Liberalism Within the Law: The Continuing Contribution of Ralph Follen Fuchs

Maurice H. Merrill
University of Oklahoma College of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Legal Biography Commons, and the Legal Education Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol45/iss2/1
LIBERALISM WITHIN THE LAW: THE CONTINUING CONTRIBUTION OF RALPH FOLLEN FUCHS

Someone has compared the lawyer's written productions, such as pleadings and briefs, to those "writings on the sand that leave naught for tomorrow's passer-by," lamented in Cory's verse. Their office is performed when they have (or have not) informed or persuaded the judges to whom they are directed. Their authors may not hope to attain the lengthened span of human recognition achieved by the writers of great literature in its varied forms.

The law-trained man who writes for the scholarly reviews or produces books on legal topics may hope for some degree of rememoration. At least, his words are preserved in libraries devoted to the law. But writing of this sort is a feeble bid for immortality. "Law," as Roscoe Pound was so fond of saying, "must be stable and yet it cannot stand still." As the matrix which protects and gives form to the social order, it must adjust to society's developing needs. Adjustment must be in content as well as in form. So it is that the writer on legal topics, be he scholiast or polemicist, must expect that a few brief years will draw the curtain on resort to his words by other than antiquarians. Awareness by his fellows of his influence upon his own time must remain his chief reward. It is especially fitting, then, that, as a scholar and a builder in the law moves from one phase of a distinguished career to another, we look at his achievements and assess, as best we can, the contributions which he has made to our times.

Who's Who in America tells us that Ralph Follen Fuchs was born in St. Louis in 1899, and that he attended Washington University in that city, receiving the degrees of A.B. and LL.B. Admitted to the Missouri Bar in 1922, he did research in economics and was awarded a Ph.D. from the Robert Brookings Graduate school in 1925. He served a stint with the United States Department of Justice and practiced law for a year in St. Louis, prior to becoming a member of the Washington University Law School faculty. After fourteen years service, he took a leave of absence to assist in setting up the machinery for the merit selection of lawyers for government service that was instituted in 1941. He served as
assistant secretary, and as secretary, of the board of legal examiners under the federal Civil Service Commission, which administered the new system, and played a most significant role in getting the program underway. In 1943, when this reform fell victim to the spoils system, Ralph Fuchs' talents were called on by the United States Department of Justice. Following this service, he became professor of law at Indiana University and entered into emeritus status at the close of the academic year 1968-69. At other points in his career, he has served as a commissioner on uniform state laws from Missouri, a member of the United States Attorney General's Committee on Administrative Procedure, a member of the National Enforcement Commission of the Wage Stabilization Board, an adviser to the Indian Law Institute at New Delhi, a trustee of Meadville Theological Seminary, and the general secretary, and later the president, of the American Association of University Professors.

So much for the general outlines of an industrious and a distinguished life; now let us look upon some of the outstanding features of Ralph Fuchs' contributions to the articulation and the improvement of our law.

In what seems the first of his writings to appear in a legal journal, he provided the key to his own philosophy. Speaking on the subject of law and liberalism, he said,

... Liberalism is one of the vaguest of concepts to be sure, but the word conveys an idea which no other term imparts. The largest element in liberalism is simply open-mindedness. ...  

The liberal, then, is the man of the open mind who is not afraid to examine the working of institutions and the functions of society.  

He is not wedded to a particular philosophy, whether of individualism or of collectivism. No doubt he will have certain "can't-help-its," to use Holmes' expressive term. None of us can escape these. But the true liberal will confine his categorical imperatives narrowly to basics which he deems essential to a decent society. In the oft-quoted words of Benjamin Cardozo, these are such that "neither liberty nor justice would exist if they were sacrificed."  

He will be repelled alike by the doctrinaire anti-governmentalism of a Leonard Read or of a Herbert Marcuse. He will not consider that every decision opening a jailhouse door deserves to be styled "liberal;" neither will he hold a like opinion of such ill-starred

1. Fuchs, Two Aspects of Law and Liberalism in the United States, 9 St. Louis L. Rev. 203 (1924). Since the ensuing pages will contain many references to Professor Fuchs' writings, hereafter his work will be cited without repeating the author's name.

