LAW AND THE DEVELOPMENT OF NATIONS*

WALLACE MENDELSON

The University of Texas at Austin

For centuries legal scholars have pursued the development of national law. Quite recently political scientists have begun to explore the development of nations. The literature is already massive. Yet little or none of it recognizes the place of law in national growth. My purpose here is to suggest—for those who may want to pursue it—the crucial role of law in developing nations. For in "all societies the historical function of law has been to elaborate, rationalize, and protect . . . dominant [or emerging] institutions and accredited ways of life." As Holmes put it, the law reveals "every painful step and every world-shaking contest by which mankind has worked . . . its way from savage isolation to organic social life."

I take as a model Professor Organski's view that modern nations have gone through three stages of political development: the politics of primitive unification, the politics of industrialization, and the politics of social welfare.[1] In stage one the primary problem is political integration—"the creation of national unity." Stage two is a battle for economic and political modernization. Accordingly the chief governmental function is to encourage a new elite—the industrial managers—and to promote the "accumulation of capital." Finally in stage three government's chief job is "to protect the people from the hardships of industrial life," to right by welfare programs the wrongs of the earlier stages.

Today most nations are still hovering in stages one or two. Japan, Western Europe, and the Soviet Union are somewhere—early or late—in stage three. The United States is perhaps approaching what may be a fourth stage—an age that may have greater reverence for life. Hippydom may be its harbinger.

*Presidential Address, Southern Political Science Association, Miami Beach, November 7, 1969.

[1]A. F. K. Organski, *The Stages of Political Development* (New York: Knopf, 1965), 7 ff.

For the early stages were high in human sacrifice. Yet if the cost has been great, so has been the accomplishment. Never before in human history has a people had at its fingertips the skill and wherewithal to heal, feed, clothe, and shelter adequately every one of its members. The great problem now—the stage-four problem—it would seem, is a poverty of spirit.

Let us consider first, however, the role of law—particularly judicial law—in the development of three modern nations. Stage one, the politics of primative unification, was achieved formally in the United States when we adopted the Constitution. But whether a nation on parchment would become a nation in fact was quite another matter. The centrifugal forces were great. Probably most Americans in 1789 opposed the Constitution on grounds that run the whole range of socio-economic-cultural interests. The convenient catch phrase of their opposition was "states rights." This was the background of the well-known nationalism of John Marshall's Court. Save *Marbury* v. *Madison,* every one of its classic decisions is a blow at parochialism. Every one of them strikes down a state claim or measure. Each repudiates a regional, political, or economic subculture. All express with compelling simplicity a vision of national unity and national supremacy. *Martin* v. *Hunter's Lessee, McCulloch* v. *Maryland, Cohens* v. *Virginia, Gibbons* v. *Ogden,* and *Brown* v. *Maryland* were integrating forces. They were cement for the Union, as Paul Feund put it—a cement imaginatively composed of unwritten, ie., implied, limits upon the states, and implicit grants to the nation.

The magnitude of Marshall's departure from the conventional wisdom of the day is easily demonstrated. John Taylor of Caroline, the "official" philosopher of the Jeffersonians, wrote volumes to prove that the Constitutional Convention had refused to authorize the "centralized supremacy" that Marshall's Court espoused. He urged a "return to the Constitution." Spencer Roane struck at Marshall's nationalism in a series of anonymous newspaper articles. Roane, it will be recalled, headed the highest court of Virginia. He, rather than Marshall, might well have been Chief Justice of the United States, if Ellsworth had resigned early in Jefferson's, instead of late in Adams's, administration.

By the end of the Civil War we were well into the second stage—the era of industrialization. What Walt Rostow calls the

take-off had begun in the 1840s. This could easily be traced in the statistics of pig iron, railroads, capital growth, and urbanization. A more revealing measure is Henry Adams's shock of non-recognition when he and his family returned to America in 1868 after a decade abroad. "Had they been Tyrian traders of the year B.C. 1000, landing from a [Mediterranian] galley," he said, "they could hardly have been stranger on the shore of a world so changed from what it had been ten years earlier."[2] Later he could see what had happened: the "mechanical energies—coal, iron, steam"—had attained "a distinct superiority in power over the old industrial elements—agriculture, handwork, and learning." In this new America, Adams found himself

