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Forensic Intelligence

Thursday, February 24, 2000

Prepared for publication in **Cornerstone** (Stewards of the Range, Boise, Idaho)

Administrative Law: The 20th Century Bequeaths an “Illegitimate Exotic” in Full and Terrifying Flower

by

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Characterized by late Justice Felix Frankfurter as “this illegitimate exotic,” overwhelming a profession “which for years had been told of its steady advance by the lonely watchers in the tower,”¹ over the course of the Twentieth Century administrative law and the regulatory regime through which it is implemented have made the transition from infancy to a bloated (one might say, sclerotic) maturity, posing a threat at least as sinister as any emanating in this century from any foreign power, choking off the tender shoots of liberty at their roots.

As does criminal law, administrative law and the regulatory regime through which it is implemented derive their legitimacy from the “police powers” of the state, powers which are justified by the state’s responsibility to protect its citizens from harm. But, while criminal law attempts to define a bright line between permissible and impermissible behavior, administrative regulation focuses on the consequences of otherwise noncriminal behavior when those consequences are deemed potentially harmful to the community.

As a concept, however, potential harm is imprecise, vague and often, ultimately, highly subjective, rendering this exercise of the state’s police power very elastic, ideal for the purposes of a selfaggrandizing class of governing politicians and bureaucrats. If any private act can be argued to eventuate in even the slightest potential harm (to someone, no matter how far removed from the precipitating act), then the state can exercise its police power and regulate the act, ostensibly for purposes of protecting the community.

Subjected to regulation, an act is “legal” only when permitted by the state’s regulators, whose permission can be conditioned on the petitioner’s fulfillment of requirements ostensibly designed to prevent or minimize potential harm. A failure to obtain the regulators’ permission or to comply with the conditions imposed by the regulators subjects the unfortunate violator to prosecution. This process turns the general tenets of Anglo-Saxon common law on their heads.

In criminal law an act is permitted unless it is explicitly declared, by statute or common law, to be illegal. In the regulatory state, in contrast, an act, although “legal,” is impermissible unless the regulators have explicitly granted the prospective actor permission to engage in it. Citizens of the erstwhile Soviet Union were wont to comment that, in the USSR, that which was not permitted was forbidden, while, in the US, that which was not forbidden was permitted; unfortunately, these

¹“The Task of Administrative Law,” 75 **U. Pa. L. Rev.** 614, 616 (1927), quoted by Sir David G. T. Williams, Q.C., “Law and Administrative Discretion,” **Indiana Journal of Global Legal Studies**, Volume 2 Issue 1 (Fall 1994) [<http://www.law.indiana.edu/glsj/vol2/sirwms.html>]. If administrative law was overwhelming the legal profession in 1927, well before 1999 it had become a financial mainstay of the profession.

observers failed to recognize the malignant metastasis of administrative law and regulation in the US.²

Although there is no reason in principle that violations of administrative laws (acting without regulatory permission or failing to comply with conditions imposed by the regulators) could not be prosecuted as criminal offenses, in general these violations are pursued as civil actions. The reason for the choice of civil over criminal prosecution is obvious: The civil defendant is in a much weaker position than his criminal counterpart. As summarized by the United States Supreme Court in *UNITED STATES v. WARD*, 448 U.S. 242, 248 (1980),

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. See, e. g., *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States v. Regan*, 232 U.S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases).

Effectively, when the civil standard of guilt "by a preponderance of the evidence" replaces the criminal standard of guilt "beyond a reasonable doubt," the defendant is denied the presumption of innocence. A criminal defendant might offer no defense and yet be found not guilty because the prosecution's case was not so strong as to overcome the "reasonable doubt" of the jury. In contrast, a civil defendant who offers no evidence of his innocence will invariably be found guilty "by a preponderance of the evidence" if the prosecution offers any evidence of guilt at all, no matter how flimsy. Thus, the civil defendant is deemed guilty and denied significant constitutional protections.

