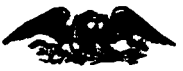
MODERN AGE

A QUARTERLY REVIEW



The Well-Intending Judges

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IN JUNE, 1968, the Chief Justice of the United States announced his intention to retire; in the same month the Pentagon issued Defense Department Directive No. 3025.12: "Subject: Employment of Military Resources in the Event of Civil Disturbances." Few noticed the Pentagon directive, but the Court announcement was widely published. Neither could have been foreseen a short three years earlier, much less any relationship between the two. But on January 19, 1965, a dissenting opinion in the Supreme Court enables us, by hindsight, to understand how directive and announcement interact to signal the formal ending of the Roosevelt-Warren era, the middle third of the American twentieth century.

The case decided by the Supreme Court on January 19, 1965, was Cox v. Louisiana, a plea for reversal of convictions under a Louisiana statute prohibiting picket lines intended to "impede" or "influence" courts in the performance of their duties. The appellant Cox had been a leader of some 2,000 college students who had picketed a jail and court house in Baton Rouge to protest the arrest of 23 of their number in demonstrations at segregated lunchrooms. The Supreme Court majority ruled for the appellants, on the ground that the police officer in charge at the scene had authorized the picketing. But four dissenters, speaking through Justice Hugo L. Black ". . . fail to understand how the Court can justify the reversal . . . because of a permission which testimony in the record denies was given, which could not have been authoritatively given anyway, and which, even if given, was soon afterward revoked. . ." And then, moving to something like prescience, ". . . the streets are not now and never have been the proper place to administer justice . . . and minority groups . . . are the ones who always have suffered and always will suffer most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step

from what to many seems the earnest, honest, patriotic, kind-hearted multitude of today to the fanatical, threatening, lawless mob of tomorrow. . . . *Those who encourage minority groups to believe that the United States Constitution and Federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country. . . .*" (Italics supplied.)

Just five months later in the Watts section of Los Angeles a routine arrest for speeding and drunkenness touched off a rage of civil disturbance in a hundred American cities over the next four years and moved the Pentagon at length to Directive No.3025.12—"in order to preserve domestic tranquillity."

I

WHY SHOULD THE majority justices in Cox v. Louisiana have rejected an argument which, as stated by Black, would surely have persuaded most thoughtful Americans attuned to the classical American constitutionalism? Because by the time Black spoke, a court majority, shifting from time to time in pace and personnel, but implacable over a period of three decades, had transcended not merely the older juridical exegesis but the original norms of the judicial process itself. One strategically positioned herald of this great change was the late Jerome N. Frank in an address to the Association of American Law Schools on December 30, 1933. Frank was then one of the rising young lawyers in the new administration, general counsel of the Agricultural Adjustment Administration, later chairman of the Securities and Exchange Commission (SEC), and finally a United States circuit judge for the Second Circuit. A prolific legal writer, Frank had led in a new philosophical jurisprudence variously labelled "realistic," "pragmatic," "factualist," "experimental," "scientific," "positivist," then well in command of many of the brightest young teachers in such élite law schools as Columbia and Yale.

Frank entitled the law school association address, "Experimental Jurisprudence and the New Deal." He began by dividing the government lawyers then in Washington into two groups, the Mr. Try-Its and the Mr. Absolutes. The Mr. Absolutes had great difficulty in adjusting to many of the new administration's proposals, but the Mr. Try-Its enjoyed drastically up-dated resiliences:

> Especially do they repudiate fixed beliefs as to the eternal validity of any particular means for the accomplishment of desired ends. . . . Most of these experimentalists, too, are characterized in these troubled days, by their primary regard for the immediate. . . . For the new deal as I see it, means that we have taken to the open road. We are moving in a new direction. We are to be primarily interested in seeking the welfare of the great majority of our people and not in merely preserving, unmodified, certain traditions and folkways, regardless of their effect on human beings. That important shift in emphasis is the vital difference between the new-deal and the old-deal philosophy. It is the leaders of this new movement whom the experimentalist lawyers in government find it delightful to serve. . . .

Writing about the same time another of the new philosophers put it more briefly—and bluntly: ". . . Rules and principles are empty symbols . . . Legal science is slowly being washed with 'cynical acid.' . . . The ideal of a government of laws and not of men is a dream. . . ."

But of course the idealization of a government of laws animates the whole older

Anglo-American jurisprudence. The institutionalization of political tradition and folkways—"the law of the land"—is explicitly what a constitution *is*—written or unwritten. The short formula is consensus to constitution to consent. The United States Constitution as originally conceived was nothing if not a fixed, that is, a reified, belief, out of recent tyrannies experienced and remoter tyrannies vigilantly studied, in the eternal validity of narrowly particularized means for the accomplishment of desired ends. Its whole rationale and intent were to temper the impact on human beings of political authority by slicing sovereignty horizontally into two layers, subdividing the lower layer vertically into an indefinite number of regional segments, and partitioning all the segments in both layers into separate executive, legislature, and judiciary. The bearing on these older concepts—intricate, awkward, designed as much to impede as to ease political action—of Frank's address was not immediately understood by the public, perhaps not even in its full scope and import by all those who heard it—perhaps not even by Frank himself!