> . . . an estray, a flotsam or jetsam of wreckage. . . . His world was dead. . . . American of Americans, with heaven knows how many Puritans and Patriots behind him [he was a stranger in his homeland]. He made no complaint . . . he was no worse off [he observed] than the Indians or the buffalo. . . .[3]

Obviously Adams's difficulty was that he clung to the values of the old America—values that parvenu businessmen were fast destroying in the name of progress. For him,

> it was a vulgar world that was rising and an evil day. Since 1865 [he insisted] the bankers had ruled America, and they were coming finally to cajole the American people into accepting their vulgar ideals and putting their trust in a bankers' paradise. As he watched the temples of the new society rising everywhere in the land, his gorge rose at the prospect. He had no wish to dwell in a bankers' paradise.[4]

This is to say in poetic terms, and from the point of view of the dispossessed, that we were in the throes of economic modernization, that a new elite was crowding out an old one, that familiar processes of socialization were transforming—secularizing—American culture into something new and strange. All these of course are major elements in Organski's stage-two model.

[2]Henry Adams, *The Education of Henry Adams* (Boston: Houghton-Mifflin, 1918), 238.

[3]*Ibid.*

[4]Vernon L. Parrington, *Main Currents in American Thought* (3 vols.; New York: Harcourt, Brace and Co., 1927), III, 216.

What was the role of judges in the brave new world that Henry Adams found so repelling? Our great problem in the nineteenth century was a scarcity of goods vis-à-vis a wealth of national resources. In that setting, as Willard Hurst has shown, the whole premise, the thrust, of the common law was to increase production by promoting economic freedom.[5] This pervasive spirit of the common law was reflected, for example, in the basic assumptions of tort, contract, and even criminal law. It found expression in the newly devised labor injunction,[6] in such specific rules as the one that protected manufacturers of defective goods from liability to third-party consumers,[7] and in those that all but freed employers from the cost of industrial accidents.[8] Toward the end of the century when legislatures tried to put some limits on entrepreneurial freedom, they encountered judicially-imposed laissez faire.

Judges, we are told, have an educational function. So be it. Mr. Justice Field was the first of a new line of professor-judges. His famous dissent in *Slaughter House* was our first formal lesson in the philosophy of what Adams called the bankers' paradise. Soon, as we all know, Field's teaching became the law of the land. Again, as in Marshall's day, the Court found new doctrines to meet the needs of the day: Dual Federalism, Substantive Due Process, and Liberty of Contract. The great bench mark decisions were the *Sugar Trust*, *Income Tax*, and *Child Labor* cases, *Lochner* v. *New York*, and the utility rate cases, to mention only the obvious. All of us have criticized these and the common-law decisions ad infinitum, but we may have missed their long-run significance. Decisions that block the claims of labor and consumer promote the growth of investment capital. And if a "traditional" society wants mass production, its first economic task is to accumulate capital. "The meager productive capacities of bare hands and bent backs must be supplemented by the enormous leverage of machines [and superhuman] power. . . ."

[5]James Willard Hurst, *Law and the Conditions of Freedom in Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956).

[6]Felix Frankfurter and Nathan Greene, *The Labor Injunction* (Glouchester: P. Smith, 1930).

[7]See William L. Prosser, *Law of Torts* (St. Paul: West Publishing Co., 1964), ch. 19.

[8]*Ibid.*, ch. 15.

But how does a developing nation accumulate capital? Some it may borrow, as we did. But mainly it must save.[9] This means much more than putting money in a bank.

> It means . . . society must refrain from using all its current energies and materials to satisfy its current wants, no matter how urgent these may be. Saving is the act by which a [nation] releases some portion of its labor and material resources from the task of providing for the present so that both can be applied to building for the future.[10]

Such matters can hardly be left to individual whim. No society can hope to modernize unless it somehow begets social attitudes and institutions that induce the masses (however needy) to consume less than they produce. Without this effort there can be no tools, no factories, no roads or trains.

