity is as much in question as his assailants. Furthermore dignity is only relative at least if dignity be judged in terms of desserts. Philosophy may enable an individual to be proof against any indignity, against all the slings and arrows of outrageous fortunes. But if dignity is seen as dependent on how one fares and is treated in the world there is no escape. To be arrested, to be indicted, to be tried, to be imprisoned: these will impair the dignity of most of us. This means that each new claim to procedural protection must meet a counterclaim for security. We must admit however, that there can be no very satisfactory "balancing" of these competing claims. But to have an awareness of the total situation may make the judge more sensitive to the common lot, to its needs, its morality and its scale of values. So ultimately the great and basic question to be explored is this: in what measure should the judge, whatever his own scale of values, temper them by reference to those of his neighbors. This is a question which Professor Hyman is admirably equipped to explore.

DEDICATION

In his most recent essay, *A Response to Perry: Judicial Method and the Concept of Reasoning*,⁷ Professor Hyman once more tackles the major task of demonstrating the possibility of an objective method which will promote and justify judicial creativity. He believes that the Anglo-American "preoccupation with law as a system of rules" has retarded development or, alternatively, that where development is taking place it has provided the weapons of an unfortunate and misguided attack. "The slashing academic criticism of the Supreme Court in the last ten years is largely of this character."⁸ The fruitful approach in his opinion is a broader conception of rationality, a conception which emphasizes standards as opposed to rules, by which I suppose he means generalized values and aims. The concept of rationality would draw on the methods of philosophy and the social sciences in so far as they can be acclimated in the law.

I agree with Professor Hyman that a certain amount of the criticism of the Supreme Court has made too much of the Court's failure to evolve at one moment of time full-blown rules. We know that rules and doctrines grow by accretion, by trial and error, by advance and retreat. But I think that here as in his other responses to criticism of the Court he is unwilling to recognize that criticism has been as much on the merits as on the style of reasoning. There is I believe no disagreement that general methods of reasoning are necessary and that in the realm particularly of constitutional law general propositions are the dynamic which moves us away from old rules to new rules. For whether we are too rule-minded I do not know but I am clear that we cannot function without rules. It was the great defect of *Betts v. Brady*⁹ that it did not give us a rule as to when an accused was entitled to counsel but only vague and undependable standards.

Finally Professor Hyman adumbrates a standard for judicial objectivity. In defining a "judicial point of view," a stance which reduces to a minimum the "elements of caprice and will" he asks of the decision maker: "Does he, recognizing that his psycho-social self will influence his sense of relevance in selecting the governing principles and assigning their relative weight strive, in accordance with the standards of legal logic explicitly applied, to reach the

7. 19 BUFFALO L. REV. 247 (1970).

8. *Id.* at 252.

9. 316 U.S. 445 (1942).

one decision which for him is right? Or does he, as a self-conscious maker of policy, deliberately select that one of two or more rationally defensible decisions which he believes will best further his ideal of a good society?"¹⁰ The former stance he suggests is the one best calculated to ease the fears of Demos.

But I do not think that this version of judicial rectitude will ease the fears of Demos. Once more it concentrates on the primacy of the conscience of the elite. As long, it says, as the judge is true to his values and follows their light all will be well or at least must be forgiven. But Demos is not much concerned with the judge's conscience or the methodological correctness of his role-playing. Demos does not distinguish sharply between the psychosocial self of the judge and his conceptions of policy. He does not object to a judge making policy decisions if those decisions do not too much offend his own notions of policy. I think we must give up the idea that judges do not or should not consciously "make" policy. There are occasions when as with legislative malapportionment the judges may rightly feel that their intervention is necessary and thus that they must find in the Constitution whatever lies at hand to justify their intervention. I know that Professor Hyman believes that malapportionment is an obvious violation of equal protection. I think that the argument to that effect is plausible but no more. Yet though I would accept it as necessary I would not press it any further than the occasion demanded. I would use it to unlock the legislature from the bind put on it by the legislators themselves. I would not, for example, generalize the illusory "one-man one-vote" rationalization by applying it across the board willy-nilly to local elections, to state constitutional departures, etc. I am afraid that Professor Hyman would regard my stance as sheer unprincipled expediency: an ad hoc "policy" decision. It is however quite "rational" and is not that enough? Is not pushing the one-man one-vote dictum wherever it may rationally lead that very rule-mindedness which it is said we should abjure?

But if I am by nature somewhat unprincipled it leads me only the more to admire the high-mindedness of Professor Hyman.

10. 19 BUFFALO L. REV. at 258.

DEDICATION

There are many who lay claim to this quality but there are very few who really possess it. And so it is with heart-felt emotion that I salute Professor Hyman in his twenty-fifth year of teaching and writing. May he continue to prosper and grow!