But its implications began to clarify almost at once and came into dazzling relief three years later, on February 5, 1937. That was the day the experimentalist President sent to Congress a proposal to reorganize the Supreme Court more closely to his own views. Frank had explained in the law school address that just as there were Mr. Try-It and Mr. Absolute lawyers, so there were Try-It judges and Judge Absolutes. Glossing Frank, as it were, some 14 years later, Professor Max Rheinstein told how

> . . . despairing of the possibility of moving legislatures, these scholars set their hopes in the judges, especially the future judges who would arise from the ranks of their own pupils. Let the judges be aware of their powers, and let them be well-trained and well-intentioned and they will be the initiators of the good society. . . .

The President's purpose, never seriously denied, in the court reorganization message, was to add enough result-oriented Try-It judges to out-vote the Judge Absolutes who still relied more on principle as a guide to decision. The Congress responded, as would have been expected of legislators under oath to support a constitution of folkways and traditions embodying consensual beliefs in the eternal validity of fixed procedures for conducting the public business. By overwhelming vote, after a Judiciary committee report of almost unprecedented severity, the Senate rejected the court reorganization plan.

But the victory of constitutionalism was merely formal, and for reasons suggested early in the debate by a court reorganization proponent in testimony knitting the Court plan into the full assumption and perspective of the Try-It jurisprudence. The witness, dean of a famous "experimental" law school, talked less of constitutional principle than of immediate results: given the obduracy of the Justice Absolutes on the Court, the plan would short-cut the otherwise necessary amendment process and so expedite validation of reform measures whose instant need was indicated by the confrontation at that very moment of armed troops and striking workingmen in automobile plants in Michigan.

And indeed, the President had launched his proposal in a time of nation-wide industrial turbulence climaxing in Michigan with the political campaign of November, 1936, in which his friend and protégé, the late Frank Murphy, was elected Governor. The President had assigned Murphy as High Commissioner to the Philippines in 1935 with clear suggestions that he would be brought home in time to run in the next

year's campaign. Simultaneously, the newly organized Congress of Industrial Organizations had launched its drive to unionize the motor industry. John L. Lewis, CIO chief, spoke publicly of heavy campaign contributions by his United Mine Workers and expected ". . . the administration to . . . help the workers . . ." Soon after Murphy's election, automobile employees occupied several General Motors plants by way of the sitdown strike device, borrowed from left extremist trade unions in France. The corporation secured court orders clearing the plants by February 5, but Murphy, pleading the risk of bloodshed, declined to enforce them. That was the February 5 on which the President sent the court message to Congress.

When Murphy ran for re-election in 1938, the sitdown strike crisis of the previous year was a major issue. The Communist party, some of whose members had been involved, announced formal support for Murphy, but he was defeated. That was on November 8. Two months later, January 1, 1939, the President named Murphy Attorney-General of the United States, chief law enforcement officer of the federal government. Within a few months Jerome Frank, by then chairman of the Securities and Exchange Commission, was assuring Murphy that "I know of nothing that has occurred in the history of the New Deal which has been as stimulating as the manner in which you have been administering the Department of Justice . . . ." One of Murphy's early acts as Attorney-General had been to recommend William O. Douglas, then chairman of the Securities and Exchange Commission, and a leader of the new experimentalist jurisprudence in his years as a law teacher at Yale, for nomination to the Supreme Court. The President complied, Douglas took the oath in April, 1939, and was succeded by Frank at the SEC.

But Murphy's career was still short of its climax. On January 4, 1940, the experimentalist President named him to an unexpected vacancy on the Supreme Court. There he became the fifth Roosevelt nominee, taking his seat on February 5, 1940. That was three years to the day from the court-reorganization message and Murphy's simultaneous refusal to enforce the Michigan court order for clearing the seized automobile plants.

Murphy's brief term as Justice—he died in 1949—is marked by two extraordinary opinions in which he spoke for the court. In Thornhill v. Alabama he ruled that a labor picket line in an industrial dispute was really a form of publication, a means of communication, like a newspaper or a book, and like a newspaper or book, enjoyed the protection of the First amendment. Three years later, in Schneiderman v. U.S., Murphy announced for a passionately divided court that an official of the Communist Party-USA could not, on that ground alone, be judged to lack that faithful attachment to the United States constitution which was required by law of naturalized citizens. In a note to Murphy, Justice Felix Frankfurter had proposed the following gloss on his Schneiderman opinion: "The American constitution ain't got no principles. The Communist party don't stand for nuthin'. The Supreme Court don't mean nuthin'. Nuthin' means nuthin', and ter Hell with the USA so long as a guy is attached to the principles of the USSR." Murphy's latest biographer, J. Woodford Howard, Jr., who supplies the Frankfurter comment, labels a key chapter "Tempering Justice with Murphy."

