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The Courts and Administrative Agencies

PROFESSOR OGBURN has familiarized us with the notion of the "lag" on social development.¹ It is a convenient term to describe the fact that no two of our institutions grow at the same rate, even if they are moving in the same direction. We can go even further. There is scarcely a single institution in which the constituent elements develop uniformly and the "lag" is sometimes so noticeable that it becomes a major problem.

In law the effect of lag shows itself in curious ways. One of these ways is a mere matter of terminology but not without importance. For example, the term "quasi-contract" should have been familiar to English lawyers since the time of Mansfield and to some extent it was familiar since that time. In the nineteenth century, however, it became common. Cases on quasi-contracts were collected into books. Text-books were written on the subject. Opinions of courts presumed that it was intelligible expression. Courses in law schools were given under that name. But it is only in the Descriptive Word Index of the American Digest published in 1931, that the word achieved the dignity of a separate heading²—a room of its own—in the place where seekers after law will look for it.

Almost the same thing can be said for the word "Administration" in the political sense and the phrase "Administrative Law." There is no heading under that title in Corpus Juris, none even in the Third Decennial Digest, published in 1927. The Decennial Descriptive Word Index, published in 1928, has, however, caught up. Administrative Law indubitably exists there and is parcelled out into nearly two columns of cross references to twenty or thirty headings running from "Aliens" to "War."

And yet the term "Administrative Law," even in England, is at least as old as Austin who made it a part of Public Law coordinate with Constitutional Law.³ It has long furnished a name to courses in law schools, to

¹ OGBURN, *SOCIAL CHANGE* (1923).

² This separate heading, it may be remembered, is merely a cross-reference in an index-volume. The Digest itself has no section or "key-number" devoted to "quasi-contracts."

³ AUSTIN, *LECTURES ON JURISPRUDENCE* (1869) vol. 1, p. 73.

collections of cases and to authoritative text-books, both in England and the United States.⁴ Its existence must be taken for granted if only because of the attacks upon it by lawyers who have viewed it with the same dislike and suspicion with which long ago the veritably old and established courts of England, the manor courts, the county courts, and the church courts, viewed the encroachments of the courts of the "Common Law."⁵

Now, administrative law is produced—dare we say, is exuded?—by administrative agencies, just as law—the common or garden variety—is the product of courts. Just what are these agencies?

In the first place, they are not courts. "The board members and the reviewing board created by the Workmen's Compensation Act," says the Court⁶ "do not constitute courts but only administrative tribunals." That is something to know and in so far as it means that the word "court" in a statute or a constitution does not cover this board, it is important. But it does not quite tell us what the difference consists in. Similar statements occur in other cases. "The powers of the state water commission in the issuance or denial of permits for appropriation of water granted by Water Commission Act 1913 (St. 1913, p. 1012) as amended are wholly administrative and not judicial."⁷ "An administrative remedy" says the court in *Kansas City R. Co. v. Ogden Levee Dist.*,⁸ "is one not judicial, but one provided by commission or board created by legislative power."

In England, likewise, in spite of an attempt to deal with the matter on a slightly different basis, we come more or less to the same result. If a body is a court, it is not an administrative agency or tribunal or board or commission, and vice versa. The attempt made in an impressive and excellent English treatise, that of Mr. F. J. Port,⁹ to make Administrative Law the body of "legal rules which have as their ultimate object the fulfillment of public law" will hardly serve our purpose. It would cover, if it were carried out as it is carried out in France, every controversy in

⁴ I need mention merely: GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893), *PRINCIPLES OF ADMINISTRATIVE LAW* (1905), *SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW* (1906); WILLOUGHBY, *PRINCIPLES OF PUBLIC ADMINISTRATION* (1927); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (1927); FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928); ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928); PORT, *ADMINISTRATIVE LAW* (1929); FRANKFURTER AND DAVISON, *CASES ON ADMINISTRATIVE LAW* (1932). No less than forty-two men are listed by the Directory of teachers in the law schools of the Association of American Law Schools as giving courses in administrative law.