2. "[N]ormally a liberal-minded person will be more impressed with the necessity for change than the general run of humanity." Id. at 204.

decisions as the now repudiated Adkins case.\textsuperscript{4} Constantly, a liberal will hold in mind that "fruitful results may be obtained by examining existing institutions critically in order to remodel them consciously in the interest of the ends they are supposed to serve."\textsuperscript{5} He will cherish that basic objective of society which Professor Fuchs recently characterized as

to reduce human deprivation and exploitation continuously, to maintain a healthful environment, and to provide the opportunities without which freedom and enterprise will be frustrated and the exercise of responsibility be thwarted.\textsuperscript{6}

Professor Fuchs has ranged widely in the process of a concrete application of this philosophy of the liberal approach to life. His service has touched such diverse areas as labor law, trade regulation, judicial technique, administrative law, the relation of law to other social and behavioral sciences, and higher education.

In the area of labor law, his attention early was turned to the lessons which foreign experience might teach Americans. He wrote an explorative survey of the hesitating and varying approach of American courts and lawyers to the nature and effect of collective labor agreements.\textsuperscript{7} To re-read this piece today is to be reminded vividly of the utterly rudimentary state of our law in this realm less than fifty years ago and of the phenomenal development which the intervening years have brought. Ralph Fuchs was one of those whose interest helped to stimulate this development. Following his exploratory article upon the American law, he wrote stimulating expositions of the more sophisticated experiences of Germany and France.\textsuperscript{8} Here, but for an excursion when the New Deal was young,\textsuperscript{9} the record of formal exposition seems to close, but his continuing awareness of the problems in the field is exemplified in later writings.\textsuperscript{10}

\textsuperscript{4} Adkins v. Children's Hospital, 261 U.S. 525 (1923).
\textsuperscript{5} Book Review, 14 St. Louis L. Rev. 341, 342 (1929).
\textsuperscript{7} The Collective Labor Agreement in American Law, 10 St. Louis L. Rev. 1 (1924).
\textsuperscript{8} "There were no such chaos and uncertainty as prevail in this country." The French Law of Collective Labor Agreements, 41 Yale L.J. 1005 (1932). Note the lament over American indifference to comparative law in Book Review, 17 St. Louis L. Rev. 188 (1931).
\textsuperscript{9} Collective Labor Agreements in German Law, 15 St. Louis L. Rev. 1 (1929); Protection of the German System of Controlling Employment by Collective Bargaining, 17 St. Louis L. Rev. 221 (1932).
\textsuperscript{10} The French Law of Collective Labor Agreements, 41 Yale L.J. 1005 (1932).
\textsuperscript{11} Collective Labor Agreements Under Administrative Regulation of Employment, 35 Colum. L. Rev. 493 (1935).
\textsuperscript{12} E.g., The Hearing Examiner Fiasco Under the Administrative Procedure Act,
Given Ralph Fuchs’ training in economics, it is natural that his attention should have been attracted to legal oversight of the competitive struggle of business entrepreneurs for survival or for affluence beyond survival. While he began teaching a course in trade regulation in 1930, according to that year’s directory of law teachers, it was only through book reviews that, in his earlier writings, he touched upon the topic. Indeed, some of his most perceptive later writing in the area has continued in the book review format. He has given us, however, a survey of the formulation and enforcement of American antimonopoly legislation, in the light of economic and social factors, and a microscopic examination of the problems raised by the Robinson-Patman Act in respect to price and service differentials. In the latter, he urged the desirability of a statutory structure which would entrust administrators with a greater flexibility to regulate in aid of the general objective of equal opportunity.

Judicial technique, or, as it might more adequately be styled, the technique of developing judicial decision, must engage the attention of anyone who works with the law in action, particularly in those areas which are commonly referred to as the domain of public law. Ralph Fuchs in his early essay on law and liberalism, emphasized that

one of the chief problems . . . is the problem of keeping those who administer the law as far as possible cognizant of the facts of life and willing to bring the law into conformity with them—the problem, in other words, of bringing about liberalism within the law.

In two trenchant paragraphs, he summed up the need and the remedy:

After all there is no possible solution to the problem of creating liberalism within the law except one which operates through the minds of the legal profession. If liberalism is open-mindedness the problem of liberalizing the law becomes one of creating open-minded lawyers and judges who will draw upon all of the evidence and upon all accumulated wisdom

17. Two Aspects of Law and Liberalism in the United States, 9 St. Louis L. REV. 203, 205 (1924).
before giving shape to the law—upon evidence and wisdom which are contained in the facts of life and in the results of research in all fields of knowledge as well as in law books. A judge deciding a case needs something besides the legal precedents to guide him if his decision is to be anything but an anachronism. Equally as important as the precedents is the social, economic, and political background of the controversy; and this is true whether the case be one in tort between two litigants or one of statutory construction which affects hundreds of thousands of persons.