In fairness to Murphy, it should nevertheless be said that he seems to have been reluctant to quit the Philippines and to join the Court. A modest and introspective man, he took each step out of humble loyalty to the President's judgment on

strategical necessities along the "open road."

Four years later, however, and in a labor crisis even graver than that of 1937, the President had readier collaboration from his friends. In September 1941, under threat of a nation-wide strike on the railways, he set up a five-man emergency board to survey the union and management positions and make quasi-judicial recommendations for a settlement. The Board was named under the National Railway Labor Act, then 15 years old, and widely labelled as the "model labor act," because rail strikes had practically disappeared under it. It represented very much a "particular means for the accomplishment of desired ends." But when the emergency board (headed by Wayne L. Morse, not yet a Senator of any party) reported, the unions took the all but unprecedented step of rejecting the recommendations. Five operating unions fixed the date for a nation-wide railway strike—December 7, 1941.

In the meantime, as we now know, official Washington was aware of the threat of hostilities from Japan in the Pacific. The President reconvened the railway emergency board and pressed it for immediate settlement of the dispute. Board members protested that their report, being quasi-judicial, could not be altered, so the President turned them into a mediatory body with instructions to work out arrangements acceptable to the unions. And how had this enterprise been managed? A union spokesman supplied the answer in formal testimony before the second Morse board:

> Immediately following the filing of the [original] report by this board . . . the report was released by the President as public information without comment. I don't know whether that has any significance to you: it has a lot to me. . . . You were asked by [the President] to help him find an answer. . . . You advised him; he said, "That is not enough. I want some more." Do you know the President has never asked us [the unions] to accept this [first] report?

In other words, by the union spokesman's uncontradicted testimony the President did not once call on his union friends to accept the quasi-judicial recommendations on the merits of his own hand-picked board, though a nation-wide strike threatened on the date that proved to be that of Pearl Harbor. "At four separate times he tried to settle the dispute after a decision on the merits had been handed down," Morse testified in Senate debate five years later. ". . . Strikes have occurred in the past, and they will occur in the future whenever the [unions] believe they have sufficient power in connection with specific disputes to obtain a modification of a decision through mediation or intervention by the Chief Executive." Almost continuous failure since 1941 of the Railway Labor act and the Taft-Hartley emergency strike provisions modelled thereon, support Morse's expert testimony. This was "experimentalism."

II

By the early 1940s even non-scholarly observers were beginning to examine not merely the forward implications but the roots and philosophical relationships of political strategies and matching jurisprudential departures quite new to American practice. The Absolutes, after all, on the bench, at the bar, and in public service generally partook of insights and outlooks broader than the United States and older than the present. What about the new men and the innovating ideas that Frank was describing in 1933?

A clue was already available to careful newspaper readers in a 1937 dispatch from

Germany quoting *Hamburger Fremdenblatt* on the President's defeat in the court-reorganization controversy:

> [The conflict] revealed that the oldest real democracy is also the most reactionary and that its various divided portions will unite in opposition whenever something new is proposed. President Roosevelt has been defeated through the trickiness of a constitution. . . .

This comment, so close to what the discomfited court reorganizers were saying that summer in the United States, was instantly recognized by scholars as a journalistic echo of the jurisprudential philosophy then dominant in Germany. In 1940, Professor Lon L. Fuller of the Harvard Law school had commented on a legal essay of some 14 years earlier by a leading German law writer. It discussed

> . . . the extent to which in Germany public law and political science have become passively positivistic. [The German author] remarks that the foreign writings most esteemed abroad were unacceptable in Germany, because, being tainted by ethics and natural law, they were not deemed sufficiently "scientific." . . . One cannot read [this article] today without some sense of the doom which [then] hung over the German social structure. . . .

Thirteen years after Fuller wrote, Professor Leo Strauss, born in Germany and arriving in the United States in 1938, discussed the post-World War I emergence of "scientific" positivism in American social science. "It would not be the first time," said Strauss, "that a nation defeated on the battlefield, and, as it were, annihilated as a political being, has deprived its conquerors of the most sublime fruit of victory by imposing on them the yoke of its own thought. . . ."

More explicit was Professor Arthur Nussbaum—then on the Columbia law faculty though Berlin born, who reached the United States in 1934:

> During the last few decades legal thinking in a number of countries has been pervaded by a reform movement which has become variously known as "realistic," "sociological," or "functional." . . . Germany and the United States have been the main scenes of that novel jurisprudential evolution. The German movement began earlier than the American. . . . The new realistic movement did not move forward in Germany until the decade preceding the [first] World War . . . . [Eugen] Ehrlich [who lectured in the United States] constitutes a distinct link between the two movements. . . .

But what really arrested American observers of the new American "experimentalism" was the address delivered by the Governor-General of Poland, Hans Frank, to a meeting of National Socialist jurists at Berlin on December 4, 1939:

> Pale phantoms of objective justice do not exist for us any more. Today our law of war is the reality of war itself. The Leader now has placed us in a world of reality filled with values that are inpendent of formal rules. The decisive principle is, who is stronger, who is more determined, who has better nerves? Whoever does not admit this is a pale theorist and is no good for politics, or, in the deepest sense, for creative law-giving. . . .