⁵ PROFESSOR T. F. TOUT, in his *CHAPTERS IN ADMINISTRATIVE HISTORY OF MEDIEVAL ENGLAND* (1920), of which seven volumes have so far been published, gives us in detail the growth of the process which seems so strikingly modern to some investigators.

⁶ *Ahmed's Case* (1932) 278 Mass. 180, 185, 179 N. E. 684, 686.

⁷ *Mojave Riv. Irr. Dist. v. Sup. Ct.* (1927) 202 Cal. 717, 722, 262 Pac. 724, 726.

⁸ (1926) 15 F. (2d) 637, 642.

⁹ *Op. cit. supra* note 4, at p. 13.

which an official or a board is a party. Such a principle is workable if we mean to carry it out completely and it would result, as it has resulted in France, in a body of substantive law parallel with the ordinary civil law but indistinguishable from it in most cases in respect of the questions which it attempts to answer. That may be a good way of handling it, but it requires us to admit that these administrative agencies are really courts or so like courts that we may treat them as though they were.

The differences in the methods used are apparent enough. One of the most striking is the fact that with an administrative agency, there is no jury. Evidently this fact cannot be a means of distinguishing courts from such agencies. There never was a jury—except an advisory one—in Chancery. There is none now in Equity cases, if any one can discover what an Equity case is. The jury is disappearing both in England and in the United States in ordinary civil cases, except in negligence actions—a large exception.

It must none the less be noted that a great many matters at issue before administrative tribunals savor of criminal suits and sometimes are unmistakably criminal in the penalties imposed. The complete absence of a jury in administrative cases is, therefore, a real distinction. If lawyers are to be taken at their word, it is a distinction altogether in favor of the administrative method. Unfortunately, lawyers are like other persons. They are quite capable of deploring the absence of a jury when they mean to depreciate administrative agencies, and to seek to dispense with it in their own courts.

We should, however, remember that one of the chief grievances of lawyers against administrative methods, the absence of the rules of Common Law evidence, is intimately associated with the jury, not with the jury as a system so much as with the concrete jury that we know. The intellectual average of our jury panels is low. I do not think it necessarily need be, but it is. No one can examine our rules of evidence without coming to the conclusion that a great many of them are predicated upon that fact. Evidence is excluded because it might have a tendency to mislead a jury. But men of average intelligence are not easily misled, if they are warned of the danger and if the qualifications are properly presented. At any rate, they are not as easily misled as our law of Evidence assumes. Bitter experience has, however, shown us that jurymen cannot be relied on to disregard the most casual and trivial statement or incident, if it attaches itself to any emotional complex. Our law of Evidence takes that into full account. And yet our law of Evidence does not exclude from the jury in most instances the crude flattery and vulgar mountebankism which lawyers sometimes employ and to which juries are notoriously susceptible. We have the contradiction that our rules of evidence which

assume jurymen to be little better than fools and which make an effort to protect them against their own folly, do not make a very consistent effort. That neither this portion of the law of Evidence nor the jury whose intellectual inadequacy is responsible for so much of it, is present in administrative agencies is, one might argue, an unmixed advantage.

The matter of procedure is somewhat the same. "Let all things be done decently and in order," is an apostolic admonition. Surely no one would wish it to be otherwise. And those who appear before administrative bodies know that there is an order there which must be followed, even if it is not quite the order of the Code of Civil Procedure.

What the lawyer doubtless misses is the air of the cock-pit, the *chaude-melée* of the tournament, the *strepitus judicii* which in all reformatory efforts, popes and emperors, philosophers and publicists, have always attempted to eliminate. It cannot be wholly eliminated because lawyers love it, as all craftsmen enjoy opportunities to exhibit their skill, as musicians love virtuosity, as aviators love stunts when they can do them.

