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## Security Through Freedom by Alpheus Thomas Mason

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fallacies and inherent impossibilities in all these pseudo-scientific writings. He concludes with the following warning: "The deplorable status of Soviet legal theory, degraded to a handmaid of the Soviet government, should be a grim warning to social scientists that true social science is possible only under the condition that it is independent of politics."

In other words, political theories must not be presented as scientific absolutes, and Hans Kelsen has aptly demonstrated that a political philosophy can be expounded and its desirability from this or that point of view explained without representing it as an either god-sent or history-imposed edifice of natural law.<sup>5</sup> The present book is valuable, not because it helps in a battle against communism—to fight this political movement by pointing out the fallacies of its legal theories and theoreticians would be like throwing pebbles at a battle cruiser—but rather because it furnishes a tool in what ought to be our ever-lasting war against bemuddled thinking and wishdreams pretending to be reality. We must not forget that all the fallacies pointed out in Kelsen's book have occurred in many of the non-communist writers throughout the ages, although not so concentrated.

REGINALD PARKER\*

SECURITY THROUGH FREEDOM. By Alpheus Thomas Mason. Ithaca, Cornell University Press, 1955, 232 pages, \$2.90.

This excellent volume by the distinguished scholar of American constitutional law is a major contribution toward an old, still unsolved problem: the rights of people in property as influenced by law and government. The six chapters—political *versus* judicial control of government; freedom and economic oligarchy; freedom and the New Deal; the Supreme Court in search of a role; welfare capitalism: opportunity and delusion; can freedom conquer fear?—represent the materials presented by Professor Mason in the Messenger Lectures on the Evolution of Civilization at Cornell University.

The book concentrates primarily on American political thought and practice in the control and regulation of property and wealth during this present century. The regulation and control of property by law and government, however, has been a very ancient and still remains a very permanent social need. After perusing *Security Through Freedom* one recalls the philosophic writing of H. G. Wells:

Lawyer and judge are essentially men of the literate and devoted tradi-

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<sup>5</sup> See, e.g., KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE* (2d ed. 1921); Kelsen, *Foundations of Democracy*, 66 *ETHICS* 1 (1955).

tion. With an element of authoritative aristocracy. No class has been so bitterly satirized and reviled, but the very bitterness of the abuse reveals a recognition that from this class it is natural and reasonable to demand a conscientiousness and self-suppression beyond the normal limits. The peasant who curses the lawyer for selling justice and making all he can by it sells his own produce without compunction and makes all he can by it though other people starve. When every iniquity of the lawyers of the past has been admitted, we still find that there were abundant gentlemen of the long robe, haunted, even if they were not inspired and pervaded, by the spirit of righteousness. The illumination they shed may not always have been a beacon, but at any rate the wick never ceased altogether to glow, and down the centuries we see a succession of these unloved men boring away in their tedious frowsty courts, really struggling in that dim mediaeval light to import some semblance of justice, some thought for the commonweal, into the limitless greed of robber barons, the unqualified imperatives of feudal chiefs and the grasping cunning of the baser sort. And they are still working to-day towards the satisfaction of this permanent social need — the exact definition of proprietary rights.<sup>1</sup>

The historical material of Chapter I dealing with political *versus* judicial control of government covers the first century of our Republic's life and documents the development of the struggle over regulation and control of property so graphically described by Wells.

The dynamic thread in our political fabric was now obvious. Running through it all are basic conflicts: economic power against political power, interests against numbers, property against persons, minority rights against majority rule.<sup>2</sup>

By 1890 judicial authority had been elevated, and economic-industrial oligarchy enthroned. The stage was thus set for one of the longest and most bitterly fought contests in American history — political democracy versus economic oligarchy.<sup>3</sup>

It remains for the material covering the 1920's, a decade of economic oligarchy, to portray the finest picture of the vested interests using government and law for their own purposes.

The central institutions of society were economic. Government aid to business was therefore an act of statesmanship because in the long run, society as a whole would benefit. Government aid to the propertyless masses was but a vain attempt to bring natural economic forces into conformity with the "mere force of numbers." So while industrial leaders rejected regulation and control, they demanded more and higher tariff, and other gratuities, and sought government "interference" to keep down interlopers, especially organized labor. "American business," declared Chamber of Commerce President John W. O'Leary, "has learned that government is a valuable partner but a poor master." Business got high tariff protection at home, while abroad economic interests were furthered by the State Department and guarded by Marines; aviation and shipping were sustained by subsidies. Secretary of the Treasury Andrew Mellon, one of

<sup>1</sup> 1 THE WORK, WEALTH AND HAPPINESS OF MANKIND 352, 353 (1931)

<sup>2</sup> MASON, SECURITY THROUGH FREEDOM 16 (1955).