As Professor Nussbaum wrote the next year, "The National Socialist government, it seems, favors the realistic approach."

It remained for an American judge to put statements like these into full context and perspective for Americans. Twelve years after Jerome Frank addressed the American Law School Association, six years after Hans Frank spoke to the Nation-

al Socialist jurists, Justice Robert H. Jackson of the Supreme Court was named chief prosecutor for the United States in the Nuremberg trials of war criminals. In his preparatory readings, perhaps in the German jurisprudence, Jackson (a court-reorganizer in 1937) seems to have suffered a sudden pang of recognition. Two weeks before his departure for Nuremberg, he spoke in a public address of

> a school of cynics in the [American] law schools, at the bar and on the bench . . . [who teach] that law is anything that can muster the votes to be put in legislation, or directive, or decision, and backed with a policeman's club. . . . Law to those of this school has no foundation in nature, no necessary harmony with higher principles of right and wrong. . . . It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe. . . .

III

Yet Justice Jackson may have been uncharitable in imputing to the American experimentalists a total failure to sense their own true direction. "We have built up new instruments of public power," Mr. Roosevelt conceded in 1936. But "in the hands of a people's government this power is wholesome and proper. . . ." In the court-reorganization of 1937, he seemed to be differentiating between American and foreign programs to convert courts into instruments of policy: "You who know me will accept my solemn assurance that in a world in which democracy is under attack . . . I seek to make American democracy succeed. . . ."

The quick of the matter was that the new judges would use realism, experimentalism, the positivism which measurably emancipated them from precedent and principle, for good ends. Rheinstein thought such ideas were "to a large extent held unconsciously," and would be applied "in conformity with the value judgments of that society of which [the judge] is a functionary"—their premise being, of course, that judges would know better than legislators what the value judgments of society really were. It was as though consciously or otherwise they were caught red-handed in the German and related doctrines which had shaped Hans Frank; but was not the very essence of the sciencism they had espoused that the law as such was neutral, washed with cynical acid, a mere instrument, a means to an end? If German positivism had been put to the uses of the totalitarian state, then the American positivists would hasten the evolution of the good society. Hans Frank rejected the pale phantoms of objective justice because they cramped tyranny. For Jerome Frank's Judge Try-It, fixed belief in eternal verities obstructed welfare and reform.

But if "despairing of legislatures," judges themselves are to "initiate the good society," how can they bend judicial techniques to what is clearly a legislative task? A fateful logic led them again and again to the Fourteenth amendment. By new applications of, by invisible radiations from, by projections of anterior curbs on the central government through this great ordinance to curb the states, much of the jurolegislation of experiment and innovation has been accomplished. Yet the turbulent history of the Civil War amendments might have warned prudent jurists against employing the Fourteenth too generally beyond "the absolute compulsion of its words." The exceptional manner of its ratification has been much rationalized, even euphemized, but Bernard Schwartz in his history of the Supreme Court was candor itself. The Fourteenth

> was imposed upon the South as part of

> the price of defeat on the battlefield. Without a doubt, the post-Civil War amendments were intended to work hardships on the South and to do so without regard to southern inclinations and desires; that is the normal purpose of terms imposed upon a defeated power and particularly after a civil war.

The operative word is "imposed": from the first it has taught the attentive how much the Civil War amendments were *sui generis*, of a different quality, sounding in assumptions distinct from all the rest of the constitution. To repeat commonplaces repeated earlier, the constitution, like legislation itself, is consensual. The constitutional convention was, qualitatively, like a special one-act parliament. The charter drafted at Philadelphia announced consent, as did the several ratifications in consenting states. The Civil War amendments are coercive, ratified in the South under duress; they are an exercise of will, the will of a conqueror whose army remained in occupation for twelve agonizing years to see that the will was done (as in the end it was not, and is not yet).

It is true that some critics of our parliamentary arrangements say unlimited debate in the United States Senate converts that body intermittently from consensus to coercion. One scholar justifies judicial intervention in the school segregation controversy "because of the stranglehold which one section of the country had upon the Congressional windpipe. . . ." A minority filibuster, this well-worn argument runs, can parry the majority will. But a two-thirds vote in the Senate can always close debate, and has. And knowledgeable parliamentarians know that a majority may tacitly acquiesce in minority intransigence because the majority members know their constituents tacitly acquiesce. The ultimate reason that legislation fails in Congress is the lack of consensus.

None of this suggests for a minute, obviously, that the Fourteenth amendment, however distinct in tone and texture, is not truly a part of the Constitution of the United States. Nor is there the slightest doubt that its stated purpose was to apply nation-wide—the abomination of human slavery and all its enumerated incidents were to be extirpated wherever they existed, in Maine and Oregon as in Mississippi. The propriety of court intervention aside, Brown v. Board of Education was well within the exact and literal subject matter announced in the plain words put before the states and sufficiently ratified.

