LIVING CONSTITUTIONS*

BY GRAY L. DORSEY†

A French poet once ranked the arts according to the intractability of the media, rating sculpture highest. By this standard, constitution-making is the highest of all arts because its medium, more stubborn than marble, is what William Faulkner has called the "simple, incorrigible, intractable, invincible human heart."[1]

Simple enough to write a constitution. But what makes it live? How is the structure of cooperation it delineates to be impressed upon the intractable human heart? This a matter of moment to millions. C. L. Sulzberger, writing from Saigon on March 11 of this year, said:

> Communism must be kept out of South Vietnam. It would be morally unforgivable to permit it once more to engulf the hundreds of thousands of refugees who have already sacrificed everything to flee it. Yet much remains to be done in erecting a barrier of safety. . . . Feudalism must be abolished. Government must be extended to the villages where all too often anarchy or communism obtains. Not only the habit of independence but its incumbent responsibilities must be acquired by the Vietnamese people.
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> What exists in South Vietnam is a barren dictatorship—barren because there is no effective dictator. Ngo Dinh Diem doesn't dare install real political freedom because anarchic centrifugal forces would rip the state apart. Yet this leaves everything in a condition of moral paralysis. One cannot counter the mystique of communism with unborn democracy and ineffective dictatorship.[2]

This problem, of what it is that quickens a social blueprint into a society, is an intellectual puzzle I have worked at for nine years. I believe the last piece has fallen into place. The present article consists of the first once-over view of the result.

The problem first occupied my mind because it is the greatest obstacle to effective international law. The community of Christian, European states no longer controls the earth. Modern international law was born in that community and functioned relatively well in it for nearly three centuries. But we are in a new world, and the new

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† Associate Professor of Law, Washington University.

1. Letter to the Editor, N.Y. Times, March 25, 1955, p. 22, col. 6.
2. N.Y. Times, March 12, 1955, p. 18c, col. 5.

international community is one of diverse values, customs, and traditions.

Making international law effective seemed to me to depend upon discovering the secret of human cooperation. Why do large numbers of persons, or groups of persons, work together rather than at cross purposes? Aristotle had asserted that family, village, and state are "natural" associations and that "man is by nature a political animal."[3] Do *particular modes* of human cooperation result *necessarily* from some physiological or environmental factor? Or is it the case, rather, that men are under a natural necessity to cooperate but that the particular mode of cooperation is selected by men through some faculty not subject to cause-and-effect determinism? My working hypothesis was that men can control the structure of cooperation; otherwise conscious efforts to bring peace and order in the world are vain. I thought it would be conclusive if I could show that the structure of even the most necessary and elementary human associations, such as the family, were determined by the conscious calculations of men. Accordingly, I attempted a comparison between the cultural conceptions and the structure of social groups in early Greece and early China.[4] At the end of a year it was plain that this chronological approach was a lifetime's work, and I was compelled to lay it aside temporarily in favor of an analytical approach.[5] Jurisprudence seemed the logical place to begin.

JURISPRUDENCE EXAMINED FOR AN ANSWER TO THE QUESTION: "WHAT MAKES CONSTITUTIONS LIVE?"

Early writers on jurisprudence were of the opinion that reason, implanted in man by nature, decides the particular structure and function of social associations. Aristotle himself said "the law is reason unaffected by desire."[6] Cicero said:

> [L]aw is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. [And again,] . . . what is more divine, I will not say in man only, but in all heaven and earth, than reason? And reason, when it is full grown and perfected, is rightly called wisdom. Therefore, since there is nothing better than reason, and since it exists both in man and God, the first common possession of man and God is reason. But those who have reason in common

3. ARISTOTLE, POLITICS bk. I 2, 8-16 (Jowett transl. 1945).

4. The results of this study are in mimeographed comparative law materials. A forerunner is Dorsey, *Two Objective Bases for a World-Wide Legal Order*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 442 (Northrop ed. 1949).

5. The first results of this study are DORSEY, LAW AND WORLD PEACE (unpublished manuscript in Yale Law School Library, 1950), submitted in partial fulfillment of requirements for J.S.D. degree, Yale Law School. A revision of the same is mimeographed for use as international law material.

6. ARISTOTLE, POLITICS bk. III 16, 5 (Jowett transl. 1945).

> must also have right reason in common. And since right reason is Law, we must believe that men have Law also in common with the gods.[7]

According to this early conception, the universe is characterized by an immutable rational order, knowable by men, who are rational creatures. As they learn to know this order, they can work together to meet their common needs. They can not live and work together if they have not reason—and indeed are not even to be considered men. Aristotle states that "[T]he state is a creation of nature, and . . . man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either above humanity, or below it. . . ."[8]

The conception that reason is the basis of cooperation among men was held for many centuries. The Church, and kings by divine right, exercised final authority in deciding what the rational order in the universe required in the behavior of men. They were the casuists (not in the derogatory sense).

The mores of the people, the just modes of intercourse among them, could not be devised by themselves to suit their own opinions of convenience or efficiency. The relations among men must accord with the immutable (divine) order in the universe. In Sir John Fortescue's *Commendation of the Laws of England,* published about 1537, the Chancellor exhorts the Prince, whose instruction has been entrusted to him, to study the law, saying Moses had commanded the kings of Israel to study Deuteronomy. "[B]ut the Law," the Prince replies, "to the study and understanding whereof you now invite me, is merely human, derived from human authority, and respects this world. . . ."[9]

On the contrary, the Chancellor answers:

> [B]e pleased to know then, that not only the *Deuteronomical,* but also all human laws are sacred; the definition of a law being thus, "It is an holy sanction, commanding whatever is honest, and forbidding the contrary. . . ."
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> Whence we, who are the ministerial officers, who sit and preside in the Courts of Justice, are therefore not improperly called, *Sacerdotes* (Priests). The import of the latin word *(Sacerdos)* being one who gives or teaches holy things; and such are all laws which are solemnly enacted and promulgated, though made by men: seeing the *Apostle* says, (Rom. xiii. I.) that all power is from God.[10]

By the casuistry of logic and authority, the Church and divine-right kings (and in England, common-law courts) brought general moral principles to bear upon the problems of daily intercourse, and laid down the pattern of cooperation among the people. These general

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7. CICERO, DE LEGIBUS bk. I vi, 19; bk. I vii, 23 (Keyes transl. 1928).
8. ARISTOTLE, POLITICS bk. I 2, 9 (Jowett transl. 1945).
9. FORTESCUE, COMMENDATION OF THE LAWS OF ENGLAND 4 (Grigor transl. 1917).
10. *Id.* at 5.

moral principles were, in turn, largely derived from natural philosophy, as is shown by the well-known dependence of Augustinian orthodoxy upon Plato and of Thomistic orthodoxy upon Aristotle.