There is a type of lawyer who is known as a fighter. He is often personally courteous and well-mannered. He observes the canons which disapprove of taking improper advantage of an antagonist. But he insists on the letter of his bond. He gives no quarter and asks no quarter. I remember an eminently successful practitioner who advised his juniors "Never stipulate. Make them prove it." They generally rationalize their attitude by the theory that they are advancing or safeguarding their clients' interests. But that is not the real reason—certainly not the whole reason. They act in this way because it is their nature to, as the late Dr. Watts observed when signalling out for commendation the better habits of birds in their little nests.

Now, lawyers have as little desire to be birds in their little nests as an eminent former Governor of New York wished to be a cooing dove. And the fighting lawyer is assured not merely of the admiration of his client, but also of the admiration of those milder—and perhaps less vigorous—colleagues whose nostrils are less dilated than his at the smell of combat far off or near. To be a legal pacifist at heart is perhaps a contradiction in terms.

What the fighting lawyer most of all resents is any interference on the part of the court in his efforts at lawfully and correctly overcoming his antagonist. He cannot bring himself to consider the judge otherwise than as an umpire, who must keep himself strictly to the task of preventing fouls and clinches but who otherwise must maintain an attitude of perfect indifference.

The judge, however, is by definition, not indifferent at all. He is supposed to have a decided interest in the controversy. He is required to see that justice is done, full justice, in relation to as much of facts of the case as he can get, not merely in relation to as much of it as leaks into the court room, while the heated combatants pause for breath. And whether judges do so habitually or not, administrative tribunals frequently do. That is, they feel bound to get as much information as they can, in whatever way they can, even if it involves a wholly independent course of investigation.

And that brings one to one of the important characteristics of the controversies of administrative law. One of the litigants nearly always, and often both, has a representative character. That is true, of course, of a great many cases in the ordinary courts, but it is much more marked in administrative matters. But the persons represented are in these cases an indefinite group of the public, a large enough and important enough group to make their advantage or protection an interest which may properly be the subject of legislation. Whether it is or not such an interest is in fact often one of the issues to be decided.

Evidently a tribunal or a board or a court that has before it as one of the parties a representative public official cannot quite deal with the issue as though it were between rival claimants to a city lot. A public purpose has been announced and the details of achieving it set forth by the statute. If the purpose is constitutional, its furtherance is heavily weighted against a personal or property loss on the part of a single citizen or group of citizens. Justice which may be merely distributive as between man and man, gets in these tribunals a special meaning and coloring.

And all these distinctions—by no means exhaustive—still leave us with our first question unanswered. If an administrative agency is to be defined as one which administers the law, but is not a court, it must be admitted that nothing that has been said has really differentiated a court from an administrative agency. What is apparent is merely that a certain amount of specialization is found in the controversies of administrative law and that one of the litigants is regularly a public official. But in essence the controversy is a legal controversy, to be determined by legal methods, by a different procedure, to be sure, and with a different law of evidence. It seems quite clear that if we had called these administrative agencies from the beginning administrative courts, we might have saved ourselves a deal of confusion and indirection.

One of our leading authorities on Administrative Law, Professor Frankfurter, has also by implication defined administrative agencies as those which administer the law but which are not courts. I think we shall discover that no other definition is really possible, but it assumes that

we know what courts are. Do we? Well, we can certainly begin by saying that courts are composed of judges. In fact a single judge is often a court. And a judge is, one should imagine, easily recognizable. The judges of the Supreme Court, of the Circuit and Federal Court, about them no one is in any doubt and they would not normally be called administrative agencies. Probably we should say the same of the Judges of the Court of Claims or of the Court of Patent Appeals. When we come to the Board of Tax Appeals, we shall, I suppose, hesitate. On the other hand, if we speak of the Interstate Commerce Commission, the Federal Trade Commission, we shall doubtless swing over completely and say that this was an administrative agency and not a court, as positively as we assert the reverse of the Supreme Court of the United States.