The problem of bringing about liberalism within the law, therefore, becomes a problem of getting social, economic, and political backgrounds prominently before the judges. The solution must come through better, broader education of bar and bench and through an enlarged scope of legal thought and method. There are few briefs which ought not contain something besides citations of cases; there are no law libraries which ought not contain more than law sheep, law buckram, and a dictionary. When law has been made something more than a self-contained system in its everyday application it will modify precedents and legal reasoning in the light of the changing facts of life. It will become normally a growing, developing system instead of one that grows by subterfuge in exceptional instances. It will become truly liberal.

Of course, this was not altogether new. The original "Brandeis brief," ushering in the idea of marshalling nonlegal studies and opinions in support of legislative action under attack as unreasonably arbitrary, had been filed more than fifteen years previously. But the article made a broader appeal by urging the bench and the bar to resort to extra-legal experience and to the fruits of scholarly investigation as a basis for the development of the law in all its aspects. As Fuchs suggested on another occasion, there is need for "a critical approach to legal problems in terms of the ends of the law in ordering human affairs." He would prefer, as standard practice, the direct consideration of the factors affecting those ends which he feels are present in the decisions under the anti-trust laws:

The purposes of law determine its content and account for the decisions of courts and administrative agencies, but purpose is

18. Id. at 206-07.
registered typically in rules and principles. Once these have been 
enacted or accepted, they are purportedly applied with only 
secondary rather than primary reference to the considerations 
that gave them births. In other words, a doctrinal screen sepa-
ratess the ends of law from the process of effectuating them 
through administration and adjudication. Decisions are reached, 
or at least rationalized, in terms of legal propositions recorded 
upon the screen, rather than in terms of the purposes that lie 
behind. . . . It is emphatically not so, however, under the anti-
trust laws of the United States; for there the doctrinal screen 
is exceedingly thin and large of mesh, permitting—indeed 
requiring—the enforcement tribunals to look constantly 
through it to the purposes of the laws, instead of finding their 
patterns of decision upon the screen itself. The patterns of 
anti-trust law are few and broad in terms; the necessity for 
resorting to social ends and economic data as guides to decisions 
is constant.20

In this way, he suggests, there would be less likelihood of delaying 
the necessary adjustments which the law must undergo if it is to keep 
abreast of the public interest. In a similar vein, in praise of a forward-
looking judge, he wrote of “the advances in jurisprudential thought and 
in legal education which industrialism has produced.”21 In other words, 
there is an interaction of life, of the law, and of philosophy in its teleo-
logical aspect, so that “fruitful results may be obtained by examining 
existing institutions critically in order to remodel them consciously in 
the interest of the ends they are supposed to serve.”22 There must be a 
truly empirical approach.

The solution of the economic problems of the future is 
likely to require resort to all of the organizational devices 
evolved by men which are consistent with the fundamental 
values of western culture, rather than doctrinaire adherence 
to only a single one.23

Despite the limitations which our treasured tradition of the adminis-
tration of justice according to law imposes upon his role, the judge does 
have responsibility for the shaping of the law so as to serve the general 
welfare.

20. Economic Considerations in the Enforcement of the Antitrust Laws of the 
23. Economic Considerations in the Enforcement of the Antitrust Laws of the 
The judge decides cases as they come to him, after hearing. He may not precommit himself, and he does not, if he is worthy of his calling. But in the mind and the heart of the great judge are ends to be served, drawn from the history and culture of the human race and from individual experience, prophetic of a future which is greater by far than the compromise with ignorance and meanness, the mixture of good and evil, which still prevails. To his hand there lies that store of vital truth which is the essence of the law—the principles of equity, the constitutional doctrines, and the sound rules of conduct which have in them the capacity for development to meet emerging needs.24

This faith in the effective capacity of the forces working to bring the law into harmony with the needs of society led Ralph Fuchs, in that first essay of which we have spoken, to urge that "liberalism toward the law" was needed on the part of laymen—"economists, sociologists, and political reformers"—in order for them "to become acquainted with the nature and functions of law and to understand the processes by which it works."25 If they would exhibit this liberalism, they would gain

an understanding . . . of what it is that law does and of the methods that the law must employ [and thus would become allies of the] forces at work within the legal system which are tending to bring it more and more into touch with modern life and to cause it to function so as to further the progress of society.26