But experimental jurists have magnified that narrow and explicit purpose into a crypto-legislative re-making at large of state criminal laws, state legislative apportionment, state laws defending property and against pornography. Even in Brown v. Board, Chief Justice Warren conceded that the history of the Fourteenth amendment was "at best . . . inconclusive" in its bearing on school desegregation. There was very much less support for generalized applications of a reach and severity hardly contemplated by the bitterest of the Republican Radicals. The victorious states meant to impose their will in one carefully defined particular not to surrender at large to the central government.

There was, of course, Radical disapproval when the Supreme Court made its first interpretation of the Fourteenth amendment, but prudent opinion undoubtedly concurred. "We doubt very much," said Justice Miller in the Slaughterhouse cases, "whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview" of the enforcement provisions. But that was in 1873, and it must at once be added that of the several testimonies of fallibility in the *United States Reports*,

this is still among the most spectacular. Within five years Justice Miller was protesting that "the docket of this court is crowded with cases in which we are asked to hold that State courts and state legislatures [some outside the South] have deprived their own [white] citizens of life, liberty and property without due process of law."

But the new "experimentalists" are at least in logic estopped from using this Fourteenth amendment expansionism to support their own. What Justice Miller complained of was the early symptoms of one of the great and famous "scandals" of our jurisprudence, as seen by progressives of all schools. In a one-two exercise in expansionism, the court majority first held that a business corporation was a "person" within the meaning of that term in the Fourteenth amendment; then that such "persons" could not be deprived of property without Fourteenth amendment due process of law. Fourteenth amendment due process, in turn, came to mean that state legislation aimed at regulating or controlling the raucous capitalism of the time would have to pass the scrutiny of federal judges. And Oliver Wendell Holmes was merely the most eloquent of several dissenting Justices who insisted that Supreme Court majorities were writing their pro-property predilections into constitutional law against the sovereignty of the states. Holmes said:

> There is nothing I more deprecate than the use of the Fourteenth amendment beyond the absolute compulsion of its words. . . . I cannot believe that the amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.

This Holmesian theme, sharpened and even envenomed in the bitter depression days, largely animated the 1937 attack on the Supreme Court in the first demonstrable surge of the new "experimentalism" in our judicial history: unconstitutional, and indeed, unconscionable pro-property bias was the central allegation against the Nine Old Men. But when with Justice Murphy an "experimentalist" majority emerged on the court itself, the earlier arguments for an aseptic literalism were abruptly jettisoned in an altogether characteristic "primary regard" for a new "immediate": "it began to seem as though, when 'personal' rights were in issue," wrote Learned Hand, that "something strangely akin to the discredited attitude . . . of the old apostles of the institution of property was regaining recognition. . . ." The strict constructionists of very recent years were translated in a wink to Fourteenth amendment expansionism of quite unexampled hardihood and scope.

IV

NOW IT IS SURELY not unfair to put experimentalists to the test of results and pragmatists to that of workability. If philosophies used for evil in other places are to be redeemed by good deeds, the deeds are to be examined. Jurists who repair the lack of consensual legislation out of the old warrant for coercion must still depend on consensus in the end. So a surge of federal juro-legislation abridging state police powers counters the German criminal jurisprudence of gun and gallows—but at length the President in the capital city itself must propose detention before trial to reduce crime in the streets. The Germans burned books and wrecked printing presses, and the Americans debilitated state censorship laws—but pornography flaunts on every screen and drugstore bookstand.

The German positivists fought communism and fawned on the propertied classes which controlled the steel mills and muni-

tions plants. The American Judge Try-Its stretch the First and Fourteenth amendments in a dozen ways useful to communism, the anti-property archetypes; and withdraw progressively from property the protections guaranteed to it equally with liberty and life itself—"whether this court likes it or not," cries Justice Black in a recent dissent, "the Constitution recognizes and supports the concept of private ownership of property."

The German positivism of bad intent generated street fighting and *Kristallnachts,* as has the well-intentioned positivism of the Americans. When student militants draw on the factory seizures of the thirties to seize universities in the sixties, they rely, as well, on systematic suspension over 35 years, of peace and property laws in behalf of earlier and no less reckless minorities.

In an ultimate horror, the Germans proscribe the Jews: and the Americans break out of a century of neglect to accord to American Negroes everything promised in the Civil War amendments and much that goes beyond anything contemplated in the 1860s or even in the 1950s. At the same time, Justice Try-It pronounces prayer decisions dimming in the public schools the Judaeo-Christian doctrines of brotherhood which alone make the new school integration policies comprehensible.

But by 1968, Robert L. Carter, former general counsel for the NAACP reports that Brown v. Board's ". . indirect consequences have been awesome . . .[It] has promised more than it could give, and therefore has contributed to black alienation and bitterness, to a loss of confidence in white institutions and to the growing racial polarization of our society." Polarization by residence leaves too few white children "to go around" in school desegregation programs. It translates one-man, one-vote apportionment (the good posivitists' retort to the bad positivists' dictatorship) into still more rigid concentrations of the political power represented by 80 per cent of the population. The National Advisory Commission on Civil Disorders has just found "white racism" pandemic not merely in the South but through the nation as a whole. (Was this the true explanation of the Senate filibusters which the court moved to supervene by its own diametrically opposite reckoning of public sentiment?)