With the Renaissance and the Reformation men began a complete re-examination, in the new scientific attitude of the age, of the grounds of human action and of the bases of human cooperation. Unfortunately, contemporary developments in philosophy led to the severing of all connection between natural philosophy and the developing new social disciplines.[11]

When the estrangement from natural philosophy occurred, all objective criteria by which validity of general principles could be judged were gone. All that remained—as shown in the analytical jurisprudence of Austin—was the logic by which particular rules were deduced from general principles. Holmes cut this down with a stroke of the pen: "The life of the law has not been logic: it has been experience."[12]

But there are so many kinds of experience (as, of course, Holmes well knew). There is the experience of what the court actually does, what action it takes in a specific case, as distinguished from what it says about the case in relation to established rules of law. This kind of experience can be examined as a clue to whether the formal propositions of the decisions are out of touch with the reality of court action.[13] Then there is the subjective experience of the judge in reaching a decision. Perhaps there are ways to probe this experience to see what did in fact lead to the judge's decision—whether the logical propositions in the statutes, reports, and lawyers' briefs, or some predispositions, or beliefs, or communal experience.[14] There is the experience of the effect the decision or the action of the court has upon the relations of persons in the community—upon the subsequent behavior of the parties directly affected by the court's action, or upon the behavior of persons in relationships similar to that before the court.[15]

There is the experience that persons have various competing demands not all of which can be satisfied, and which the law more or less successfully reconciles or balances.[16] There is the experience of

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11. See Dorsey, *The State, Communism, and International Law*, 1955 WASH. U.L.Q. 1-3.

12. HOLMES, THE COMMON LAW 1 (1881).

13. As illustrative of the Legal Realist movement, see: LLEWELLYN, THE BRAMBLE BUSH (1930); CLARK & SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT (1937).

14. FRANK, LAW AND THE MODERN MIND (1931).

15. Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943); Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930).

16. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911-12); Pound, *The End*

personal psychological reaction to actions which legal decisions will stamp as just or unjust.[17] And there is the personal psychological experience of "belonging" to a group and feeling loyalty to political and legal institutions.[18]

There is the experience that individuals achieve their ends through cooperative action with others according to modes of behavior which they commonly accept and follow in their day to day intercourse, independently of any law process. And there is the experience that legal prescriptions that depart too far from these patterns of cooperation will be ignored or avoided whenever possible.[19] The study of experience can be given increased dimensions by extension backward through time,[20] or by focusing on the more simple context of a contemporary primitive society.[21]

However, there is also the experience of experiencing and acting on the basis of experience. The human animal is capable of acting because he *will,* not because he *must.* His activities are intentional and he lives in an intentional community.[22] There is the experience that the institutions which men form in the course of their cooperation with each other also have a conscious purpose, an intentionality.[23]

Alexander H. Pekelis participated in the eye-opening work of legal realism. But he came to a realization that when the icons have all been destroyed the jurisprudential landscape can not be left bare; reliable standards of judgment must be erected. The standards he proposed were in what he called "jurisprudence of welfare." Pekelis wrote:

> Jurisprudence of welfare must not be corrupted into a jurisprudence of expediency. It must remain faithful to Goethe's admonition that "man where he appears significant behaves as a lawmaker." The expediencies of specific situations must be valued from a general viewpoint and shaped into an intelligible

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of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195 (1914); J. STONE, THE PROVINCE AND FUNCTION OF LAW 782-85 (1950); RUMELIN, HECK, et al., THE JURISPRUDENCE OF INTERESTS (Schoch transl. 1948).

17. PETRAZHITSKII, LAW AND MORALITY (Babb transl. 1955); CAHN, THE SENSE OF INJUSTICE (1949).

18. R. WEST, CONSCIENCE AND SOCIETY: A STUDY OF THE PSYCHOLOGICAL REQUISITES OF LAW AND ORDER (1945), especially part III, pp. 213-52.

19. MONTESQUIEU, THE SPIRIT OF LAWS (Nugent transl. 1900); VON JHERING, LAW AS A MEANS TO AN END (1913); EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Moll transl. 1936).

20. MAINE, ANCIENT LAW (2d ed. 1871); VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1920).

21. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

22. Cossio, *Phenomenology of the Judgment,* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES (P. Sayre ed. 1947); Romero, *Man and Culture,* in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 385 (Northrop ed. 1949).

23. JORDAN, FORMS OF INDIVIDUALITY (1927); GURVITCH, L'EXPERIENCE JURIDIQUE ET LA PHILOSOPHIE PLURALISTE DU DROIT (1935). (I would agree with the authors cited that it is a matter of experience that institutions exhibit intentionality, but I would not agree that direct apprehension can give the content of that intentionality.)

pattern. It is not enough that specific actions of governmental agencies be wholesome and serve the expediency of the moment and the needs of an individual situation. In the words of the Nichomachean Ethics, "to be just, they must be done and distributed in a certain manner. And this is a more difficult task than knowing what things are wholesome." A true jurist, mindful of the general welfare, instead of merely investigating what specific judicial action or administrative measure would best serve the public welfare in individual situations, will ask himself what canon of action can best serve that purpose, upon what maxim, capable of becoming a universal law, the specific measure can be predicated.

Concrete cases cannot be decided by general propositions—nor without them. Even in the most narrow sense welfare is measured not only by the absolute amount of goods and services enjoyed by men, but by their relative distribution as well. In this sense, welfare and law both come under Dante's definition of law, as proportion of man to man, the *hominis ad hominem proportio.* It may be possible to psychoanalyze away the father complex and the quest for security. But the quest for a conformity to rules, for a recognizable pattern of action, for an *ordo voluntatis,* is nothing else than a quest for harmony and beauty. It is a trait of mankind; even more, it is the mysterious prime force of our universe, which gives a rhythm to the crooning of savages and the games of children and a geometrical form to the crystallization of salt.[24]

Pekelis was writing in 1946, but he was back at the point of beginning again in jurisprudence—a fixed order in the universe and a natural need in men to pattern their relations after that order. But Pekelis gives no inkling of how man's need for order is to be met. Must man himself take the initiative, work it out to the best of his ability, and accept the consequences of his own errors? Or is the order of society beyond his control—a product of "social" consciousness or "social" acts that individual men participate in but are powerless to change? Savigny, the influential German jurisprudent, conceived law (in Gierke's words) as "the positive result and living expression of the common consciousness of an organic community."[25]

What is the basis of solution if the "common consciousness" is at war with itself, or the "felt need," as the sociological jurisprudents like to put it, is different with different segments of a community? When labor and management are sorely at odds on an issue, must we assume these groups to be separate organic communities whose interests can never be reconciled, and their conflict resolved only by the destruction of one or the other? This conclusion is required of Com-

24. Pekelis, *The Case for a Jurisprudence of Welfare,* 6 LAW. GUILD REV. 611, 618 (1946).

25. 1 GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 223 (Barker transl. 1934).

munist jurisprudence by its class-warfare premises, but it ought not be found in our jurisprudence.