This faith in the ability of the law, acting through the combined legislative and judicial processes and through enlightened professional opinion, to respond to the needs of the time seems to have faltered briefly during the Depression. To insure that decisions on constitutional issues will be based on sound appreciation of the economic, sociological, and other factors significantly bearing on the problems involved, he wrote, care must be taken to bring these factors adequately before the tribunal, since "constitutionality of highly important measures is determined by judges whose qualifications for the socially important task of passing upon the validity of legislation are accidental if they exist at all."27 While

25. Two Aspects of Law and Liberalism in the United States, 9 St. Louis L. Rev. 203, 207 (1924).
26. Id. at 209. Note also the emphasis on methodology in the development of the foundation facts which could justify federal jurisdiction in Legal Technique and National Control of the Petroleum Industry, 16 St. Louis L. Rev. 189 (1931).
the cases involving the validity of the early New Deal measures aimed at combating the depression were pending, Professor Fuchs expressed concern over whether adequate foundations to insure thoroughgoing judicial apprehension of appropriate facts were being laid. In connection with this call for sound strategy, however, he voiced dissatisfaction with the concept of due process of law as a substantive limitation upon what government may do; also, he raised the question whether a tribunal composed solely, or even predominantly, of lawyers was constituted properly for the disposition of questions relating to the competence of the government to act, under the Constitution. As to the first question, he said:

Due process of law, as a criterion of the validity of substantive legislation, has no definite content that can be made use of in predicting judicial decisions. Its availability to the courts simply affords them an opportunity to give effect to their views of the reasonableness of legislative actions in matters of disputed social policy.

Perhaps he would be less critical of this concept in light of the developments of due process in protection of the substance of various freedoms since 1947.

As to the second point, he wrote:

Even assuming that a far-sighted check upon legislative action

---

28. . . . Success in procuring satisfactory judicial decisions, however, is dependent upon a technique of presenting cases in court and of procuring their adequate consideration which can scarcely be said to have been worked out. Minimum requirements appear to be, first, the marshalling of pertinent facts in such a way that their significance will be revealed to the courts, and, second, the litigating of cases at such times and in such order that favorable decisions are most likely to be forthcoming. Both requirements seem to call for an organized legal strategy on the part of the Government under the direction of the Attorney General and the Solicitor General, with continuous gathering of data for legal purposes and a planned docket. Whether such a strategy exists, at present, it is impossible to say. Past methods lend no encouragement to a belief that it does.


29. The Constitutionality of the Recovery Program, 19 St. Louis L. Rev. 1, 16 (1933).

30. When personal interests or freedoms seem threatened as a result of administrative action, the Court manifests readiness to extend judicial safeguards to them, in the guise of review of the fairness of the administrative procedure or review of the administrative determination of jurisdictional points, whether of fact or of law. To this end, it has used the traditional legal method of impressing technicalities to the service of ends which are deemed important.

Administrative Determinations and Personal Rights on the Present Supreme Court, 24 Ind. L.J. 163, 194 (1949).
is desirable, it seems that the tribunal entrusted with the high function of imposing it should consist of persons who bring together the fruits of varying mental disciplines—a small council of the nation's wisest men and women instead of merely eminent representatives of a single profession.31

This language suggests, perhaps, that there should be a special court to deal with issues of constitutionality, somewhat akin to what seems possible under provisions in the Constitution of West Germany,32 on which membership should not be confined to lawyers. Of course, there is nothing in the United States Constitution to prevent such a development with respect to the Supreme Court—nothing except the insurmountable objection that it runs counter to our established basic presupposition that the judicial branch should be manned by lawyers. Whether or not this observation as to the proper composition of a constitutional tribunal was meant to be more than the phrasing of an ideal standard, without respect to practicality of realization, Professor Fuchs did not develop this thought in detail, nor does he seem to have recurred to it later.33 Even when his earlier forebodings were proved true by the decision which blasted the Blue Eagle out of the sky,34 he was not moved to adverse comment upon the Court or upon the institution of judicial review.35 Instead, he placed a large part of the blame for the result, which he obviously deprecated, upon tactical errors which he had warned against earlier,36 concluding:

The very uncertainty of the situation, however, suggests a possible way out. Well-planned presentation of future cases involving the constitutionality of existing and contemplated Federal regulatory legislation may result in judicial recognition of a Federal power adequate to cope with the more important problems. The effort to achieve such an outcome will appear illegitimate only to those who believe that the Supreme Court has already spoken with clarity, that its views necessarily are

32. See Grundgesetz art. 93 and particularly art. 94(1) (W. Ger.).
33. He might have had this thought in mind, however, in an almost contemporaneous reference to the view that the validity of major regulatory measures in the eyes of the Supreme Court of the United States hinges upon hazardous factors to which the fate of the nation cannot wisely be trusted.
correct, and that under no circumstance would it repudiate anything it has said. Such a view, of course, is at variance with experience as well as with reason.  