When race militants employ the time-hallowed abuses and immunities of trade unions against trade unionist teachers, macabre and ultimate Nemesis revives Nazoid anti-semitism in the streets of New York. And across a century of truly dropsical distention of the Fourteenth amendment, the force and will of Reconstruction echo in Defense Department Directive No.3025.12.

V

THE INTIMATIONS seem to be that those who reject pale phantoms of objective justice come to common grief, no matter how their motives differ. "We know that in practice," says A. H. C. Chroust, "there is hardly a more eloquent claimant of [human] rights than the legal positivist or realist who spends most of his time disproving 'scientifically' the very existence of or truth of those rights." To intend good ends does not decontaminate septic means. Means are, in our constitutional assumptions, among the ends: maintenance of constitutional due process, of separate powers and consensual legislation was the end which would legitimate and fortify all the other ends. What are the chances of converting means into ends again, and ends into means? If the Roosevelt-Warren third-of-the century is ending, what happens next?

The first thing is obvious: getting controversy off the streets and college lawns and back into the "less glamorous but more dependable and temperate processes of the law." In early 1969 optimists might find

prospects for this at least fair, with resumption in race matters of the quiet progress before 1954 and continuing in some vital areas since. A graver index to the larger future is available in recent government trends now very strong, probably irreversible, possibly able to be slowed down, and quite aside from jurisprudence. In 35 years we have clearly regressed in political conceptualism and institutional articulation—check and balance wobble, separation of powers fuzzes. As early as 1930, Dean Pound of the Harvard Law School was proclaiming "The New Feudalism:" in "the original fundamental idea [of the old feudalism] . . . the single individual . . . was not thought of as self-sufficient . . . He commended himself to some lord. . . ."

We do not generally concede how broadly we commend ourselves to a state which nurses, houses, feeds, educates, pensions, and buries always increasing numbers of us. Not inappropriately does the Secretary of Health, Education and Welfare describe a new welfare reform plan under study at the White House as "the most sweeping since the Elizabethan poor laws." Those who defend the trends as inevitable can cite overwhelming evidence much beyond medieval Europe that pyramidal and patriarchic government is the norm for mankind, and our own brief two centuries of self-help and constitutional limit an exception and, perhaps, an eccentricity. They are equally persuasive when they argue that a government of plenary commitments must have plenary power to discharge them. Here, too, they can cite history, particularly the late English feudalism romanticized by Lord Bolingbroke from whose Patriot King the Americans broke so sharply in the eighteenth century.

We know that in medieval theory the king and his council nurtured and ruled all, with the council including relatively undifferentiated judges and legislators. "The chief justices," says William Holdsworth, "have as members of the king's council, a real voice in the making of laws . . . In fact, the legislative, executive and judicial authorities have not as yet become so completely separated that they cannot occasionally work together." Holdsworth was speaking of the reign of Edward II (1307-1327), but the discussion will not seem wholly foreign to contemporary Americans. As we have seen, the warmest friends of the Warren Court do not deny—they proclaim—that it has already recaptured much of the legislative function in a widely accepted authority to make new law when national or state legislators fail for reasons which the one judge who completes a quorum considers insufficient.

A working intimacy of American executive and judges is quite in the medieval pattern. Lincoln had his Davis and Harding his Taft (or vice versa), but Johnson moved forward. Considering at least two Justices for Chief Justice, he named one. The Justice he named (because he "was a pragmatist") assisted at closed executive meetings and remonstrated with citizens who spoke unkindly of executive policy. The Justice (by now ex-Justice) he did not nominate served at least once while on the Court to "pick the administration's chestnuts out of the fire in a secret meeting" with a Cabinet official and a great labor magnate on a troubled question of wages (Associated Press, January 1, 1965); and later embarked on executive business as an ambassador to a foreign court, having resigned as a judge.

Holdsworth recalls that in 1312 "Bereford, C. J., directed the parties to an action in which circumstances were unusual to 'sue a bill to parliament'; and after debate in parliament judgment was given for the plaintiff." Our separation of powers has hardly decomposed that far—though surely

it is maintained only in form when the Court does the legislating itself! Of one thing we may be quite sure: a constitution designed for limit and oriented toward *laissez-faire* will prove increasingly inappropriate to an organic, nurturing, and patriarchal state. And to political exigencies that cannot wait on legislative consensus, a juro-legislation insulated against electoral rebuke may increasingly respond.

To say all of which does not rule out as at least conceivable a "great and stately" jurisprudence in which human rights—including security of person and property—would still have recognition. The earliest judges in the Anglo-American tradition believed, after all, in a natural law transcending human affairs, but mindful of humanity made on a very high model. In subjection to this "brooding omnipresence" and its impress on conscience, the old judges began long before Edward II to shape the concepts which grew into petitions, remonstrances, and bills merely elaborated and consolidated in our Philadelphia charter. The "experimentalists" teach that this natural law is mere "myth-making and fatherly lies," impossible of belief because "to us who have eaten from the tree of knowledge, that happy state of innocence is no longer possible," as Professor Rheinstein puts it.