In our jurisprudence, rather, the answer ought to be more like the one given by Francis B. Sayre in the often-violent era of labor relations before federal legislation put the stamp of legal respectability on unions. In arguing against the use of the criminal conspiracy doctrine in labor disputes, Professor Sayre said:

> In those fields of industrial controversy where passion runs high and where class conscious groups are arrayed in bitter fight the one against the other, where each side with difficulty is restrained from open war and induced to substitute therefor settlement by judicial action, the law has a very difficult and delicate function to fulfill. Under the terrific thrust and strain of some of the most tremendous social issues of the day, it is of far more than usual importance that the law applicable to labor controversies should express principles of justice evident to and accepted by the great mass of mankind; above all else, such law must be thoroughly predicable. Otherwise class groups will see in legal decisions only the prejudice and bias of the individual judges; and popular respect for the law and its administration by the courts will wane to a possible danger point.[26]

Short of a dictatorship of the "proletariat," or the tyranny of a Fuehrer who personifies the "common consciousness of an organic community," what but reason can break down the dividing walls of class interest? And what but reason and a sense of personal responsibility can move each man as a citizen of the republic to take his stand in fruitful and free relationships with his fellow citizens, one among equals? Yet current jurisprudence gives little indication that reason performs this service, and no explanation of how it is accomplished.

Legal realism and sociological jurisprudence are the two schools of jurisprudential thought that flourished in the United States during the first half of this century. They were apt for the problems we faced in that period. We were united in allegiance to certain principles of justice. In a rapidly developing industrial society a casuistry that restricted itself to the propositions in law books went astray. Sociological jurisprudence said, "Look to the social result of applying this particular rule to this particular behavioral situation—logic does not operate in a vacuum." The legal realists said to the courts, "You are actually doing things by your decisions that your formal opinions do not say you are doing—be guided by reality, not by rationalization." Both admonitions were eminently sensible in our situation. But the nations struggling with new constitutions are seeking a sense of social direction and a climate of personal "authenticity."[27] Their

26. F. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).
27. ORTEGA Y GASSETT, CONCORD AND LIBERTY 20 (Weyl transl. 1946).

problem is not the faithful application of agreed principles to new social situations. They search the heavens for navigational stars. Our problem was instrumental. Theirs is axiological.

You will gather that in current jurisprudence I found little help in answering the question of what it is that enables men to cooperate instead of working at cross-purposes. With respect to this question, all jurisprudence that grounds itself in *experience* is after-the-fact learning. It is not useful until the thing sought has been found. I turned to an examination of our conceptions of the nature of man.

THE ANSWER SOUGHT IN CONCEPTIONS OF THE NATURE OF MAN

It is obvious that men must associate in cooperative effort in order to satisfy even their most elemental needs of food, clothing, and shelter. As Seneca put it:

> Imagine ourselves as isolated individuals, what are we? The prey, the victims of brute beasts—blood most cheap, and easiest to ravage; for to all other animals strength sufficient for their own protection has been given. The beasts that are born to wander and to pass segregate lives are provided with weapons; man is girt round about with weakness. Him no strength of claws or teeth makes formidable to others. To man [deity] gave two resources, reason and society; exposed as he was to danger from all other creatures, these resources rendered him the most powerful of all. Thus he who in isolation could not be the equal of any creature, is become the master of the world. . . . Society has checked the violence of disease, has provided succour for old age, has given comfort against sorrows. It makes us brave because it can be invoked against Fortune.[28]

It is significant that Spinoza, a millennium and a half later and a scant century before the industrial revolution, in speaking of the importance of society, should sound a new emphasis, in these words:

> The formation of society serves not only for defensive purposes, but is also very useful, and, indeed, absolutely necessary, as rendering possible the division of labour. If men did not render mutual assistance to each other, no one would have either the skill or the time to provide for his own sustenance and preservation. . . .[29]

Suppose the individual man should be able to defend himself against beasts, disease, the vicissitudes of the elements, and should be so diligent and multi-skilled as to provide for his own sustenance and shelter. There would still be a further reason why he would need the assistance of some at least of his fellows, namely, for protection against the depredatory of his own kind. For as Hobbes observed, "the weakest has strength enough to kill the strongest, either by secret

28. Cited in GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 12, n.2 (Carnegie transl. 1925).

29. Spinoza, *Tractatus Theologico-Politicus*, in 1 CHIEF WORKS OF SPINOZA 73 (rev. ed. 1891).

machination or by confederacy with others. . . ."[30] Even Locke, who did not take as pessimistic a view of man-without-society as Hobbes did, still said that unless men were associated for the mutual protection of their property, their enjoyment of it (life, liberty, estate) would be "very unsafe, very insecure."[31]

These quotations indicate the three main facets of a biological fact which Julian Huxley has summarized by saying that the "increased control over and independence of the environment" that marks man as the presently dominant species, with man *for the first time,* is accomplished not by the development of various specialized branches of the species structurally adapted (*e.g.,* hard covering to reflect light and large water storage capacity, or small size and acute hearing, or long legs and a ruminant's stomach, or heavy over-all body hair) to life in the desert, the jungle, the plains, the mountains, the forests, etc., but "by the complexity of his social life and his division of labour."[32] The environment to which Huxley refers includes the "organic as well as the inorganic" and "in addition, the organic environment of an individual includes the rest of the species."[33]

And what makes possible man's complexity of social life and his division of labor? Huxley says it is *conceptual thought* and *true speech.* These capacities, he says, are distinctively characteristic of man. They are the source of his uniqueness.[34] Because my whole argument turns on the conceptual step between stimulus and response in human behavior, I shall go briefly into a number of physical and social disciplines in order to show recognition of it, something of its nature and its social consequences.