He found this prophecy fulfilled when the Wagner Act was sustained. The effectiveness of careful planning, of painstaking presentation of significant fact, and of convincing marshalling of all the factors bearing upon the proper resolutions of the issues were given full credit for the part played in achieving a satisfactory result.

The tribunalistic solution of problems of statecraft, while perhaps questionable on the ground of its essential lack of democracy, may evolve into an effective means of solving modern problems by scientific methods. Thus the ancient dream of a government of philosophers may find partial realization.

We have no further instance from his pen of expressed doubt concerning the institution of judicial review. The American judicial system has proved to be liberal in the sense of being open-minded. Henceforward, Ralph Fuchs' concern will be directed toward problems of presenting adequately to the judges the materials upon which to exercise open-minded judgment. A large part of the remaining portion of the article on the Wagner Act decision is devoted to treatment of the methods—judicial notice, legislative committee reports, legislative findings, research bureaus, briefs, evidentiary presentation, administrative investigations—which may be used to establish adequate foundations for decisions in the realm of public law.

Probably administrative law will prove to be the area in which the most fruitful and enduring contributions of Ralph Fuchs have been made. His early interest in economics and in labor law naturally led him to the area. Administrative tribunals played a significant role in the development of labor relations law and of various forms of economic regulation in this country. The hesitancy of the courts to accept tenders of unfamiliar

39. The completeness and the realism with which these facts are laid before the courts, together with their apprehension by the judges, constitute the very heart of the judicial process in constitutional cases. The same statement can be made with regard to important anti-trust cases and many cases involving judicial review of the acts of administrative agencies.
Id. at 514.
40. Id. at 515.
41. "The constructive forces in the Anglo-American legal process will hardly yield now to blind conservatism." Id. at 532.
42. Id. at 524-31.
jurisdiction and some distrust by reformers as to judicial competence or benevolence combined to bring about this reliance upon the administrative process. As a result, one interested in progress could not escape concern with administrative law, particularly as opposition to reform so frequently was coupled with attacks upon the process which was the chief instrument for making reform effective.

A vignette effectively dispelling the perennial charge that a tidal wave of meddlesome regulatory legislation annually sweeps over our citizens may be taken as the first "Fuchsian" exposition in this field. Some years later appeared a thoroughgoing survey of the philosophy, the structure and the application of administrative regulation in the modern state. Practically contemporaneously, Fuchs published what remains the classic exposition of the nature of administrative rule making and the factors which distinguish it from adjudication. An expository analysis of rule making in the area of food and drug regulation and an examination of the crucial issues of administrative law followed shortly. In the latter Professor Fuchs defined administrative law as "simply the law which establishes the procedure and methods of the executive branch of the government in its contact with private interests and provides for judicial checks upon its authority." He noted the passage of the first period of controversy during which eloquent debate was waged concerning administrative justice and the supremacy of the law, and concerning the reconciliation of administrative agencies with the constitutional provisions for separated governmental powers. In contrast, he suggested that concern should be shifted to the problem of reconciling the need for efficiency in the ruling of our complex society with the protection of individual interests against abuse. This recognition of the high import-

44. Id. at 538.
45. The Quantity of Regulatory Legislation in the United States, 16 ST. LOUIS L. Rev. 51 (1930).
50. Id. at 196.
51. Under our system of government, no agency should be permitted to exercise a degree of power, in relation to small matters or large, which renders it unduly dangerous to human freedom. Governmental authority with respect to any subject must be divided or its exercise checked upon, in such a way as to minimize the danger of abuse. . . . The exercise of adequate discretion for dealing with the problems of a complex society and the simultaneous provision of sufficient safeguards against the abuse of discretion are the two clearest needs of modern democratic government. The separation of powers has
ance of a proper balance between the efficient achievement of social purpose and the protection of legitimate personal claims recurs through his writings. To an assemblage of law teachers, he urged:

At all . . . stages in the determination of administrative procedure the central question is, or ought to be, what procedure will be most conducive to the successful performance of the particular administrative junction for which the procedure is being desired, having in mind, also, due protection to affected private interests.