Yet it may depend on whether those who ate from the tree really ate or merely nibbled. The American positivists who read Defense Directive No.3025.12 and the Walpurgis nightscape which it reflects have now more than nibbled and are less than refreshed. One who fed to the teeth was the late Gustav Radbruch, author of a German textbook in legal positivism. Emerging physically intact from what he called the "twelve-year dictatorship" (1933-1945), Radbruch prepared another edition of the original work—but announced a new point of view:

> The legal positivism that ruled unchallenged among German scholars . . . this view was helpless when confronted with [National Socialist] lawlessness . . . Legal philosophy must restore to consciousness a wisdom that is centuries old and that was common to antiquity, the Christian Middle Ages and the Enlightenment. During these periods men believed that there was a law higher than mere enactment, which they called the law of nature, the law of God or the law of Reason.

Americans know about it, as Professor Filmer S. C. Northrop says:

> New England was founded in major part by nonconformist Protestants who came to the western hemisphere to escape from the rule of the religious majority. Like Jefferson [they] were heavily under the influence of the philosophy of natural rights and natural law of Locke. With the opening of the frontier this living law spread to the middle west and the far west . . . It is exceedingly unlikely that legal positivism has seeped down . . . to the masses to a sufficient extent to alter this original and basic philosophy of American culture. The coming of Roman Catholics in large numbers brought in a natural law philosophy also. These two positions of the living law of the United States constitute a statistical majority of the people.

Northrup was writing in 1957, but nothing that happened November 5, 1968, is inconsistent with his analysis.

To be sure, the older transcendentalism may be past revival, and it can encourage rather than restrain judicial law-making when the judge equates his own predilections with the divine will. But humility, always the major yield of a true sense of transcendence is perfectly possible among judges who reject natural law doctrines. This Felix Frankfurter and Learned Hand,

positivists both, indicated in their steadfast practice of the "passive virtues" described by Alexander Bickel, one of their ablest disciples. The difference is between judges who use their release from higher sanctions to indulge their own ideas of public desire and judges who see in their lack of divine guidance all the weightier curb on any temptation to substitute the private will of unelected and lifetime jurists for the consensus of the people's frequently elected legislature.

VI

IN SUM, IF there is a rise in judicial self-aggrandizement, there may be a decline. Jurists dizzied by early success, can learn humility from ultimate failure. A national majority with at least lingering commitment to transcending law and limit on judges will still have judicial notice in the least representative of American political institutions. Already the constitutional legislature has denied the chief justiceship to a positivist jurist who left the Yale law faculty for Frank's Agricultural Adjustment Administration in the year of Frank's "Experimentalist" address to the law school association; and a generation later struck even colleagues on the Supreme Court as over-prone to juro-legislation. Now the chief justice for the next stage has been named by President Nixon, learned in the law and acutely observant of affairs over the three decades of legal positivism. There is another vacancy and others may follow. The people's elected legislators still command the confirming power, and may temper, if not abate, "experimentalism."

On the court even under Warren, time has not always favored Rheinstein's law professors who despaired of legislators and hoped to train up future judges from among their own pupils to juro-legislate the good society. The Yale positivists, Douglas and Fortas (resigned) were joined on the bench by Justices Stewart and White, of a younger Yale law generation. Stewart dissented from a one-man, one-vote decision grounded in an uttermost Fourteenth amendment stretch because "I could not join in the fabrication of a constitutional mandate . . . uncritical, simplisic and [a] heavy-handed application of sixth-grade arithmetic."

In a fourteenth amendment re-write of state criminal law by the majority, White dissented because ". . . law enforcement . . . will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution . . ." Nicholas deB. Katzenbach, one of the younger Yale law alumni, warned, as Attorney-General of the United States, that in recent decisions enlarging the defense in criminal procedure, "I believe the judges have left the public behind, and even among judges, the margins of the consensus have been passed. . . . "

VII

To criticize the Supreme Court of the United States is a grave undertaking. The critic sometimes finds himself in unappetizing company. Moreover, the juro-legislation of the Roosevelt-Warren court is a very small part of its total performance—the tip that shows above the surface of the waters, as it were. Below it has gone about its elevated version of the appellate judge's normal work, mindful of principle, respectful of precedent, aware that "continuity with the past is not a duty, it is only a necessity." Criticism there is there, too, again quite normal—from disappointed suitors, from academic commentators, for results reached, or for lack of art in reaching them.