The neurologist, C. Judson Herrick, in his studies of the evolution of the cerebral cortex has followed the development of the physical organs upon which these capacities depend. He has stressed the importance of the development in man of a brain which is not dominated by neural centers of any one sense organ, but which is balanced and flexible, able to sort stimuli and assemble them in a nearly infinite variety of combinations, and to delay reaction while the effects of possible alternative courses of action are anticipated and considered, thus eliminating much overt trial and error.[35] Recent studies by Warren S. McCulloch and Walter Pitts, and by Arturo Rosenbleuth, Norbert Wiener and Julian Bigelow, working through physiological and functional approaches, respectively, have shed a great deal more light on the subject of how, and in what ways, ideas control and direct

30. HOBBES, LEVIATHAN 63 (Everyman's ed. 1914).
31. LOCKE, CIVIL GOVERNMENT 179 (Everyman's ed. 1924).
32. HUXLEY, EVOLUTION: THE MODERN SYNTHESIS 561-65 (1942).
33. *Id.* at 495-96.
34. Huxley, *The Uniqueness of Man,* in MAN STANDS ALONE (1941).
35. HERRICK, BRAINS OF RATS AND MEN (1926).

human behavior. It is particularly significant that the latter group, working with a behaviorist approach, should reach a conclusion that vitiates the major premise of traditional behavioristic psychology.[36]

Kurt Goldstein, a physician and professor of psychology, has done extremely interesting clinical work in the past ten years towards proving that the capacity to deal with *conceptualized* reality is a necessary attribute of mental normality. Dr. Goldstein has written:

> Analysis has shown that the capacity to assume this abstract attitude, also known as the "conceptual" attitude, is a prerequisite for normal human behavior: acting voluntarily, taking the initiative, shifting voluntarily from one activity to another, making adequate choices, classifying objects or ideas, grasping the essentials of a complex situation, synthesizing new ideas, reacting correctly to objects or situations with which one is not directly confronted, detaching one's ego from the outer world and reacting in an objectively correct manner.[37]

The cardinal point is that man, in his unique role as man, does not react directly to his environment, but rather through the interpretative step of conceptualizing his environment and himself. Every man has certain psycho-biological needs and impulses. He is located within a geographical, ecological, and climatic context over which he has only limited control. And he is subject to natural disasters of epidemic, earthquake, and flood, over which, again, he has at best limited control. But man, to the extent he makes use of his unique characteristic as man, does not act automatically or directly to fulfill his needs, vent his impulses, or meet the challenges of environment. To some extent at least, he can determine the effect environment, and even his own experienced needs and impulses, will have upon his attitudes and actions. This fact is the source at once of the glory and damnation of man.

Man sorts out his concepts, selects key concepts, and orders the whole into a seemingly true picture of the real world of self and environment. Dominant aspects of his geographical and ecological environment may create a focus of attention upon themselves as key factors. Climatic circumstances, biological and psychosomatic factors may have the same influence. Disease, natural disasters, such as floods and earthquakes, would seem to have an effect upon men's affairs chiefly as hazards to the carrying out of courses of action based upon an interpretation of self and environment.

Any particular man may make no attempt to perform this interpre-

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36. Summarized in Northrop, *Ideological Man in His Relation to Scientifically Known Natural Man*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 407 (Northrop ed. 1949).

37. Goldstein, *Prefrontal Lobotomy: Analysis and Warning*, Scientific American, Feb. 1950, p. 45. See also Goldstein, *The Mental Changes Due to Frontal Lobe Damage*, 17 JOURNAL OF PSYCHOLOGY 187 (1944).

tative process, but may passively accept the interpretation of others, fixed in the products of culture and impinging upon him in a myriad of ways from the day of his birth. But man, *qua* man, *is not* moved automatically or directly by internal or external environment, and he *need not* be moved in any particular direction by the stream of culture. He may act in different directions, when he has gained the perspective to see them, and may by his works change in some degree the direction of the cultural stream as it flows on to the next generation. This fact is specifically affirmed by the psychologist, Rollo May.[38]

Man acts upon the basis of some interpretation of reality, whether partially his own or entirely culturally received. This fact must be taken together with the fact, noted above, that man can fulfill his basic needs only through cooperative action with others. Putting the two together, we see that the fact that men in actuality have the same needs and impulses and even the same external environment will not necessarily enable them to work together to meet those needs. In order to cooperate, they must act upon the same *interpretation* of their needs and environment. In a free society the view of reality that patterns the structure of cooperation will be the general conviction of the community. But in any given society it may have been imposed or insinuated by conquest, or demagoguery. Nevertheless, if there is to be any cooperative action, that action, whether voluntary or forced, must be in accordance with some common view of reality.

With respect to the social sciences and the humanities, Filmer S. C. Northrop has made the most striking assertion in recent years that a common view of reality is a necessary link between men associated in a common undertaking.[39] Anthropologist David Bidney has noted that other contemporary philosophers, "such as A. N. Whitehead, Ernst Cassirer, and John Dewey," are in agreement with Northrop that "the major cultures of the Western and Eastern worlds 'involve basic theoretical assumptions from which the social institutions and practices that they value proceed.' "[40] Clyde Kluckhohn has found the same thing to be true even of the primitive culture of the Navaho Indians.[41] Indeed, Bidney says that "most anthropologists and many sociologists" accept the "thesis that native cultures reveal basic, philosophical or metacultural presuppositions which serve to integrate their

38. MAY, MAN'S SEARCH FOR HIMSELF 85 (1953). See also Bidney, *Human Nature and the Cultural Process*, 49 AMERICAN ANTHROPOLOGIST 375, 383-84 (1951).

39. NORTHROP, MEETING OF EAST AND WEST (1946); NORTHROP, LOGIC OF THE SCIENCES AND THE HUMANITIES (1947).

40. Bidney, *The Concept of Meta-Anthropology and Its Significance for Contemporary Anthropological Science*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 323, 338 (Northrop ed. 1949).

41. Kluckhohn, *The Philosophy of the Navaho Indians*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 356 (Northrop ed. 1949).

cultural perspectives."[42] This thesis, that the presuppositions of a culture determine its empirical manifestations, underlies Pitirim A. Sorokin's monumental study, *Social and Cultural Dynamics,* which encompasses over twenty-five hundred years of human experience.[43]

Men are social creators. Our *need* for society was created in us by our Creator. But any human society that is in fact created is a product of conscious calculation. To cooperate men must have a common interpretation of reality—of their natures and the universe. Men's views of reality differ and change. Accordingly we find, in history, human coagulations of varying quantities, structure and tone, as men shift about under various banners in their efforts to solve their constant problems.

I have quoted or cited expert witnesses from biology, neurology, physiology, psychology, philosophy, sociology, and anthropology to prove that reason plays a part in human cooperation. I trust this testimony will overcome the deterministic view of some psychologists and social scientists, under which

> [H]uman purposes are considered "elaborations" of tissue needs; responsibility is reduced to successful socialization or a strong superego; art, religion, science itself, become the accidental excrescences of unconscious forces, biological drives, whose primary aim is inhibited.[44]

Such a view of man is contradicted by the very purpose of psychoanalysis. If the deterministic view were true, psychoanalysis could only tell the individual *why* he acts as he does. It could never open any hope for him that he could behave in more socially acceptable ways that would relieve his frustration and unhappiness. The efficacy of psychoanalysis depends upon some autonomous faculty in the patient remaining in command, to recognize "reality" and to direct behavior in accordance with its implications.