Insistence upon the balanced approach constitutes the most significant of his many outstanding contributions to the shaping of administrative law in our generation.

The rule-making portion of the administrative process has been one of his major interests. In his early discussion, he made the basic distinction that rule-making deals with the formulation of general determinations affecting denominate classes of persons or situations, while adjudication results in "orders or findings or . . . action applying to named or specified persons or situations." The distinction has received acceptance alike in scholarly writings, in judicial decision and in legislative drafting. His rejection of futurity of effect as a distinctive mark of rule-making has not received a like general occurrence. Our common

a role to play in preventing the second of these needs from being ignored.

Id. at 194. The reader, familiar with Madison's exposition in The Federalist No. 47, will not fail to note the parallelism in the thought of the two writers.

52. All administrative agencies are specialized organizations established by legislation to safeguard or promote certain public interests and vested with powers that affect private persons and property. The basic questions with respect to them are, first, how effectively they promote the public interests entrusted to their care, and, second, what the consequences are for the private interests which they affect.


Professor Fuchs praised the Attorney General's Committee on Administrative Procedure because, throughout its report, "emphasis is placed upon the need of furthering efficiency, along with safeguards to private interest, in the work of the agencies." Some Aspects and Implications of the Attorney General's Committee on Administrative Procedure, 7 Ohio St. L.J. 342, 345 (1943). Years later he commented, in respect to another report on administrative procedure, "I think, in our zeal to protect private interests, we had better be pretty careful these days lest we make effective government impossible."


55. Id. at 261.

56. Compare Model State Administrative Procedure Act § 1(2) (1946), embodying the requirement of futurity of effect in the definition of rule, with the Revised Model State Administrative Procedure Act § 1(7) (1961) eliminating it. Both versions have achieved legislative acceptance. See F. Cooper, State Administrative Law, 113 (1965).
prejudice against retroactive legislation, reinforced by a number of state and federal constitutional provisions, tends to reduce to a minimum the occasions in which new rules will be applied to past situations, whatever may be the effect of definitions.

In his initial article on rulemaking, Professor Fuchs rightly stressed the variety of procedures that properly may be employed in rulemaking, dependent upon the nature, purpose and objective of the rule. Although he did not condemn out of hand the developing congressional tendency to import strictly adversary methods into this phase of administrative activity, he has warned that undue formalization can render it complex, dilatory and inefficient.

The broader problem of basic fairness in the administrative process also has attracted his careful attention. In a wide-ranging article, he dealt with numerous aspects of this question. Earlier, he had spoken favorably of the desirability of the "unification of major policy in the several areas of economic regulation" and of the various modes by which this might be accomplished. Despite his invocation of the collaborative effort of lawyers, economists and political scientists in the task, the effort has not yet even been commenced. Some of our current ills probably should be attributed to this failure to heed the voice of prophecy.

Concern with the adjudicative aspect of agency activity led naturally to interest in the place of the hearing officers in the federal agencies. This has been a matter of special attention ever since the inception of the movement that eventuated in the Federal Administrative Procedure Act of 1946. Professor Fuchs was definitely opposed to the proposals for a complete separation of the adjudicative process from the agencies, which were made at the inception of the movement, both on the grounds of the impossibility of distinguishing policy determination from "pure" adjudication and on the "loss of expertness on the part of the deciding body and of efficiency in the conduct of the regulatory function as a whole."
Concern that administrative adjudication should not be oblivious to the ends which the law administered is designed to serve springs from his recognition, early expressed, that law and policy "cannot be divorced." It has led him to oppose proposals which would separate the hearing examiners from the agencies which they serve, or would impose rigid barriers against consultation between adjudicators and staff on matters related to policy, or would consign adjudicative work, involving more than simple fact issues of private right, non-regulatory in character, to administrative courts which would be unrelated to the enforcing agency. Upon the probably unfortunate results of this last proposal, he commented cogently:

Adjudications growing out of regulatory processes are, however, another matter; for in them the importance of agency expertise and discretion is high. Not merely fact determination and application of law to fact are involved, but the evolution of social, political, and economic policy as well. The policies applied in such adjudication should grow out of over-all administrative experience, such as a regulatory agency continuously acquires. A purely adjudicatory agency, such as an administrative court, even though its judges specialize in particular subjects, can gain experience only through testimony and argument before it. There are strong grounds for concluding that this is not enough. The impact of continuous grappling at first-hand with the problems the legislature desires to have solved, and has conferred discretionary authority as an aid in solving, is often necessary. Where this is true, the transfer of adjudicatory functions to a court not subject to this impact would sacrifice vital public interests.