When the Supreme Court suppressed worker and consumer claims and taught us the blessings of laissez faire and the Gospel of Wealth, it fostered capital accumulation. Its decisions were part of a socialization process that glorified "private enterprise" and for a time at least kept the common man in his humble place. This, with the resulting stimulation of business energy and appetite, is the crux of economic modernization. To put it crudely, the Court promoted the savings and managerial effort that built our mass producing factories. The common man paid dearly in his standard of living as he has in all industrialized countries including Soviet Russia. Perhaps our judges—like the Soviet commissars—were so effective in restraining consumption because they were politically independent and not very responsive to mass hardship. Whatever the reason, capital formation rose geometrically after the Civil War. In 1850 the estimated value of our industrial and commercial plant was $3.3 billion. By 1880 it had increased to

[9]In advanced nations from 10 to 20 percent of national income may go into capital formation. In underdeveloped nations the rate of savings and investment may be less than 5 percent—less than enough sometimes to offset population growth. See Paul A. Samuelson, *Economics* (New York: McGraw-Hill Book Co., 1964), 768; and Colin Clark, "Population Growth and Living Standards," in *The Economics of Underdevelopment*, by Amar N. Agarwalla and S. P. Singh (New York: Oxford University Press, 1958).

[10]Robert L. Heilbroner, *The Great Ascent* (New York: Harper and Row, 1963), 92-93.

$18.6 billion. In the next 30 years it grew by almost 400 percent to $72.1 billion. By 1929 the figure was $125.7 billion in constant dollars.[11] When Henry Adams went abroad in 1859 the total value of goods manufactured in the United States was $1.8 billion. By the turn of the century forty years later, manufacturing output had increased by well over 700 percent.

Having achieved mass production, the United States entered stage three—the era of the welfare state. The problem now was not production, but distribution. Consumer goods were so potentially plentiful and so near at hand that there was less need to restrain consumption. We could afford Social Security, collective bargaining, minimum wages, the forty-hour week, Medicare, and similar measures. The common element in these programs is a "redistribution" of wealth. Income that earlier might have been channeled toward capital formation was now diverted to provide goods and services for the common man. His fathers' unwilling investment in American plant capacity began at last to pay him dividends.

In this new world judicial law was again crucial. Beginning in 1937 the Roosevelt Court cleared away Mr. Justice Field's old constitutional roadblocks. Dual Federalism, Substantive Due Process, and Liberty of Contract disappeared. Government at all levels was free to promote the interests of the weak at the expense of the strong. An elite had served its social purpose, and was now being discounted. Since 1936 no regulation of business, no social legislation—state or federal—has suffered Supreme Court veto.[12] Equally striking has been the Court's application of statutes. Never before has federal legislation been construed so lavishly to favor labor and consumer interests. The old Federal Employers' Liability Act, for example, grew by judicial construction beyond anything its congressional sponsors dreamed of. When Congress enacted F.E.L.A., it provided that workmen could have compensation for industrial

[11]J. Frederic Dewhurst and associates, *America's Needs and Resources* (New York: The Twentieth Century Fund, 1955), 814; Robert D. Patten and Clinton Warne, *The Development of the American Economy* (Chicago: Scott, Foresman, 1963), 243.

[12]The one exception is *Morey v. Doud,* 354 U.S. 457 (1957). Cases involving state interference with interstate commerce, i.e., with extra-state interests, are another matter.

injuries only where the company was negligent. This, of course, is hopelessly old fashioned. The new Supreme Court did not wait for Congress to adopt a more modern approach. The judges simply recast the old measure, all but eliminating the negligence requirement and substituting something very close to absolute employer liability for industrial accidents.[13] Even in modern legislation, the Court has had little patience with the give and take of legislative compromise. It has read the Fair Labor Standards Act, for example, almost as though the hopes of its most ardent advocates had been adopted by Congress without concession to opponents, without accommodation of rival interests.[14] Since 1936, then, labor and consumer interests have enjoyed a preferred status in court vis-à-vis the businessman—an obvious reversal of roles. Other underdogs have also risen. The Warren Court was gracious indeed to the Negro, the criminal-case defendant, and the malapportioned voter. The weak have inherited the judicial world just as the nationalists did in stage one, and the industrialists in stage two. Again the Court has been creative, though the precise outlines of what Mr. Justice Goldberg called the new doctrine of equality are not yet entirely clear.