Apparent Opposition Between Reason and Emotions Resolved

Assuming the case is proved that human behavior is not completely controlled by irrational psycho-biological drives and passions, the next issue is the relation of these to reason. For it certainly would be vain to argue, in the teeth of the evidence of modern psychology, that

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42. Bidney, *op. cit. supra* note 40, at 343.

43. Sorokin, Social and Cultural Dynamics (1937). Sorokin has written in Reconstruction of Humanity 98, n.2 (1948):

> All the important recent works on culture recognizes the integration of a major culture into a single system based on a major premise and articulating it in all its main compartments. Spengler's *Decline of the West* (New York, 1926-28), A. J. Toynbee's *A Study of History* (New York, 1934-37), A. J. Kroeber's *Configurations of Culture Growth* (Berkeley, 1945), and F. S. C. Northrop's *The Meeting of East and West* (New York, 1946) afford examples of such works.

44. M. Arnold, *Basic Assumptions in Psychology,* in The Human Person 9 (M. Arnold & Gasson ed. 1954).

these irrational factors have *no* effect on human behavior. Today, emotions are regarded as mobilizing the energies of the person to meet emergencies.

> For example, the excitement in fear makes available bodily energy with which to get away from the objects which excite the fear. The tension in anger is an increase in the level of energy display, in order that the organism can struggle against or meet the situation which caused the anger.[45]

In an older view, "emotions" included the energizing passions and also the drives or needs of the body. There has been a strong tendency in Western civilization to set up a relation of opposition between emotions, so viewed, and reason.

The quotation from Aristotle, that "law is reason unaffected by desire,"[46] indicates that Greek thought knew this relationship of opposition between reason and emotions. A fuller quotation of the passage reads,

> [H]e who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the mind of rulers, even when they are the best of men. The law is reason unaffected by desire.[47]

Cicero was asked to explain—if law is implanted in us by nature—why people's laws differ. He said that "if the judgments of men were in agreement with Nature, so that, as the poet says, they considered 'nothing alien to them which concerns mankind,' then Justice would be equally observed by all."[48] But, he said, we are perverted by those about us or else,

> [B]y that enemy which lurks deep within us, entwined in our every sense—that counterfeit of good, which is, however, the mother of all evils—pleasure. Corrupted by her allurements, we fail to discern clearly what things are by Nature good, because the same seductiveness and itching does not attend them.[49]

In Christian thought, the urgings of the flesh have often enough been identified as the voice of the Devil—as with our own Puritans—but submission to God's will tends to take the place of responsible exercise of reason as the saving factor, especially in revivalist sects. Rollo May emphasizes the influence of nineteenth century thought on the "splitting up of the personality." He says, "For the late nineteenth- and early twentieth-century man, reason was supposed to give the answer to any problem, will power was supposed to put it into effect, and emotions—well, they generally got in the way, and could

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45. ANDERSON, THE PYSCHOLOGY OF DEVELOPMENT AND PERSONAL ADJUSTMENT 258 (1949).
46. See text at note 6 *supra*.
47. ARISTOTLE, POLITICS bk. III 16, 5 (Jowett transl. 1945).
48. CICERO, DE LEGIBUS bk. I xii (Keyes transl. 1928).
49. *Id.* at xvii.

best be repressed."[50] I wish to suggest briefly an explanation of this older view and then to suggest what seems a more useful view of the relationship between these three aspects of personality.

Man being an animal, it would be surprising if he did not retain in some measure a basic set of reflexive actions designed to protect and preserve him. It is reasonable to assume that these crude, untaught actions would breach the obligations of a "civilized" society, and would therefore be considered bad. Further, it does seem to be true that severe stress sometimes has an atavistic effect on men, and they make attempts at self-preservation more suitable to base animals. Perhaps these facts explain the conception that the emotions urge evil acts in response to the irrational demands of the flesh, and to the long-run disadvantage of man, whereas reason curbs these irrational demands and counsels the will to act in ways that will serve man's ultimate good.

It is extremely significant that it was found necessary to introduce the concept of "will" only with respect to actions directed by reason. Rollo May notes that it was the role of will to see that men did the acts prescribed by reason. When men's acts were the fruit of emotion it was not said that the emotions counselled the will to do these acts and the will brought them forth. This fact is clear in criminal law where the defendant is ordinarily held responsible only for his "willful" acts. In regard to matters extremely dangerous to human life, or other paramount social interests, the defendant may be held to a standard of rational control over his acts that he, personally, can not meet. A man is legally responsible for causing death by acts done in the heat of anger. The acts were activated by "emotion," not "will," but every man is under obligation to "control" his emotions so that he does not fly into a murderous rage except under the most extreme provocation. This responsibility is a condition to the right to move about freely in a civilized society.

Thus we see that, in this widely-held conception of man's nature, emotions activate behavior, but reason does not. Reason was conceived as being capable of producing a rational plan to guide behavior, but incapable of inducing behavior in accordance with the plan. Nor was the rational plan self-activating. It was the role of the will to activate behavior counselled by reason. (Explanations of "will" in this conception are notoriously difficult.) The emotions were to be repressed because they would activate only evil behavior.

I suggest that on the basis of the evidence of man's nature presented above, a simple explanation of will, and a reconciliation of reason and the emotions can be made. We must begin with a different conception of the emotions. If we view them as urging man to *act*, not just urg-

50. MAY, MAN'S SEARCH FOR HIMSELF 50 (1953).

ing him to take the basic, atavistic reflexive actions, the explanation and the reconcilation become possible. This view accords with recent investigations,[51] and also with the older conception of the emotions to the extent it identified the emotions with energizing and activating passions.

Since man can survive only through action (cooperative action, in fact), it is reasonable to assume that he has an elementary drive, need, or urge to act. Action activated by this drive would serve to meet other basic, psycho-biological needs of the person. When the actor had made use of man's unique conceptualizing faculty, satisfaction of these basic needs would be sought by acts "thought" to be appropriate to meet the situation as understood. In emergencies, however, reason might abdicate and "instinct" would call for the reflexive actions of animal man. Only these latter acts, and not the emotions that mobilize man to action, are in opposition to reason. The role of reason would then be to inhibit and guide the elementary urge to act. Under this conception, the basic *drive* to act would become the *will* to act when reason gives its assent.[52] Will is emotion plus reason.

This conception of the interrelated personality aspects of reason, will, and the emotions should not weaken the underpinnings of criminal justice, or discommode Christian doctrine in any way. It reveals at once why the Germans, for all their high-flown dialectics of freedom, ended with a powerful but barbaric society. When they turned away from the natural law, humanistic tradition of Western civilization, they removed censoring reason from the concept of will, and glorified the irresponsible remainder as the source of good among men.[53] Untaught and unchecked by reason, the basic drive to act ran berserk under the black banners of Nazism. The "will of the *Volk*" was an unlimited license to act—so long as the acts were strong, bold, and romantic. The Germans were "energetic and dangerous."