And yet the matter is far from clear. An "administrative agency" is one that is engaged in carrying out regulations. When these regulations are statutes, or are based on statutes, it is "carrying out," *i.e.*, enforcing, executing, administering laws. The kind of administrative agency that we are concerned most with is regularly not a single person, but a board or commission, that is, a group of men who must reach conclusions by argument and vote, but need reach conclusions only when there is a dispute between some persons as to what the regulation meant or to whom they applied.

That, however, is precisely what courts do. Nor are the regulations which the administrative agency carries into effect, really different in any way from those carried out by courts. Not only are they substantially alike, but in most cases they are even in form and name the same. The administrative agency is in almost every instance created by a statute, its powers are limited by statute and its purpose restricted. That is equally true of most courts. Even when the courts enforce a non-statutory body of law which they call the Common Law, it is in the first place, a body constantly encroached upon by statutes, and as a matter of fact, only slightly larger proportionately than the non-statutory body of administrative law which administrative agencies have already created out of this practice, the needs they serve and the broadness of the authority committed to them.

Indeed, it has long been noted that there is no difference of any fundamental sort between courts and administrative agencies. They both administer laws, and as far as their pronouncements are concerned, they administer them in the same way. That is to say, they do so regularly by determining controversies, by interpreting statute or statute-like regulations, by inflicting punishments, by declaring rights, by issuing prohibitions.

What then are we to make of the statement that administrative law is recognized only by the fact that it issues from an administrative agency and not from a court? Is it merely that the form is called "commission" or "board"? I think the differences can be summarized in two things: First, the administrative agency is not composed—at any rate, not exclusively composed—of lawyers. The court is. Secondly, the administrative agency uses a different method of investigation from that of the court. Its procedure is different. Its rules of admissible testimony are different.¹⁰

That these differences are unessential, no one will venture to say, when we remember that they have roused in lawyers a degree of aversion and a warmth of emotional utterance with which our profession is not usually credited. What the significance of this animosity is we may consider later. For the present, let us just note its existence.

The solidarity of bench and bar is an admirable common law tradition. The judge is a lawyer on the bench. The lawyer predicates his counsel on what he would do as judge. It is essential for him to be able to see a question as a judge would see it. He may violently dissent from any specific judge's opinion. He may regard it as execrably bad law. There is the story of the highest court of a great eastern jurisdiction which decided by a vote of four to three that the opinion held by the minority could not be entertained by any reasonable man. But despite all this, a lawyer is too well aware of the frailty of legal judgment not to contemplate the possibility that his own views might be considered equally aberrant by his colleagues. It is not too much to say that he respects the judge, even when he contemns his judgment.

And, of course, he had better. Contempt for a particular judgment of a particular court is a venial sin. Indeed, it is not a sin at all but one of our precious constitutionally secured rights. Contempt of court is a serious offense. And it is not so merely because it may result in fine or imprisonment, suspension or disbarment, exclusion from the court-room or erasure from a list. The law being, as it must needs be, the prognosis of a court's decision, it would be intolerable, if we could not bring ourselves to regard the institution which is a permanent function of the law, as an institution of value.

And that institution cannot be considered apart from the men who make it up. There is no such thing as an abstract judge, what philosophers call the "universal of a judge."

Sir Robert Peel once declared that although the tutor of Martinus Scribblerus, the philosophic Crambe, professed to be able to frame the

¹⁰ STEPHENS, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE* (1933).

conception of a true universal idea of a Lord Mayor, he, Peel, could not.¹¹ Our judges are composite pictures, to be sure, but they are composite pictures of living men, or of men remembered or imagined as living men. They retain many of the features of the judges we have seen, just as Sir Robert Peel's Lord Mayor still retained his furred cloak and his chain. And while those features are the features of men we know, men like ourselves and doubly like ourselves because they have been trained as we have been. These men have become just sufficiently part of an institution, to justify toward them a general attitude of respect and support which is a psychological necessity for the continuance of law.