ENGLAND

We turn now to the oldest western nation. After the Conquest what we now call England was a conglomeration of Anglo-Saxon and Norman peoples. Each had its own customs, laws, and language. By Stephen's day (1135-54) civil war was rampant. King, barons, and clergy were at loggerheads on basic problems of constitutional authority. Their differences spilled over into the courts, some of which derived authority from the King, some from the barons, some from the Church. The feudalism that had promised order brought anarchy. The Conquest—like our own written Constitution—imposed only formal unity. By the middle of the twelfth century, England was ripe for stage one—the politics of primitive unification. Henry II (1154-89) saw the problem and found a

[13]Prosser, *Torts*, 560-561; and Wallace Mendelson, *Justices Black and Frankfurter* (Chicago: University of Chicago Press, 1961), ch. 2.
[14]*Ibid.*

remedy. First he settled what had to be settled by military means and fiscal reform. Then he turned to the legal system, recognizing apparently that no peace could last until royal, i.e., national, law replaced feudal law.

Expanding the concept of the King's Peace, he made crime an offense against the monarch—a national offense, triable only in a monarch's court. Previously crime for the most part had been merely a private wrong. In civil affairs, too, the jurisdiction of the royal courts grew. Earlier in unusual cases one could get a royal writ ordering a case to be tried in the King's Court, but Henry now expanded and regularized the writ process. Recognizing that judicial work was becoming highly specialized, he gave it only to specialists. Again drawing on sporadic precedent, he extended and regularized the use of local juries. In short he made justice more just (more rational and more acceptable) in his than in other courts. Feudal and local tribunals, for example, were still committed to trial by battle, compurgation, and ordeal.

Glanvill was the great Chief Justice—the John Marshall of that day. Because the royal, i.e., national, judges offered a better product, they gradually crowded out their rivals. In the process they developed a common law, a law common to all England and all Englishmen. What we would now call national law—developed by national courts—replaced feudal law (just as English replaced rival languages). In the process England became a nation. Here again judges and the law were crucial integrating and socializing forces.

Slow technological development presumably delayed industrialization until the eighteenth century. But when it came courts eased its way. Lord Chief Justice Mansfield (1705-93) is famous for his role in "modernizing" the common law. What he did, of course, was to weave into English jurisprudence those settled customs and understandings of the commercial world known as the law merchant.[15] This obviously promoted and encouraged business

[15]See William Holdsworth, *Some Makers of English Law* (Cambridge: Cambridge University Press, 1966), ch. 7. A brief account of the reign of Henry II will be found in George B. Adams, *A Constitutional History of England* (New York: Henry Holt, 1931). For more extended accounts, see Frederick Pollock and Frederick W. Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1952); William S. Holdsworth, *A History of English Law* (London: Methnen, 1936).

enterprise. Later with the factory system came decisions restricting employer liability for industrial accidents[16] and outlawing strikes as criminal conspiracies.[17] When Parliament overrode the latter, the judges responded with the doctrine of civil conspiracy.[18] A climax came in the *Taff Vale Case*[19] which made unions suable entities, liable in damages for their "conspiracies." Here again—to mention only landmark decisions—is a pattern of judicial law restricting labor's income in favor of capital formation. Charles Dickens and Karl Marx responded each in his own manner—the one with sentimentality, the other with the dialectic of surplus value (defined as the excess of what labor produced over what it was permitted to consume).

Dicey's famous lectures on *Law and Public Opinion in England* were delivered at the turn of the century. Like Henry Adams's biography, they mark a turning point in history. Lamenting the demise of the old political economy, Dicey traced in some detail what he called collectivist or socialistic developments in English law. Our cousins were entering the welfare era.[20]

JAPAN

A century ago Japan was largely a feudal realm dominated by the Tokugawa Shoguns, some 250 territorial lords (daimyo), and their retainers (the samurai). At first the peasant had been the backbone of the economy, supporting himself and the aristocracy by rice cultivation. Gradually commerce brought a merchant class, artisans, urban centers, and a money economy.

The Shogunate was not unaware of these developments. It responded mainly with policies designed to cushion their effect and to prevent excessive change. Ironically the result was

[16] *Priestly v. Fowler*, 150 Eng. Rep. 1030 (1837).

[17] *R. v. Rowlands*, 5 Cox at 431 (1851); *R. v. Bunn*, 12 Cox 316 (1872).

[18] *Temperton v. Russell*, (1893) Q.B. 715 (C.A.); *Quinn v. Leathem*, (1901) A.C. 495.

[19] (1901) A.C. 426.

[20] Dicey, of course, was concerned primarily with statutory law. Changes in judicial law, however, were no less revealing. For excellent summaries, see Wolfgang G. Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens, 1951); Morris Ginsberg, *Law and Opinion in England in the 20th Century* (London: Stevens, 1959).

more than a trace of emerging nationhood. The Shoguns collected taxes, maintained a rudimentary peace, and used secret police (metsuke) to support the traditional morality and class structure. Most important, for our purposes, they provided courts—however reluctantly—to serve commercial needs.