In order to hold that reason has an inhibitory and guiding function over emotions it is not necessary to assert that reason functions with respect to *every* act of the individual. On the contrary, this position is perfectly reconcilable with psychology's empirical evidence that most behavior is not immediately preceded by rational activity. Because the impetus of action does not proceed from reason, but from emotions, it is not necessary for reason to function in order for the person to act. *However,* it is necessary that reason *shall not have denied* the emotions permission to find outlet in that kind of action with respect to the particular situation.

51. See p. 266, *supra.*

52. The late William Temple, Archbishop of Canterbury, expressed a quite similar view of the nature of will, though with more of a *Gestalt* emphasis, in TEMPLE, NATURE, MAN AND GOD 223-24 (1935).

53. See Troeltsch, *The Ideas of Natural Law and Humanity,* in GIERKE, NATURAL LAW AND THEORY OF SOCIETY 201 (Barker transl. 1934).

The statement, it will be noticed, is made in the negative. Emotion can activate any behavior that has not been inhibited by reason. With respect to most of the actions of daily life the function of reason in guiding behavior is analogous to the operation of an automatic pilot. The first time I experience ridicule I may be unable to decide which of several alternative actions to take—whether to walk away, to return ridicule, or to strike my persecutor. But after the incident I will think about it and decide what I should have done. The next time, or the time after, I will be sufficiently in control of myself that I will do what I have rationally decided is the best thing to do when I am ridiculed.[54] Suppose I have decided to keep my peace and walk away. After I have met ridicule a number of times I will "automatically" turn away from ridicule. I will not need to stop and think about it. I have already left standing orders that whatever emotions are aroused by ridicule shall be allowed to find outlet only in the action of walking away.

As with an automatic pilot, these standing orders can be changed. I can re-think the situation. Perhaps I have found from experience that walking away accomplishes peace, but not mutual understanding. Perhaps I regard mutual understanding as worth achieving, even at the risk that both peace and understanding will be lost. If I then hypothesize that answering ridicule will lead to mutual understanding, I may decide that in the future I will stand and answer ridicule. The first time or two I subsequently meet ridicule my actions can not be "automatic." I will have to make a conscious effort to act in the new way which I have determined to be appropriate to this situation. Once safely on the new course, the automatic pilot will again take over and I will not need to apply reason, but, without pause for rational calculation, will apply myself to answering the ridicule.

So it goes with respect to the numberless situations the individual faces from day to day. It is not that reason is not in command, but that reason's orders are standing, and the behavior has become "habitual." It is a severe emotional strain for reason to "break" a habit and establish a new one. In the example used above, walking away served to reduce the emotional tension aroused in me by ridicule. Now I do not allow myself to walk away but force myself to stand and speak. Far from reducing tension, this may considerably heighten it for the time being. However, if I find that standing and talking does indeed, as reason has told me it will, effect both peace and mutual understanding, I will begin to find that standing and talking reduces my emotional tension as well as, or better than, walking away did. I will

54. This process is clearly observable in children who are "learning to play" with others, although here the course of action eventually adopted will probably be that advised by parents. The child will be heard to say a number of times what he is going to do "the next time" before he "works up his courage" enough to actually do it.

be through the emotional strain of changing over to a new "habitual" reaction.

An automatic pilot may be set carefully or carelessly. So with the responses a person's reason permits him to make in the behavioral situations of daily life. In fact, a man may never become aware that he is capable of selecting between alternative courses of behavior. A measure of leisure and learning is necessary to put a man in a position to consciously direct his future. Independent thought was useless to "the quarry slave at night, scourged to his dungeon."[55] But even with the necessary learning and leisure, any man may neglect or ignore what is possible to him and set his responses in every instance by what "is done," or "is not done." It is notorious that we are all, in a sense, pre-set by our childhood training. Our parents, and others in charge of us during childhood and youth, build into us the courses we will sail in various kinds of social weather. Even if our own reason counsels some changes, we may never have the courage to cross over the threshold of strangeness that separates us from the new.

"Cultural conditioning" has pervasive effect on the behavior of individuals. But somewhere the line of imitation and conformance had origin in conscious choice and independent, rationally controlled, action. Emotions activate us. Reason directs us—even though often the direction is mediate, rather than immediate.[56]

If the above analysis of the role of reason is correct, then reason holds the key to action, although reason itself cannot act. And while reason does not *induce* action in accordance with its prescriptions it can release energy generated by the normal urge to act by *accepting* a certain rational plan as a proper guide to behavior. (Of course, this "acceptance" may be only negative and unconscious, by means of cultural conditioning.) This acceptance, or commitment, is the source of social power. In the study of politics, it is the dimension of political dynamism.[57]

Doubtless the atavistic reflexive actions we retain as our animal heritage were designed to keep us alive in some sort of universal community, assuming that *homo sapiens* without reason would have struck an ecological balance with other forms of life. But man did have reason, and had to seek out for himself the pattern by which he would live with his fellows and other forms of life in this universe. And that same reason made man aware of himself, that glorious being, as distinct from others. Consequently, the ageless struggle has been to

55. BRYANT, THANATOPSIS 26 (The Bibliophile Society ed. 1927).

56. The foregoing reconciliation of modern psychology and the natural law conception of the role of reason appeared in preliminary form in Dorsey, *Symbols: Vehicles of Reason or of Emotion?*, in SYMBOLS AND VALUES: AN INITIAL STUDY 441 (Bryson, Finkelstein, MacIver & McKeon ed. 1954).

57. Dorsey, *Constitutions in Depth*, 4 J. OF SOC. SCI. 1, 4 (1953) (published by the College of Law, National Taiwan University, Taipei, Taiwan, China).

strike a balance between getting other men to do things that will aid me without having to do more than I am willing to do to aid them. It is always I, not you, that I am first concerned with. Concern for others is often expressed as "enlightened self-interest," showing that it is something learned. My emotions are aroused by the things that touch me, frighten, hurt, or excite me. As long as this is true, I can be moved to action only by a situation that directly affects me. That others are being beaten and enslaved does not arouse me to act unless it comes into my own family, or perhaps, unless it occurs before my eyes. Furthermore, once I am moved to action, if I am still serving myself alone, I will expend myself only to a limit compatible with my own well-being. I will not destroy myself, break my own health, or jeopardize my own source of income or security, or my own safety from punishment and slavery, in order to aid others.

Suppose, on the other hand, that I accept as a living faith, not just as a logical set of statements, a rational plan that includes tenets that violence shall be done to no man except after full and fair public trial and only in punishment for violation of published laws. By commitment I have put my emotions in the service of a cause larger than personal survival. I have put my emotions in the service of that portion of mankind which joins me in pursuit of common social goals. Henceforth, if I am "faithful," my emotions will be aroused by injustice to strangers and I will expend myself without stint to prevent that injustice. Thus men in community achieve protection and security at the price of individual readiness to give up life, if need be, in order to make life secure for others. In Christian teaching, this appears as the aphorism "To find one's life, one must lose it."