When we consider these other groups of judge-like persons, whom elsewhere I have ventured to call "judicasters," these members of boards and commissions, we see at once that most of our presuppositions are absent. These men are not lawyers. They have not eaten and prayed with us. They do not speak our language. We can follow their reasoning but, if we disagree with it, we have no intention of accepting the result, if we can possibly avoid doing so. And there is no institutional respect that weighs in the balance in their favor. We cannot believe that the totality of their judgment can possibly be law. Every judgment is unique. It will not fuse in our minds with a mass of accepted doctrine, as the Common Law does.¹²

Evidently time will remedy this situation to some extent. As these boards and commissions multiply and become usual and traditional, there will be—perhaps already is—a career that concerns itself with them entirely. They will be manned by men who spend much of their life in them and who will soon be customarily drawn from uniformly trained officials. I hesitate to use the dread word bureaucracy, but bureaucrats our judicasters inevitably must be.

One of the difficulties I have with bureaucrats is not the one that is usually attached to them. I am not so much afraid that they will become aloof and remote, without knowledge of the actual conditions they are regulating and mechanically assisting the routine movement of a great machine. That may or may not be a real danger. But there is likewise the very opposite danger that they will be quite too much in the midst of

¹¹ "Never having seen but one Lord Mayor, the idea of that lord mayor always returned to his mind, and that he had therefore great difficulty to abstract a lord mayor from his gold chain and furred gown." JENNINGS, *AN ANECDOTAL HISTORY OF PARLIAMENT* (1881) p. 243.

¹² A great deal of the bitterness of lawyers toward these apparently new creations is expressed by Mr. S. E. EDMUNDS in his book, "THE FEDERAL OCTUPUS IN 1933; A SURVEY OF THE DESTRUCTION OF CONSTITUTIONAL GOVERNMENT AND OF CIVIL AND ECONOMIC LIBERTY IN THE UNITED STATES AND THE RISE OF AN ALL-EMBRACING FEDERAL BUREAUCRATIC DESPOTISM" (1933). The very title breathes a seventeenth century air.

activities of various sorts, activities altogether too real, practical and immediate.

I suppose that one of the conspicuous vices in our system of government can be expressed in the one evil word, "lobbying," the kind of pressure, individual pressure, group pressure, mass pressure, that is brought to bear chiefly on our legislatures and has so largely helped in discrediting that branch of our governmental scheme. Of course, there is a proper and an improper lobbying, but most of it is improper, because it is secret, because it is insistent, because it appeals to self-interest and fear. But it is not only the legislature that is lobbied. The various administrative agencies, whether boards or individual officials, are subjected to an increasing and irritating lobbying that often enough takes the form of open intimidation. One of the worst features of this lobbying is that it is frequently conducted by members of the legislature themselves, who might, one would suppose, be particularly aware of its impropriety.

The pressure that is in this fashion sought to be exerted is quite outside the formal hearings and discussions which on all controversial matters, these commissions not only grant, but by law must grant. These hearings are in fact in form and substance so like arguments before judicial tribunals, the issues raised are so precisely like legal issues, that the boards and commissions are never more like courts than in these formal hearings. But what would be considered outrageous in the case of a court is of daily occurrence before these tribunals. Those who appear directly or by agents in the formal hearings, who submit briefs and documentary evidence, do not scruple to make personal and private visits to the members of these boards and to urge by every device they can a determination favorable to their interests.

It is here that the absence of a tradition of respect works most harmfully. The mere discussion with a judge of a question which he will have to determine judicially is a grave impropriety. Pressure brought to bear on him of any sort, except argument in due form, is a punishable contempt and in the case of a lawyer is a disbarable offense. It is not unknown, to be sure, but it is quite rare, so rare that the cases are negligible. If we could make our boards and commissions into real courts, our judicasters into unmistakable judges, there is no reason why they could not envelope themselves in the protective dignity which is one of the salutary traditions of the Courts of the Common Law.