<sup>3</sup> *Id.* at 41.

the richest men in the world, steadily reduced income taxes, especially in the higher brackets. In 1921, as the wheels of industry were turning more slowly, leaders of industry were quick to see why. "All authorities and members of all parties, groups and schools of thought agree," the *New York Journal of Commerce* asserted, that "internal revenue duties are a chief cause of business depression and disturbance and that they must be revised."<sup>4</sup>

Naturally Professor Mason must devote his principal remarks in this writing toward the judiciary, especially the United States Supreme Court, for as H. G. Wells observed, within the courts some semblance of justice must emerge. The violent revolution encompassing the Supreme Court from 1936 onward as it searched for a new role in American law and politics is perhaps the writer's sharpest, cleanest engraving of our basic constitutional problem surrounding the judicial supremacy concept. The court-packing plan of 1937 followed by the dynamic judicial decisions which affected wealth and property by upholding state minimum wage laws and federal authority over an extended interstate commerce area opened several paths for the court.

After the Court's surrender in 1937, the Justices faced alternative uses of their fearful power. At their peril, they could continue Sutherland's concept of the "rigid and changeless Constitution, apparently to be applied in the same way, no matter how much the subject to which it is applied, may change." They could relinquish the power they had previously usurped and refuse to censor legislation they did not approve. Or they could travel Stone's road of judicial self-restraint. The inclusiveness of the 1937 retreat is shown by the acrimonious debate that has since ensued between the justices as to the meaning of their surrender. In case after case they have re-examined the function of the judiciary as an instrument of government, trying to determine where the Justices might appropriately interpose a check and where they should stay out. Three distinct concepts have emerged: *The Court as "resolver of the clash"* between, say, the demands of free speech and religion and considerations of national security, between the claims of the part against those of the whole, as in the Arizona Train Limit case. *The Court as avowed defender of civil liberties*, on the basic theory that thought, speech, and religious belief constitute the matrix, the "indispensable condition of nearly every other form of freedom." *The Court as a circumspect participant in the governing process*, lest it "prevent the full play of the democratic process." Fiercely rejecting the doctrine of preferred freedoms, Justice Frankfurter holds that the Constitution does not give the Court a greater veto power when dealing with one phase of liberty than with another. "Judicial restraint is equally necessary whenever an exercise of political or legislative power is challenged." "Courts are not representatives bodies. They are not designed to be a good reflex of a democratic society," he contends. "Their judgment is best informed, and therefore most dependable, within narrow limits."<sup>5</sup>

Professor Mason completes his evaluation of the current struggle over

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<sup>4</sup>*Id.* at 51, 52.

<sup>5</sup>*Id.* at 141, 142.

control of wealth by law and government in his analysis of the Eisenhower administration and the present emergence of welfare capitalism.

Although Mr. Eisenhower, as a private citizen, had been highly critical of the bureaucratic trend, as President, he has not turned his back on either the achievements or the theory of the New Deal. On the contrary, the Republican President recognizes that "government must use its vast power to maintain employment and purchasing power as well as to maintain reasonably stable prices"; "must be alert and sensitive to economic developments, including its own myriad activities"; "must be prepared to take preventive as well as remedial action"; "must be ready to cope with new situations that may arise." "This is not," the President said, "a start-and-stop responsibility, but a continuous one." In words that smack of Franklin D. Roosevelt himself, President Eisenhower boldly proclaimed: "The arsenal of weapons at the disposal of Government for maintaining economic stability is formidable. We shall not hesitate to use any or all of these weapons as the situation may require."<sup>6</sup>

It is helpful to compare these observations with those of our present Under-Secretary of Labor and Presidential Confidant Arthur Larsen as he expresses present Republican philosophy on law and government toward the regulation and control of property and wealth.

It is the genius of the Eisenhower Administration's achievement that it has merged and brought into balance all the positive forces in our country. It is not against any of them. It realizes that they sometimes conflict, but it has found a way to encourage them to work together to a common benefit.

Thus: 1896 was against labor; 1936 was against business; this Administration is against neither, but is *for* both.

Eighteen ninety-six mistrusted the Federal Government; 1936 mistrusted the State Governments; this Administration mistrusts neither, but assigns each its full role.

What we are now observing is the raw force of nineteenth-century capitalistic private enterprise supplying the driving power to produce a steady prosperity, and the raw force of twentieth-century collective labor action supplying the driving power to improve the wages and working conditions of workers, while the State and federal governments, using the techniques and experience gained over many years, prevent harmful excesses and actions against the public interest, and make provision for the hazards and insecurities that are a by-product of free private enterprise. In all this, the key word is *balance*.<sup>7</sup>

The final thesis of Mr. Mason on this historic struggle in America is summed up thusly:

To escape anarchy, politics must be dominant over economics. Official, politically responsible government must insist on monopolizing coercive power, as against any and all private aspirants for such power. It must do this, not because there is special virtue in established authority or because government is or can be omniscient, but because this is the only way of

<sup>6</sup> *Id.* at 179, 180.

