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LIBERTY AND THE POLICE POWER

By CLARENCE MANION

"Things have come to a pretty pass when a man can't wallop his own jackass" This pungent commentary was called forth from the late Henry Watterson many years ago by the faint but nevertheless unmistakable tendency of statutory law to invert the fundamental principle of American government. Mr. Watterson felt that to "wallop his own jackass" was an act so totally unrelated to the infringement of any right of his fellow citizens that its prohibition was uncalled for by the purpose which had so solemnly motivated the creation of the American State. If he was disturbed then he would be profoundly shocked today. The tendency which he noted has been developed to the point where there are few if any remaining limitations upon the power of a State legislature except in so far as that power has been construed to be granted to the Federal government by the Constitution. In other words the American citizen now has practically no rights of person or property that neither Congress nor the State legislature may not impair by legislation. This is a most peculiar eventuation in view of the natural rights philosophy upon which all American government was most deliberately founded. It seems to have been clearly understood by all Americans in 1776 that the individual citizen possessed certain rights that governments were bound to respect. The government of England was rejected precisely because Parliament asserted its omnipotence and in its place the Americans substituted a government charged solely with the duty of protecting the God-given rights of man. "Government, like dress, is the badge of lost innocence" wrote Thomas Paine early in 1776. In an essentially wicked world the rights of individuals are subject to constant invasion as they certainly would not be "were the impulses of conscience clear and uniformly and irresistibly obeyed." Paine consequently maintained that the design and end of government was "freedom and security". A few months later the Declaration of Independence characterized this conception of the end and object of government as "self evident" and invested our American institution with the duty of preserving "unalienable rights".

John Adams wrote of the Declaration that "there is not an idea in it but what had been hackneyed in Congress for two years before", and Jefferson countered by saying that "I did not consider it as any part of my charge to invent new ideas altogether and to offer no sentiment which had ever been expressed before." It is apparent therefore that Revolutionary America considered the Declaration of Independence to be the "common sense of the subject". It is well to remember too, that at this time (1776) eleven of the thirteen original States set to work to draft their respective constitutions. With the philosophy of the Declaration of Independence accepted as the "common sense of the subject" it will be seen that these new governments were launched in an atmosphere of intense individualism. Their legislative, executive and judicial departments were considered mere instruments of protection for the unalienable rights of man. The subsequent adoption of the Articles of Confederation and still later of the Federal Constitution served merely to transfer to the Federal government certain powers formerly exercised by the individual States.

Through the first half of the nineteenth century this concept of the purpose of American government was never seriously departed from either by the legislatures in making laws or the courts in passing upon their validity. However, the conclusion of the war between the States left thousands of manumitted slaves within those jurisdictions that had attempted secession and their presence there was undoubtedly the source of grave temptation to Southern State legislatures. It was anticipated that the laws of the South would assume a strongly regulatory character with reference to the negroes, and those who had worked for a vindication of the principles of the Declaration of Independence through the adoption of the Thirteenth Amendment were resolved that there should be no return to negro slavery thru the subterfuge of State law. In 1866 the Fourteenth Amendment was formally made a part of the Constitution. Among other things it provided that no State shall "deprive any person of life liberty or property without due process of law." No state had seriously attempted to violate the spirit of this commandment prior to the Civil War. Up to this time State legislatures had abided by Jefferson's definition of their powers, namely: "That their true office is to declare and enforce only

our natural rights and duties, and take none of them from us. No man has a natural right to commit aggression on the equal rights of another and this is all from which the laws ought to restrain him." Laboring under this conception it is inconceivable that any State legislature should make any attempt upon the life, liberty or property of a citizen unless in answer to or in anticipation of an aggression upon the rights of one of its subjects. One could still "wallop his own jackass" in America in 1866 but the Fourteenth Amendment provided that if any State law should ever prohibit the practice of this or any other "liberty" a Federal question would be raised and the validity of the State law could be tested in the courts of the United States.

In 1878 the Supreme Court complained that "while it (the 'Due Process' clause) has been a part of the Constitution as a restraint upon the power of the States only a few years the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty or property without due process of law.*****But when in the year of grace 1866 there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty or property without due process of law,' can a State make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land which is now in A shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law within the leaning of the constitutional provision." (*Davidson v. New Orleans*, 96 U. S. 97.)