It would be difficult to improve upon this statement of the argument against committing issues of such kind to an independent tribunal

The problem of the selection and tenure of hearing officers has received detailed treatment by Professor Fuchs. His approach to this subject must have been enriched by his experience with the project for recruiting government lawyers through a merit selection process. His broad perspective enabled him to write a sparkling, provocative and informing survey of the disastrous blunders that marked the original attempt at implementing the merit system for examiners commanded by the Federal Administrative Procedures Act and of the brouhaha that ensued. The piece should be required reading for those concerned with the problem of reconciling the need for merit in the public service with the pressures of interested groups. Throughout, Professor Fuchs has urged that the hearing officers, however entitled, be so chosen and tenured as to promote quality and efficiency in the administrative process. He has emphasized the need for guarding against the influence of politics, personal or ideological. He also has taken up the cudgels manfully against the canard that association of the hearing function with the agency staff results, in other than the most unusual situations, in combining prosecution with judgment.

Obviously, administrative law possesses a variability even beyond that natural to law in general. Professor Fuchs has kept well abreast of this shifting subject. He has contributed to the knowledge of localized agency law by a thorough survey of judicial supervision of agency action in Indiana. More recently, he has turned to consideration of the growing use of regulations to establish fixed policy, as distinguished from the adjudicative development thereof, and the statutory phraseologies upon which the broad exercise of policy-fixing authority through rule-making...
may be based. He has viewed, approvingly, the increasing resort to participation by representatives of various interests in the formulation of rules. He has noted a recent tendency in the decisions of the United States Supreme Court to allow federal agencies to expand the use of granted powers beyond the normal meaning of the statutory words in order to bring about effective control over the general field which the court believes has been entrusted to the administrators' care. In this regard, he seems advertent to the dangers involved in such judicial and administrative free-wheeling. However, in the same discussion, he seems also to give an over-all benison to the new development with which I find it hard to agree. He admits, that, if the decision in Phillips Petroleum Company v. Wisconsin had been based on congressional intent, the result would have been "the opposite of what it was," adding the qualification "but not necessarily better for the country." It is precisely this deliberate judicial distortion of clear legislative purpose that, for me, constitutes the unforgivable sin against the spirit of our distribution of governmental powers. It is an offense far more reprehensible than any merely latitudinarian construction of words of broadly indefinite stateliness. Its utter improbity is that it makes all care in draftsmanship into the extreme vanity of vanities. It should receive no semblance of condonation. It is this semblance that I fear in such half-approvals as Professor Fuchs embodies in the statement that "significant extensions of agency authority, through the exercise of flexible powers, are inevitable under modern conditions" and in his failure to speak out against judicial decision which admittedly "reduces administrative and judicial dependence on legislation [including constitution provision] far more than was traditional before, and sets highly elastic limits to authority." Truly, we may be in danger of subverting our delicately balanced republic.

Ralph Fuchs, combining proficiency in economics and jurisprudence,

79. *Id.* at 238-44.
81. *Id.* at 245. Compare the more significant role assigned to legislative prescription more than thirty-five years earlier:
Upon the presence of a legislative choice of ends, which is to be drawn from all of the provisions of an act, rather than upon the conformity of specific words of guidance to supposed judicial requirements of definiteness, the question of whether legislative power has been delegated should turn.
obviously is aware of the need that "law and the other social" and behavioral "sciences be united in the service of the commonwealth." Indeed, his own writings which we have examined already reveal a skilled fusing of his learning in the two areas of his special study. To these should be added an especially perceptive treatment of the alternatives by which governmental control may be exercised over enterprise in the advancement of social ends. His recognition of this need for correlation of all the areas of learning which bear on the legal control of social conduct looms through his discussions on problems of education. Thus he has said that "we need far better teaching in regard to history, human psychology, social and economic problems, and the actual operation of legal institutions." He has recognized the relationship between law and ethics by such observations as, "law makes its progress by following in the path of morals, now lagging far behind, now crowding close upon the heels of morality, and at times even making a spurt in advance." He has reminded us that "behind our legal doctrines, whether adopted by courts or promulgated by legislatures, and also behind many of the new procedures which are being applied, especially by administrative agencies, there lie economic, social, and political problems in terms of which these legal rules and methods can be explained" and that "the existing law curricula are not adequate for the purpose of building up in the student and, therefore, of creating in the lawyer an adequate appreciation of the reasons for the phenomena with which he deals."