Traditionally each feudal lord administered justice in his own fief (han), but had no jurisdiction over any case involving an outside party. Commerce, however, ran throughout the land and would not conform to feudal boundaries. To bridge this gap, to accommodate suits involving more than one fief, the Shoguns developed what we might call national courts and national law.[21] Obviously such inter-fief jurisdiction is analogous to the diversity jurisdiction of our national, i.e., federal, courts. So, too, as in England, this Tokugawa jurisprudence "owed a great deal . . . to the creativity of judges and much of [its] doctrine to judicial precedent."[22] Here, then, was an emergent national or common law, judge-made, promoting social integration—the beginning of stage one: the era of primitive unification.

In the long run, the new social forces could not be contained in the old feudal forms. Too much was required of the peasants. The aristocracy had social status, but no economic power; the merchants had wealth, but no standing. This and foreign pressure for trade relations brought a revolution from above led by a samurai faction.

The integrating changes begun by the Shogunate attained high momentum with the Meiji Restoration of 1868. The crumbling structure of feudalism was soon demolished—largely by buying off the old aristocracy. Modernization was a matter of following western paths. Indeed the new Emperor promised under oath that "intellect and learning would be sought . . . throughout the world." Unlike the medieval English, the Japanese did not have to wait for a new technology. "They went to England to study the navy and merchant marine, to Germany for the army and for medicine, to France for law, and to the United States for business methods."[23] The result was rapid modernization. By 1895

[21]Dan F. Henderson, *Conciliation and Japanese Law* (2 vols.; Seattle: University of Washington Press, 1965), I, 92 ff.

[22]*Ibid.*, 123.

[23]Edwin O. Reischauer, *Japan* (3rd ed.; New York: Knopf, 1964), 123.

> Japan had either established or started to develop such essential features of the modern nation-state as . . . a centralized and bureaucratic government, an army and a navy, a national system of education, newspapers, . . . a railroad [and] telegraph system, political unification, a modern system of law, and a sentiment of national unity spread widely among the people.[24]

Not the least of the imports from abroad were the Civil, Criminal, and Commercial Codes. Drawn largely from European models, these property-oriented digests were strong on protection of business interests and all but silent on labor and consumer safeguards. This left the new industrial elite (zaibatsu) free to exploit the common man. Low wages, administered prices, regressive taxation, with a strong incentive to save and invest, promoted rapid capital formation. The gross national product more than doubled in the 20 years from 1879 to 1898. In 60 years ending in 1939 it increased almost 1000 percent.[25]

Here again in a backward land law was a modernizing force. By promoting business, at the expense of other interests, it fostered capital formation without which there can be no great economic progress. In Japan, as elsewhere, modernization was expensive. The cost had to fall somewhere. In the early, critical years it fell upon the peasantry through a land tax. The rural countryside "played for Japanese capitalism the role of an internal colony." As a matter of social engineering, the leaders of the new Japan strengthened the traditional rural social structure. The "existing political, social, and economic elites of the villages were . . . confirmed in their [customary] authority; the traditional community and family systems were . . . reinforced and given new legal status and sanctions."[26] In short the rural sector was stabilized in its traditional ways to subsidize rapid modernization of the business sector.

[24]John M. Maki, *Government and Politics in Japan* (New York: Praeger, 1962), 16.

[25]Henry Rosovsky, *Capital Formation in Japan* (New York: Free Press, 1961); Kazushi Ohkawa and Henry Rosovsky, "A Century of Japanese Economic Growth," in *The State and Economic Enterprise in Japan*, ed. by William W. Lockwood (Princeton: Princeton University Press, 1965).

[26]Robert E. Ward, "*Modernization and Democracy in Japan*," in *Comparative Politics*, ed. by Roy C. Macridis and Bernard E. Brown (Homewood, Illinois: Dorsey Press, 1964), 579.

By the First World War Japan had become a first-rate industrial power. The welfare state was bound to come. Indeed a substantial labor movement had developed during the war years.