Because of the relative advantages conferred on the state in civil by comparison to criminal prosecutions, only those offenses for which nonfinancial sanctions (incarceration or execution) are perceived to be necessary will be prosecuted criminally if the option of civil prosecution is available. For many statutory offenses the state has given itself the choice of civil or criminal penalties, and for these the state will generally elect civil rather than criminal prosecution. Even in the case of a purely criminal offense, when assets can be asserted to have been the fruit of criminal activity, the state will often elect not to prosecute the criminal offense but, instead, to pursue civil asset forfeiture; thus, cases which might have been lost in the criminal courts can frequently be pursued profitably in civil actions.

Violations of regulatory laws would be particularly difficult to prosecute criminally, simply because the underlying statutes are generally vague and imprecise; legislators have left to the regulatory bureaucracy, pursuant to "administrative procedures acts," the definition of specific requirements and offenses (which will generally be limited to acting without benefit of a permit or in violation of permit conditions). Thus, it is not surprising that the domains of administrative regulation and civil prosecution have expanded in concert.

The question remains: What explains the widening scope and progressively deeper reach of this regulatory regime over the last century? Beyond the "natural" tendency of government to expand and to extend its reach into all facets of its citizens' lives, several answers can be suggested.

First, regulation permits the political apparatus to respond to the demands of well-organized and politically-potent minorities (i.e., to the claims of "group rights" over individual rights) without inducing the popular resistance which would be occasioned by overt criminalization of previously lawful and unregulated behavior. The experience of Prohibition graphically demonstrated the

²Since the dissolution of the USSR a more perceptive Russian observer has commented that eventually Russians will be more free than Americans, simply because, in Russia, the Soviet and post-Soviet bureaucracies have been thoroughly discredited, while in the US citizens still generally accept the legitimacy of the regulatory bureaucracy.

severe resistance which the state risks when it attempts to define as a crime any traditionally noncriminal act. In contrast, people acquiesce more willingly to the infringement of even fundamental liberties when the infringement takes the form of regulations (as opposed to outright prohibitions) which can be argued to prevent some unintended harm.

Second, many laws, criminal as well as civil, have as a principal, if not sole, purpose the generation of revenue for the state. That is, the state does not really care whether or not people perform the prohibited acts; its only interest is in collecting the fines imposed on violators of the law. However, if state income is the object, then regulation, with its permit fees and other charges, and civil prosecution, with its financial penalties, its lower standard of proof and its denial of fundamental constitutional protections to the defendant, are vastly more efficient than criminal prosecution.

Third, and perhaps most importantly, regulation provides the political apparatus with access to the resources (political contributions and bribes) necessary to retain power. Essentially, the governing political and bureaucratic elites and their minions can “sell” regulatory indulgences and penalize competitors of the indulged. Criminal “prohibitions” offer similar opportunities, but bribes from criminals are less easily legalized or camouflaged and their discovery subjects the recipient to greater public opprobrium. Thus, suicide (is alleged to, but may not, have) followed the revelation that Judge A. Jerome Bronson of the Michigan Court of Appeals had accepted bribes in exchange for “fixing” decisions. Although politicians are occasionally embarrassed by revelations of favors to their contributors, as was Senator John McCain recently, none in recent memory has committed suicide.

If the reasons for the malignant expansion of the administrative state are obvious, so also are the destructive consequences. First, when an action is taken with the permission of regulators, those truly harmed by the action may find that their ability to secure relief through tort law has been severely compromised, simply because the fact that regulatory requirements were fulfilled becomes a strong defense. Second, the sale of an ever broader array of indulgences (permits, exemptions from regulation, regulatory punishment of competitors) gives rise to a progressively more entrenched and corrupt political class.

The most destructive consequence, however, is the emergence of the concessionary state. The rights of a citizen are subverted, replaced by the concessions which are granted and may be withdrawn by the state. As a result, the relationship between the state and the citizen is fundamentally altered. The sovereignty of the citizen is replaced by the state’s sovereignty over the citizen.

The challenge of the Twentyfirst Century is to reverse the Twentieth Century’s triumph of the administrative state. In this struggle the future of liberty will hang in the balance.



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