But he also has shown awareness of the limitations inherent in the nature of those sciences which are such only in the elemental dictionary sense of "systematized knowledge," without the additional characteristic of providing rules that can be applied purposefully to achieve desired results.

It seems more than likely that the social sciences should resign their pretensions to being principally empirical sciences and become avowedly the means of applying the lesson of experience through the shrewdest, keener intelligence possible to

---

83. Book Review, 9 Tex. L. Rev. 120, 121 (1930).
84. Alternatives in Government Control of Economic Enterprise, 21 Iowa L. Rev. 325 (1936). Note his regret that "Amazingly little constructive thought has as yet been devoted to ways and means of organizing economic activity for the attainment of social objectives under modern conditions." Id. at 345. Perhaps more attention has been turned in this direction since he wrote, but one wonders whether it has been very fruitful.
86. Collective Labor Agreements in American Law, 10 St. Louis L. Rev. 1, 8 (1925).
87. Round Table on Law School Objectives and Methods, 9 Am. Law Sch. Rev. 566, 571 (1940).
LIBERALISM WITHIN THE LAW

the solution of human problems. The separation of the study of causation from the devising of measures for effectuating policy seems quite impossible. The effort to attain the unattainable, rather than the inadequacy of the methods employed in some of the studies previously undertaken, may account for the failure of criminological research when measured by scientific standards. Social causes and effects are always causes and effects in the here and now and are inseparable in their very conception from the setting which conditions them. Since that setting is certain to shift, no permanently valid conclusions can be reached. . . .

We may need empirical social scientists, but they must remain the humble servants of those of who are concerned with official and unofficial legislation. They cannot hope like the physical scientists to build a body of knowledge which possesses independent validity and therefore ultimate as distinguished from immediate utility.88

He might well have added, as I am sure he would be the first to agree, that this inability to produce knowledge possessing "independent validity" prevents the "other" social and behavioral sciences from furnishing dependable foundation stones for creative legal activity, whether at legislative, judicial, or administrative levels. It probably is for this reason that, while recognizing the desirability of cooperative research projects combining the efforts of faculty and students from various fields in searching for solutions to selected societal problems,89 he does not opt enthusiastically for the appointment of non-lawyers to law school faculties.90 Likely he has kept in mind Robert Hutchins' lively account of the dubious results of earlier adventures along that line.91 Instead, he has urged that, aside from those joint projects, which "would be largely by way of addition to the law curriculum as now generally envisaged,"92 law schools should undertake a three-fold program:

1. Obtaining additional information by research, especially into the functioning of trial courts and administrative agencies;

2. Inter-weaving factual data with traditional legal materials for teaching purposes; and

---

89. Legal Education and the Public Interest, 1948, 1 J. Legal Ed. 155, 168-74 (1948).
90. Id. at 167.
92. Legal Education and the Public Interest, 1 J. Legal Ed. 155, 173 (1948).
3. Effecting an organized view of law and its functioning, through jurisprudential study.\textsuperscript{93}

The material having been assembled, he would rely largely on the printed word to acquaint the lawyer with the insights which other disciplines may give him:

Satisfactory legal training along these new lines involves the use of an enormous volume of material. The utmost economy of time and effort on the part of teacher and students is absolutely essential. Close study of printed materials affords by far the most efficient method of becoming acquainted with reality—provided, of course, the printed materials reflect reality with a sufficient degree of accuracy. . . . The world can to a large degree be brought into the classroom and the library. It is at best doubtful whether, while it is being examined there, the examiner can afford to expend a portion of his energy in first-hand contact with the transactions of men.\textsuperscript{24}

Here, then, we have the bases for the two approaches to collaboration between law and other social and behavior disciplines stated: cooperation at the faculty and selected student level in joint research when appropriate; selection of the fruits of study by the practitioners of the several disciplines to illustrate the problems which the law must face and the resources available for their solution, but without formal classwork in the "other" disciplines at the law school level. And, here perhaps, we may close, with deep appreciation of the many ways in which this brilliant, humane man has served well his own time and will influence the future.

\textbf{Maurice H. Merrill}\textsuperscript{t}

\textsuperscript{93} \textit{The Educational Value of a Legal Clinic—Some Doubts and Queries}, 8 Am. Law Sch. Rev. 857, 859 (1937).

\textsuperscript{94} \textit{Id.}

\textsuperscript{t}George Lynn Cross Research Professor of Law, Emeritus, Univ. of Oklahoma College of Law.