> Japanese labor unions . . . were strong enough by 1919 to exert considerable pressure through strikes, and strikes became a definite part of the Japanese scene in the 1920's. . . . It seemed but a matter of time before the proletariat would join with city intellectuals and white collar workers to form a strong, possibly dominant political force in Japan.[27]

The Great Depression, the Manchurian Crisis, and the murder of Prime Minister Inukai, in 1932, however, brought the end of party government. A modern economy fell into authoritarian—largely military—hands. The labor movement and all liberal or democratic tendencies were suppressed. Then after the disaster of the war, the Occupation—by legal process—made Japan a welfare state. Not the least of the imported innovations was judicial review. Indeed it has served in Japan—as it has served here since 1936—to legitimate the welfare state.[28]

CONCLUSION

Law no doubt is a stabilizing or conserving force. It is also—simultaneously—a crucial instrument of social change. Under a facade of formal symmetry, it must honor reasonable expectations born of the past, yet allow *lebensraum* for the present and the future. As we have seen in three developing nations, it is constantly adopting new principles from current needs at one end and gradually sloughing off old ones at the other.[29] At its best, as in England, for example, it maintains that "tolerable continuity" without which society is wracked by revolution, "and men must begin again the weary path up from savagery." Law then is not, as some still insist it should be, a bucket of ready-made answers, but a reconciling process. Its role is to channel conflicting social energies

[27]Reischauer, *Japan*, 153.

[28]See Dan F. Henderson, ed., *The Constitution of Japan* (Seattle: University of Washington Press, 1969); and Charles L. Black, *The People and the Court* (New York: Macmillan, 1960), ch. 3.

[29]See Oliver W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1923), 36.

into peaceful accommodations—the endless sequence of accommodations that we call civilization.

Surely stage three—the welfare state—cannot be the end of the line. The straws seem plain in the wind. Wordsworth saw it long ago:

> The world is too much with us: late and soon,
> Getting and spending, we lay waste our powers:
> Little we see in nature that is ours;
> We have given our hearts away, a sordid boon.

Stated in more strident language this is, of course, the New Left's basic complaint. Stage four, one may guess, must deal with that problem.

Our real dangers, I suggest, are not from the outrageous but from the conforming; not from those few who shock us with unaccustomed dress and conduct, but from the mass of us who take our virtues and our tastes—like our shirts and our shoes—from the limited patterns that the market offers. Since the world began there never have been one-tenth as many people as there are now who felt alike, thought alike, ate alike, slept alike, hated and loved alike; who went to the same games, endured the same mass media, and approved the same sentiments.[30]

For some the solution is clear: smash everything, start again, and keep it simple. But how many lives would be smashed in that process? How with a smashed economy could we maintain our 200 million people? This difficulty the would-be system smashers refuse to face. For them it is enough to kill the goose of the golden eggs. This brings us to the heart of the matter: how to use more effectively the tremendous productive capacity that has taken so long to develop and has cost so much in human sacrifice. Simple economies after all are the curse of most of the world.

It may be humiliating, but man's first needs are economic. There is no peace or dignity for those who are starving. The trouble has always been that man has had to live at the edge of famine. That has shaped all attitudes and institutions, and this is why the money changers could never be far from the temple. But,

[30]I have drawn here from Learned Hand, *The Spirit of Liberty* (New York: Knopf, 1952).

now at last in this country, abundance for all is possible. We are no longer doomed to fight one another for bread in a dog-eat-dog existence. Centuries of development have repealed—for a time at least—the iron law of scarcity. That is our key to the creative, the fulfilled life. And so at last stage four seems destined to recognize that men are much more than economic creatures, that we may indeed be here for something better. As our young people put it, each of us is here to do his own thing.

A great hang-up is that we haven't been able to use and enjoy adequately the wealth of goods we can produce. Distributive techniques inherited from generations of poverty seem obsolete in an era of mass production. The difficulty is not in the technology of distribution itself. It seems rather that we can't change our moral values as readily as we can alter our production techniques. When a nation suffers for lack of capital, many must sacrifice a large part of what they produce, i.e., they must submit to exploitation, if there is to be any overall improvement. In such circumstances conventional morality—in Russia, the Party Line—sanctifies and justifies the exploitation. We have had to live with all but universal poverty for so long that we accept its morality and institutions as part of the law of nature. In our hearts we feel we know that the poor are poor because of some defect of character—that to suffer in silence is a great virtue since the meek shall inherit the earth. Such a morality, calculated to make exploitation acceptable to its victims, may be highly functional in a primitive or backward economy. It may be highly dysfunctional in an Age of Affluence—particularly when it promotes racial privilege and serves no general economic need.