It is for that reason that I view with equanimity the dangers of bureaucracy and with apprehension the dangers that are inherent in an excessive fear of bureaucracy. I should like to make real courts of those boards and commissions that act like courts, that deal with the problems with which courts deal, and I should even like to call them courts, if only

to make mandatory that they should be treated by those who deal with them with the same deference as that with which courts are treated and freed from the pressure which only very rarely is applied to a court.

But, in order to do that, they must be taken out of the lower reaches of politics, just as the courts are, and placed in the higher. That is to say, it is not and it should not be a matter of indifference what views of governmental policy a judge or commissioner entertains. His point of view is a part of his personality and his personality is in the highest degree a relevant factor of his behavior as a judge. But commissioners should no more than judges be part of the huckstering and trading, the ranting and bedevilling, from which we have certainly not succeeded in rescuing what is popularly known as politics.

If administrative agencies are to borrow from the courts the position and power of the latter, they also ought to borrow from them one of the essential prerequisites of courts. The members of courts are specially trained men. They are lawyers. I am suggesting that commissions and courts ought also to be composed of lawyers. The essential character of the work courts and commissions do is the same. There is no reason why training in the technique of legal investigation should not be demanded of all types of persons who make legal determinations by public authority, no reason to believe that the immersion in the innumerable phases of life, which is an incident of legal study, will not be of first rate value for incipient commissioners as for potential judges.

On the Continent of Europe it is assumed that boards and commissions will be filled from those who have had legal training quite as much as that courts will be so composed. Indeed, that the making of decisions which determine legal rights should be left to men who have no clear notion of what legal rights mean, would seem in these countries something of a paradox, defensible as paradoxes often are, but needing defense because it is a paradox. But whatever may be the practice of other countries, a highly desirable approximation would, I think, be effected if administrative agencies were relatively permanent, if they were endowed with the powers of courts and if they were manned by lawyers.

Of course, they must be lawyers plus. They must be lawyers who have had sufficient training in economics, in history, in political science, to be able to deal with special problems as a specialist must. And it is precisely this kind of lawyer that the most progressive law schools are attempting to train, not only for administration but for the normal routine of law.

How administrative agencies—let us boldly throw off the mask, let down our hair and call them courts—how these administrative courts are to be fitted into existing systems—whether they should be sub-courts

not of record, from which an appeal lies to the lowest of our courts, or whether they should have a system of their own culminating, as in France, in a Conseil d'État coordinate with the highest Civil Court, or whether by a compromise the systems shall be separate, but should unite at the top in an enlarged Supreme Court, sitting normally in Departments, but for special purposes in banc, for these questions I regret to say I have no immediate answer. There be those who can propose new Constitutions for the United States after a good night's rest and new Codes of Procedure while you wait. I have no such talent. *Non ea vis animo*. But I cannot quite feel that the problem is insoluble, even if it may take more thinking than has heretofore been given to it, in order to solve it.

But the integration of our legal system by the absorption of administrative courts may have an even more far-reaching effect. And the effect will move from the administrative court to the civil court.

The demand for courts which are to be different from ordinary courts is not a new one. In almost every historic system of law, there have been sporadic attempts to create exceptional tribunals who are to proceed, *sine strepitu aut figura iudicii*, "without the forms and the tumult of trials," who are to do justice and do it expeditiously. The history of the Common Law is full of such creations. The curious thing is that the Courts of Common Law are themselves in origin such exceptional tribunals where expeditious justice freed from the forms and technicalities of the older courts, was offered on reasonable terms. The king's courts were in the literal sense administrative and exceptional courts.