Just why the "full and exclusive" title of A must be given to B before a violation of due process is evident, is not particularly clear but after the decision in *Mugler v. Kansas* (123 U. S. 623) the distinction was of no consequence. In that decision the Supreme Court declared that "it cannot be supposed that the states intended by adopting that (the fourteenth) amendment, to impose restraints upon their powers for the protection of the safety, health or morals of the *community*" In other words, as early as

1887 the Supreme Court affirmed the proposition that a State might take the life, liberty or property of its citizens without due process of law and in spite of the prohibitions of the fourteenth amendment, provided that such taking was in the general interest of the public health, morals or safety. Said the court: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go.***If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

It is precisely at this period of American constitutional history that the right of the "community" begins to be asserted as superior to the right of the individual citizen. "Police power" for the protection of the "general welfare" is henceforward emphasized as one of the inherent rights of the States, the fourteenth amendment and the American philosophy of natural individual rights to the contrary notwithstanding. "This does not evidence a revival of sentiment in favor of "States Rights", says Professor Charles Burdick in his *Law of the American Constitution*. "It shows rather, taken together with the increasing regulatory activities of the Federal Government, a gradual replacement of that philosophy of individualism which prevailed during the eighteenth and first half of the nineteenth centuries by a philosophy of collectivism, evidencing itself in governmental paternalism." (Page 561.) It is important to note however, that this collectivistic, or more properly socialistic policy is being brought about in spite of the letter and spirit of our American institutions. Recalling the previously quoted language of *Mugger v. Kansas*: When does a statute "purporting to have been enacted to protect public health etc., have no real or substantial relation to those objects" so as to be really "a palpable invasion of rights secured by the fundamental law"? What is "reasonably associated with the general welfare of the community" is a question that will be answered differently by different legislatures and variously constituted courts. It is at best a question of fact and it is precisely the fickle attitude of the Supreme Court in deciding

this "reasonableness" that has evoked much recent criticism of its prerogative of nullifying legislation; a criticism that found its crystallization in the LaFollette campaign for the Presidency.

The unfortunate feature of *Muggler v. Kansas* and supporting decisions is that it makes the welfare of the corporate *community* a test for the propriety of Police Power regulation. The welfare of the corporate community as such was never intended to be the object of American legislation. The Declaration of Independence and the State constitutions formulated at the same time were all motivated by the necessity for protecting the rights of the *individual man*. When all individuals were protected in the exercise of their respective rights the welfare of the *community* would necessarily follow as a matter of course, but it was never supposed that the rights of the individual were to be protected or approached through the avenues of legislation dictated by majority opinions as to what is now and again for the "general good". To admit that as between a "right" of the individually created man and the "welfare of the community" the right of man must give way, is to decide ultimately that no citizen has any rights that a majority of his neighbors is bound to respect. Such a decision repeals the last letter of our constitutional experiment and makes of written constitutions "absurd attempts on the part of the people to limit a power in its own nature illimitable." (*Marbury v. Madison*.)

As late as 1876 the proper theory of the Police Power was concisely stated by the Supreme Court in *Munn v. Illinois* (94 U. S. 113) as follows: When one becomes a member of society he necessarily parts with *some* rights or *privileges* which, as an individual not affected by his relations to others, he might retain.***** This does not confer power upon the whole people to control rights which are purely and exclusively private but it does authorize the the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to *injure another*. This is the very essence of government and has found expression in the maxim "sic utere tuo ut alienum non laedas" *From this source comes the police power.******

To say that one may not use "his own" so as to injure "another" is far different from deciding that a citizen or his property may be regulated in the most miscellaneous and opportunistic fashion to the end that the "general welfare" will be ultimately promoted. The first is individualistic and in keeping with Amer-

ican ideals: The last is socialistic and makes the expression "unalienable right" a meaningless hypocrisy. When does one so use himself or his property so as to injure others and thus make such use of himself or his property the proper subject of statutory prohibition? The law of Torts has worked this situation out to a nicety. Barring contracts, one is liable to another in damages when his performance has been the *proximate cause* of that other's injury. Conversely, one is at perfect liberty to do anything which will not be the proximate cause of injury to another or to another's property. With that liberty the legislature should be powerless to interfere. As it is at present applied the Supreme Court's "Rule of Reasonableness" is a meaningless thing calculated to bring the court into disrepute and to relegate individual liberty to "the limbo of forgotten things". Many meddlesome freedom-destroying statutes would undoubtedly fall before the test of proximate cause, yet those essentially protective statutes would remain and these are all that should remain in view of the fifth and fourteenth amendments and the "unalienable liberty" to which American government is supposed to be irrevocably pledged.