Not so long ago we provided free public schools for everyone. There was massive opposition. Many thought such "pandering" to the poor, as they put it, would undermine family responsibility and destroy our moral fibre. Now as affluence grows, we are asked to expand the public-school idea—to underwrite minimum health, housing, and food standards for all Americans. Again there is widespread opposition on traditional moral grounds. But are those grounds universal and eternal, or do they reflect merely the peculiar and transitory needs of an earlier, poverty-ridden economy?[31]

[31]It is, of course, just possible that we cannot with impunity destroy the spur of want, including hunger. Even so sanguine and hopeful an observer

If we escape the total destruction that some of our youngsters think they want, and if the developmental process of the past is a clue, stage four will not come overnight. Step by slow step we may find increasing inconvenience in traditional ideas and institutions. Responding to this, the law—legislative and judicial—may slowly bend or break old arrangements premised on scarcity and gradually devise new ones more compatible with the economics of abundance. Such changes always seem too fast for conservatives and too slow for liberals. As the level of frustration rises, radicals seek short cuts and tolerance declines.

There is an ancient Chinese curse of terrible doom: "May you live in a time of transition." We live, I suggest, in such a time. Like Henry Adams and A. V. Dicey, we feel the stress of change and know not where it leads. In such a plight we crave the safety of our cages—however narrow—and our disciplines—however archaic. These are defenses against the agony of change. The heretic makes us uneasy. Too often he is reckless, vain and shallow, strutting in the glare of the fire he kindles. But not always. Sometimes he is merely the measure of how far we have departed from our own paths. Such heresy—when true to the faith—puts its trust in life. It knows that man's upward course, from the first amoeba that felt a flicker of sentience, is mainly an effort to affirm the meaning of his own strange self, to divine his significance, and to keep a tidy soul.[32]

Such, one may hope, is the new heresy of the young. And it may be their special burden—striving unsurely and often with self-defeating tactics—to close the gap between word and deed, to drag themselves and us to a more humane stage in the developmental process called civilization.

---

as Brandeis held that man (in the mass) is as lazy as he dares to be. The recent history of once Great Britain raises questions about the effect of "welfare" upon economic motivation, though Britain may be a special case. In any event, perduring competition of rival groups for less work and increasing shares of a relatively diminishing national product is a haunting specter—some elements of which are already apparent in the United States.

[32]See Hand, *Liberty*, 60.

EPILOGUE

It is of course just possible that mankind is not as pure in heart[33] as young idealists apparently assume. Even they seem hard pressed to make silk purses from the material at hand. Witness the sad descent of SDS from its Port Huron statement to its present nadir (to say nothing of SNCC).

One of life's crucial lessons, I suggest, found expression in Gladstone's dictum: "To be engaged in opposing wrong affords . . . but a slender guarantee of being right." A corollary is that when one is sure one has the truth, it is time to look for a balancing, or countervailing, truth. Of course this is not as much fun, nor nearly as thrilling, as the thought of smashing everything in sight under the cloak, of course, of high moral principle. Nor is it as romantic as the faith that, when everything has been demolished, there will spring up spontaneously a noble world of god-like men. All this without plan or program—except destruction.

It is painful to poke even gentle fun at the dreams of the young. If I seem to do so, it is in the hope that a blending of their vision with a modicum of tolerance and humility may yet make a better world. The highest ideals may be perverted by unworthy means. Violence at home is no better than violence abroad. Disagreement is normal, even among those under thirty.

> We reach accommodations as wisdom may teach us that it does not pay to fight. And wisdom . . . comes only as false assurance goes —false assurance, that grows from pride in our power and ignorance of our ignorance. Beware then [young and old] of heathen gods; have no confidence in principles that come . . . in the trappings of [self-righteousness]. Meet them with gentle irony, friendly skepticism, and an open soul.[34]

[33]Those who cannot accept such an old-fashioned, non-scientific term may want to consider as a substitute the Papez-MacLean theory of schizophysiology. For a brief resume of its meaning and implications as to the nature of man, see Arthur Koestler, "Man—One of Evolution's Mistakes?", *The New York Times Magazine,* October 19, 1969, 28.

[34]Hand, *Liberty,* 101.