The demand for special tribunals to perform the task of courts in matters of administration was based on the fact that the methods of the ordinary courts had ceased to have any measure of expedition and very little contact with reality. It is not too much to say that if our courts had had a procedure that was flexible and simple, that did not heavily penalize every slip, that did not enormously encourage prolixity and repetition, if our courts had a rule of evidence that knew no limitation but that of relevance and common sense, if they were not required woodeuly to ignore facts they knew and pretend to know facts they could not possibly have any acquaintance with, if they were not committed to the exclusive use of a method of investigation that they would not think of using exclusively in ordinary affairs, the controversies on administrative details, the interpretation of administrative regulations, would have naturally and inevitably been committed to those bodies who were already administering the law. The term "administrative agency" would not have existed, either as a cover for an administrative court or as a pretext for putting legal business in the hands of non-legally trained persons.

An integration of our system cannot be achieved except at the price

of a sane examination of our methods of work. It will not be the first time that such a course has been suggested. It would be an easy matter to say, "Let us scrap with one drastic movement our Code of Procedure and our entire law of Evidence." I should not like to do that. But unless we set to work to effect some very vigorous elimination of the accumulated absurdities which we have permitted to enter our system, we are in some danger of being forced to scrap a great deal more than Procedure and Evidence.

The task of administering the law is part of the task of government and government cannot be completely in the hands of lawyers. If we will not do our part of the task in a way that has a discernible relation to the other functions of governing, the matter will be taken out of our hands.

That eminent Fascist, Oliver Cromwell, attempted to make his Common Law presbyters change their habits. He failed completely. "These sons of Zeruiah," he exclaimed ruefully, "be too hard for me." It is not so certain that a persistent and whole-hearted attempt will be equally unsuccessful.

And we have an historic example that might guide us. Dissatisfaction with existing legal methods has created administrative agencies, courts, that is to say, that mask their identity, but not their purpose, of stripping the older courts of jurisdictions they have not intelligently handled. That happened also in the twelfth and thirteenth centuries of English history. The administrative agencies of the king, at first merely the supplements of the older courts of the manor, the hundred, the county, the diocese, encroached upon these until in one way or another, they had destroyed them or paralyzed them. We need not necessarily be lost in gloomy foreboding of a similar result from the existence of administrative courts today side by side with the civil courts. History does not repeat itself as much as we have been asked to believe. But it might at least suggest possibilities.

The king's courts, the courts of the Common Law, were originally grafts on the tree of English law, which grew while the parent stem died away. But the incident was not unique. Other courts developed later and they developed out of the same need that created the Common Law Courts, in part the need of doing expeditiously what routine methods did cumbrously or not at all, and in part the need of delimiting special branches of governmental business in which the *strepitus et figura iudicii* was a scarcely qualified nuisance. Our legal history knows of many such creations, some of which like the Star Chamber, the Council of the North and others, served their purpose and were ended, others of which, like the judicial part of the Chancery, throughout numerous vicissitudes,

succeeded in maintaining itself in full vigor and finally became an essential part of the system itself. If we must keep to metaphors, it did not wither and decay like the ancient pre-Common Law Courts, nor was it lopped off like the Star Chamber, but became a stout and living branch of the tree itself.

The growth of administrative tribunals in the nineteenth and twentieth century is, therefore, no new phenomenon. It repeats what happened in the twelfth and thirteenth centuries and again in the fifteenth and sixteenth. And any one of the further developments may take place which took place before. The parent stem may wither. We may decide to lop it off. Or it may become a part of the trunk. What will happen may be determined by casual growth and emergent need. Or else, we may wish to play a conscious and partially directive role in the process.

One of the possibilities is that which I have here presented. Courts and administrative agencies might be welded into a common system because they perform a common task, and in this welding the administrative agency can be made into a larger, a stronger, a more effective body than it now is, and by compensation the court can become a more human and rational body than it now is. It is hard to see why either court or administrative agency should seek to resist this process.

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