But it is the political decisions, the juro-legislation, which will make the new Court look most carefully to its "moral sanction," without which it cannot prosper. We have seen how Robert Carter believes that, promising too much (more accurately, perhaps, by not stressing enough the limits on its promise) the Brown decision ". . . contributed to a loss of confidence in white institutions . . ." The Court is a white institution as Carter uses the term. "Since the Nuremburg post-mortem on the Hitler régime," said Justice Jackson, "few will believe that these positivist doctrines are weapons in the struggle to preserve liberty." If it is supposed permissible for the judge "covertly to smuggle into his decisions his personal notions," warned Learned Hand, "compliance will much more depend upon a resort to force, not a desirable expedient when it can be avoided. . . ."

It can be avoided if non-positivist judges continue what they are; and if positivist judges will re-read Jackson on the ideological affinities of American legal positivism; Black on earnest multitudes and feral mobs; Hand on humility—and then embrace one least canon of judicial self-restraint: so to judge as to minimize the use, even atrophy the need, of Defense Department Directive No.3025.12, the unloveliest monument to the Roosevelt-Warren jurisprudence.

This article was completed some months before the recent extraordinary events in the history of the Supreme Court. These I do not propose to discuss, though I think none incompatible with the discussion as it stands. One more recent episode to me so striking, as rounding out a symmetry of thirty years that some account may be of interest.

When President Roosevelt sent the court-reorganization message of February 5, 1937, to the Congress, I was a special student in the Yale Law School, finishing the second year of graduate study required at Yale for the M.A. degree. The proposal by the executive branch to enlarge the court with judges compliant to the presidential will seemed to me shocking. I looked at once to the law school faculty for protest and resistance, but many of the professors, led by the Dean himself, announced instant and zealous support. This dismayed me even more, and when it came time to choose a subject for the essay required of M.A. candidates, I decided to examine the new jurisprudential philosophy then blooming at Yale, Columbia, and other leading law schools, which seemed to me to have motivated the court plan, or at least the law professors who spoke for it.

The more I read into the background of this "legal realism," and checked its contemporary affinities, the more my concern grew. In my final chapter I suggested that it might well corrode the old symbolism of consensual law and order by which we had lived, even usher in what I called a "rule of iron." To sharpen my point I quoted a contemporary description by Professor Hans Kohn (delivered at Harvard in its tercentenary year, 1936) of the political and social climate then prevailing in the Third Reich:

> Might creates right. The objectivity of law is declared a liberal prejudice. Right is what helps in the struggle for power. In a world like that all security has disappeared. The abstract majesty of law is gone. The concrete situation alone and its supposed needs decide. . . . Fear grows everywhere and fear only begets more fear. . . .

My theme was not universally applauded in the Yale ambiance of 1938, but the essay was read by a committee of three professors who certified my eligibility for the M.A. degree awarded in due course shortly thereafter.

Almost exactly 31 years later, on April 30, 1969, three Columbia University professors stood in the entrance to Fayerweather Hall on the Columbia campus. They were among several faculty members who had volunteered to "interpose ourselves" against new seizures of university building by student militants. Several students charged them, and, said one of the three, "One [student] held my arm behind my back and another hit me across the face with a stick. I was shoved to the floor. One student took the brass nozzle of a fire hose and was about to hit me with it when I scrambled away. . . ." (As quoted in the *New York Times*.)

When the students grabbed this man, his two colleagues were shoved roughly aside. One of them had been a member of the committee of three at Yale which had read my M.A. essay in 1938. At Fayerweather Hall in 1969 a student bystander was heard by a *New York Times* reporter to say: "What a terrible business! This is straight out of Germany in the nineteen thirties. . . ."

The Supreme Court's Civil Theology

FRANCIS WILSON

WE HAVE PLAINLY reached the nit-picking stage in the discussion of religious liberty in the United States. The Justices of the Supreme Court, dominated as they are by the secular-liberal ideology (as L. Brent Bozell has named it), have reached for power against history and tradition, against the historical allocation of powers provided in the Constitution, and against the religious feelings of perhaps a majority of the nation. The ultimate in non-judicial absurdity was probably reached in the DeKalb, Illinois, prayer decision early in 1968, in which a verse recited by kindergarten children was declared unconstitutional and contrary to the First Amendment. The lines recited by the children said, *inter alia:* "We thank you for the flowers so sweet, etc." One might add that this decision was accepted by a docile people, just as the same docile people seem unwilling to organize a political drive for the so-called Prayer Amendment sponsored by Senator Dirksen of Illinois.

No doubt there are numerous reasons for the failure of busy people to organize against the Supreme Court's suspension of the decision of public questions by majorities. The issue extends from local government, the local school board, and state governments to the freedom of Congress to deal by internal (and popular) majority with issues under the First and Fourteenth Amendments. The decisions of the Supreme Court have removed important religious freedom issues from a customary and long-established tradition of majority control in the different levels of American government.

Aside from other reasons, we have been taught from our childhood that we have the most wonderful system of government in the world and that under it we have more freedom and more democracy than any other people on the face of the earth. We shudder at the rampaging barbarians in our streets, but we do nothing. We wait patiently for stuffy party pronouncements, verbose political speeches, and the relatively meaningless elections (in terms of the course of events) which every biennium and every quadrennium bring forth.

Our belief in the greatness of our system