<sup>7</sup> LARSEN, A REPUBLICAN LOOKS AT HIS PARTY 9 (1956).

avoiding chaos, the only way, as Locke's men discovered in a state of nature, to prevent individuals and groups from taking law into their own hands.<sup>8</sup>

The writer relies heavily on personal accounts of individual Supreme Court justices and economic and political leaders to season the basic historical philosophy of his lectures. These serve often to emphasize the constant changes men make under varying conditions:

As a professor at the Harvard Law School, Frankfurter deplored any effort to portray Supreme Court Justices as "impersonal vehicles of revealed truth." He then urged recognition of them as "moulders of policy" (*Forum*, June 1930, p. 334). As a Supreme Court Justice, he holds that "it is hostile to a democratic system to involve the judiciary in the politics of the people" (*Colegrove v. Green*, 328 U.S. 549 [1946], pp. 553-554).<sup>9</sup>

It is regrettable that the author does not devote directly and specifically greater attention to the mainstream of American political thought and practice—*equality*. Perhaps even this book should have been entitled *Security Through Equality*. Is not the freedom of America really only the effective tool to cut away the bramble bushes of inequality, to build in our nation the realization of Thomas Jefferson's first self-evident truth: that all men are created equal? Our drive toward real security has been primarily toward equality. Alexis de Tocqueville was alert enough to record this over a century ago:

Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people. I readily discovered the prodigious influence that this primary fact exercises on the whole course of society; it gives a peculiar direction to public opinion and a peculiar tenor to the laws; it imparts new maxims to the governing authorities and peculiar habits to the governed. I soon perceived that the influence of this fact extends far beyond the political character and the laws of the country, and that it has no less effect on civil society than on the government; it creates opinions, gives birth to new sentiments, founds novel customs, and modifies whatever it does not produce. The more I advanced in the study of American society, the more I perceived that this equality of condition is the fundamental fact from which all others seem to be derived and the central point at which all my observations constantly terminated.<sup>10</sup>

Justice William O. Douglas has written along a similar vein this year.

Wherever equality is the theme, men live together in peace. Wherever inequality is the practice, grievances and complaints fester. Equality among men of all creeds, nationalities, and colors is the great curative of social ills. No one segment of society can long be set apart in a ghetto of second

<sup>8</sup> MASON, *op. cit. supra* note 2, at 180, 181.

<sup>9</sup> *Id.* at 143 n. 68.

<sup>10</sup> DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 3 (1945).

or third-class citizenship. Once that happens, a divisive influence is at work, one that will sooner or later tear the community apart. As an eighteenth century American, Joel Barlow, said concerning the theme that all men are equal in their rights, "This point once settled, everything is settled. Banish the mysticism of inequality and you banish almost all the evils attendant on human nature." Gandhi spoke eloquently of the problem when he pleaded for abolition of the caste of the untouchables. His was not a half-way solution. "We must not throw a few miserable schools at them; we must not adopt the air of superiority towards them. We must treat them as our blood brothers as they are in fact. We must return to them the inheritance of which we have robbed them. And this must not be the act of a few English-knowing reformers merely, but it must be a conscious voluntary effort on the part of the masses." What Gandhi said is equally true of the problems of every minority the world around. Equal protection is the most important single principle that any nation can take as its ideal. Those who practice it have a strength and unity that other nations lack. Those who practice it give to each minority a sense of belonging. And a sense of belonging is, perhaps, as important a community attitude as any. The duties, as well as the rights of citizenship, are generated out of the sense of belonging. Where there is a sense of belonging, there are ties of loyalty and devotion that no strains of politics can ever sever or destroy. Gandhi once called for an India without "race-hatred." "Let that be our nationalism," said Gandhi. That was also the call of Lincoln and Franklin D. Roosevelt in America. A nation without race hatred is singularly strong in spirit. The ideal that Gandhi set for his nation and that Lincoln and Roosevelt set for America is the ideal that we now set for our new world community.<sup>11</sup>

The security we seek must be the security of equality. The security we use to achieve equality is freedom: freedom to talk, discuss, express, dissent, assemble, worship. Mr. Mason eloquently pleads for this tool of freedom in his final chapter: Can freedom conquer fear?

The problem now, as always, is to combine individual freedom with social justice, to fuse that degree of initiative necessary for progress with the social cohesion needed for survival. No adjustment will ever be perfectly and finally achieved. It is the tediousness of its method and the stress on human values rather than efficiency that places free government at seeming disadvantage. "The wastes of democracy are," as Justice Brandeis said, "among the most obvious wastes." So many minds have to be consulted, informed, and brought into agreement. But that, when done, is democracy's great strength, the only assurance that whatever course it may have to take, freedom may endure.<sup>12</sup>

Our freedom must do more than endure, it must prevail as our guide into the historic haven of all humanity: the brotherhood of man as exemplified by the political and legal equality of each individual. Atomic scientists have created this brotherhood by fissionable fiat. It remains for us as citizens of our nation and of the world community to use our

<sup>11</sup> DOUGLAS, *WE THE JUDGES* 25-27 (1956)

<sup>12</sup> MASON, *op. cit. supra* note 2, at 215.

freedoms to create that security of the nation and of the world for which we all yearn. The intelligent inspiration given by Alpheus Mason in these lectures fits well the testamentary direction of Hiram J. Messenger to Cornell University to provide annually a "course or courses of lectures on the evolution of civilization, for the special purpose of raising the moral standard of our political, business and social life."

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