Here, then, is the signal importance of committing oneself to a rational plan: It yields the *power* of faith. The commitment can not be to any private rational plan. It must be to a rational plan that others accept, or will accept, because men must follow a common plan to cooperate, and cooperation is necessary to human existence. When even a relatively small number of men are united in a common faith their power is incalculable. All inhibition being removed, there is no limit to the satisfaction they can give themselves in action. Because of their commitment, right action is clearly defined, and they have the zeal of "moral righteousness." The power of a few men thus joined in faith is legion.

But if faith is the source of power, doubt is the thief of power. Doubt is the beginning of a re-examination by reason whether the emotions should any longer be allowed to find outlet in the present ways of behaving. It is the "Go Slow" sign. When we begin to question whether we should act in established ways, we can not help but act with less conviction, and therefore with less power. If we are reas-

sured, we will loose the reef in our sails and drive forward again on the old course. But if we cannot refute the doubt, nor justify it, nor hit upon a better course, we will continue under short sail, proceeding slowly. Dissatisfied with the waters we are in, yet, if we are not sure where better waters lie we will be reluctant to drive headlong in any direction, but will hold our power in check, biding time, fretting over charts, and our navigating shots of sun and stars. The automatic pilot will be disconnected pending resetting.

Conviction and commitment create power by removing reason's inhibition of man's natural urge to act. Doubt vitiates power because it restores inhibition. But conviction of what? Doubt of what? There can be but one answer: Conviction of the *truth* of the rational plan to which commitment is made—of its interpretation of the nature of man, of his needs and impulses and of the environment in which he lives, and of the implications of that interpretation for human behavior; doubt of the truth of that interpretation and its implications.

Thus we arrive at an understanding of the central importance to the effective functioning of a law process of what Pound calls "received ideals."[58] Our ideals result from what we hold to be true about the ultimate nature and purpose of man. It is right and good to "live up to" these ideals. And we do that by acting in ways that we determine to be implied by them. From our ideals—from the conceptualization, or rational interpretation of reality—the working relations of a society are casuistically filled in during the process of living together. Judicial decisions are "predicable," as Professor Sayre advises they should be,[59] because they apply accepted principles to concrete behavioral issues. Judicial decisions are effective to establish peaceful working relations between such disputants as labor and management not so much because they are backed by the organized force of the community, as because they "express principles of justice evident to and accepted by the great mass of mankind."[60]

Professor Sayre was pointing out a fact of common experience—that "accepted principles of justice," or "received ideals," have a coercion of their own. Ortega y Gassett makes clear the immense significance of this fact. Writing about ideas that have become guides to community action—which he calls "beliefs"—Ortega says:

> Beliefs, to be sure, begin as ideas. But in the process of slowly pervading the minds of the multitude they lose the character of ideas and establish themselves as "unquestionable realities."
>
> A belief, moreover, in a matter so intricate and stirring as the problem of rule cannot exist of itself. It must derive from more

58. Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1 (1933); Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136 (1931).
59. See p. 260, *supra*.
60. F. Sayre, *supra* note 26, at 393.

> fundamental beliefs concerning human life and the reality of the universe. . . . Political unanimity implies more than an agreement on politics. However secondary political questions by themselves may be, they can be resolved only if agreement prevails in non-political matters, agreement which, in the last instance, concerns the reality of the world.
>
> Each of the European nations lived for centuries in a state of unity because they all believed blindly—all belief is blind—that kings ruled "by the grace of God." To hold such a belief they clearly had to believe in the existence of God. Which meant that they felt they lived not by themselves, alone with their man-made ideas, but in the ceaseless presence of an absolute entity—God—with which they had to reckon. This indeed is belief: to reckon with an inescapable presence. And this is reality: that which must be reckoned with, whether we like it or not. When the peoples of Europe lost the belief, the kings lost the grace, and they were swept away by the gusts of revolution.[61]

What Ortega is here emphasizing is that, while man acts in a conceptualized reality, the conceptualization must have been "accepted" or "received" to the point where its conceptual origin is forgotten and it seems to be reality itself instead of a rational picture of reality. Without this "commitment," as it would be put in religious terms, the rational interpretation will not control the acts of individuals and society will die, or abort, as the case may be. Conceptualized reality that has become "unquestionable reality," is "the one and only power that checks and disciplines man from within."[62] Such a reality, believed in common, provides the framework within which disputes can be peacefully and fruitfully worked out. As Ortega puts it:

> Above the contending parties there persist in full validity certain common circumstances to which they both can resort. These are dogmas about life and the universe, moral norms, legal principles, rules regulating the very forms of the struggle. Thus both sides feel that in their fight they are securely held and equally protected by one familiar world. While they fight, state and society stand firm around them.[63]

Application of Preceding Theory to a Specific Situation

In the academic year 1952-53 I had an opportunity to pass along my thoughts on constitution-making to students in the only province of the Republic of China that has not fallen to Communism. That year I taught Theory of Constitutional Law in the College of Law, National Taiwan University, at Taipei, capital of the province of Taiwan (Formosa), and present refuge of the Nationalist government. Modern China, to the advent of the Communist take-over on the mainland, made 19 major attempts in forty years to establish constitutional

61. Ortega y Gassett, Concord and Liberty 19-20 (Weyl transl. 1946).
62. *Id.* at 20.
63. *Id.* at 16.

government.[64] None of the documents ever came alive in the voluntary obedience of the people. It must be kept in mind, however, that constitution-making in China faced dismaying obstacles. Among these were: the strangeness of the idea; the momentum of centuries behind prevailing social institutions; the staggering task of moving half a billion persons to new political forms without aid of modern means of communication; the necessities of defending against national extinction or disintegration. With respect to the latter, it should be remembered that after the revolution of 1911 overthrew the Manchu dynasty the new Republic of China was not politically unified until completion of the Northern Expedition by Chiang Kai-shek in 1928. The use of force by foreign powers to emphasize their demands continued even after that date, when Russia re-established its control over a North Manchurian railway by armed invasion in 1930. Still, Kenneth Scott Latourette reports that, after 1928, great strides were being made under the leadership of the Kuomintang party (of Sun Yat-sen and Chiang Kai-shek) to bring economic prosperity and political stability to modern China. This progress was interrupted by the Japanese invasion of Manchuria in 1931, and, with their further invasion of China in 1937 and Communist activities, China was never subsequently free from armed aggression.[65]

At the time I went to Taiwan to teach and learn, the conclusions set out above were already formed. In a lecture before the Chinese Association for the United Nations, after summarizing the argument above, I said:

> It is faith that makes cooperation possible and yields the power to make that cooperation effective. In the first place, the common rational plan that has been accepted as a faith directs the diverse efforts of many persons into cooperative channels and makes possible the multiplication of their human force. In the second place, acceptance of that plan releases human energy and provides the zeal, determination, and cohesion to achieve the goals defined by the common rational plan.
>
> This "acceptance" may be only negative and unconscious on the part of a great many persons, in that they have been culturally conditioned to act in those ways and have not cancelled the standing orders, thus preset, allowing their emotions to find outlet in those ways. But real, lasting strength springs from conscious conviction of the truth of the rational plan, of the interpretation of the nature of man, of his needs, impulses, and aspirations, of the nature of the environment in which he acts to meet those needs

64. TSAO, CONSTITUTIONAL STRUCTURE OF MODERN CHINA 1-22 (1947).

65. LATOURETTE, HISTORY OF MODERN CHINA 119-220 (Penguin ed. 1954). The Southeast Asia Defense Treaty (Manila Pact) Art. II provision for action of the signatories against internal subversion directed from without must be taken, I submit, as recognition that the type of "revolution" carried out by the Communists in China was in fact aggression. The Treaty text is printed in 31 DEP'T STATE BULL. 393 (1954).

> and aspirations, and of the implications of that interpretation for human behavior. For unless a man knows [what he believes and why he believes it] he is vulnerable to doubt when [established social] relations and ways of behaving are challenged. And doubt is the great thief of power. Conviction gives power because it removes reason's inhibition of man's natural urge to act. It releases human energy. Doubt destroys power because it restores inhibition. When there is no confidence there is no zeal, no determination. When there is uncertainty we slow up to take our bearings.
>
> This is the avenue of aggression that the Communists have used to such good advantage. They point out individual instances of injustice, a man who pays too much land rent, another who does not receive a living wage, and they exploit these to induce doubt in the minds of members of that society in the truths and the social justice that they have lived by. When they begin to doubt they are not so willing to produce abundantly and to defend vigorously the old ways and the government that protects the old ways. The power of that society to accomplish its ends and to defend itself has become less. The Communists are then free to act more boldly to induce more doubt and to sabotage by violence until, in time, the society is so far paralyzed by doubt and indecision that a relatively small amount of force will succeed in converting that society into a Communist society.[66]

I found that what I stated as theory my listeners accepted as fact. It was a summary of their experience on the mainland of China. What I brought to the Chinese that was new was the conception that social paralysis need not be accepted, that faith rests on accepted truth, and truth is subject to rational examination and re-evaluation. I carried the message, based chiefly on Filmer S. C. Northrop's methodology of the social sciences and the humanities,[67] that thought and action find unity and common purpose in a people's view of reality.

In order to show the implication of the preceding theory to a specific situation, I will apply it to the problem modern China has faced. To do this without a burdensome amount of background information I will need to assume that the reader is familiar with principal events in China in the past 100 years. The discussion that follows appeared substantially in *The Journal of Social Science* published by the College of Law, Taiwan University.[68]

Until recent times China had community of thought and belief, and community of personal action in accordance with that belief, but little "political" action in the original sense of action as an organized group, as a "polis." This was natural. She had little need

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66. Address by Gray L. Dorsey, 56th Forum of Chinese Association for the United Nations, Oct. 18, 1952, subsequently printed in CURRENT FACTS AND OPINIONS, Information Series No. 67, March 6, 1953, p. 19 at 26 (Taipei).

67. NORTHROP, THE MEETING OF EAST AND WEST (1946); NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES (1947).

68. Dorsey, *Constitutions in Depth*, 4 J. SOC. SCI. 1 (1953) (published by College of Law, National Taiwan University, Taipei, Taiwan, China).

for political action during the long centuries when hers was seemingly the only civilization in the world. China was least prepared to act with unity and power against outsiders. There had been no outsiders but barbarians. But when the West forced itself upon China, in the last century, she had to take strong political action against outsiders in order to avoid destruction. It is to the everlasting credit of Dr. Sun Yat-sen to have realized this and to have acted to meet the emergency. Foreign nations ran China's customs, much of her banking, administered their own laws on her soil, took territory and trading facilities. This was the direct threat to the existence of Chinese society—that her territory and her people would be divided up among the foreign nations. An equal threat to Chinese society was the effect on the mind of this forced intercourse with the West. Chinese who came into contact with Westerners were falling away from Chinese ways and losing Chinese beliefs.

China needed much more political power to remain free and independent. First she borrowed the weapons that had proved so effective against her. But the material instruments of power were not enough. Then China borrowed—first through reforms under the Empire, then through revolution—the forms of political organization of the powerful Western nations. Because we were occupied at the time[69] with instrumental problems, not value problems, China was not forewarned by the Western political thought from which she borrowed that a constitution must have dimension in the depth of a people's convictions before political power will flow into the forms of political authority it defines. China shortly discovered this the hard way. Chinese still thought and acted like Chinese, although they promulgated an American-English-French constitution after the successful revolution of 1911. Yuan Shih-kai, who gained support as a revolutionary leader, betrayed the revolution and tried to found a new imperial dynasty. China's revolutionary leaders turned to the Russian example for help in the problem of consolidating a successful revolution. Lenin was the modern master of the art of acquiring, holding, and wielding political power. The Chinese leaders adopted his democratic centralist organization of a ruling party to bring social order out of chaos.

In order to make China powerful enough to survive, Dr. Sun advocated the regeneration of the Chinese people, as well as political reorganization. This he hoped to do by awakening a national spirit and by redistributing wealth and stimulating the production of more wealth. To make possible the regeneration of the people and the protection of the Republic, the people's power, *min ch'uan* (which was one of Dr. Sun's famous "Three People's Principles"), was to be

69. See discussion of jurisprudence, pp. 255-61, *supra*.

exercised through the ruling party, organized on the principle of democratic centralism. When these things had been accomplished and the people had been tutored in self-government, the people's power was to be exercised through representative government constitutionally defined. War intervened. Political power and military power were magnificently forthcoming to withstand and defeat foreign military aggression. War passed. The Communists hurried to the north and got military materiel from the Russians. Political naïveté prevented friendly nations from rendering desperately needed support and aid. Under circumstances that were still unfavorable, the Constitution under which the present Nationalist government acts was promulgated. But political power, the power of united group action, evaporated before the Communists. The mainland fell. President Chiang Kai-shek has said that this was "not due to the overwhelming strength of the Communists, which was not strong enough to defeat our Revolutionary Army, but due to the organizational collapse, loose discipline, and low spirit of the [Kuomintang] Party."[70]

Is the constitution of the Nationalist government of China a product of the basic convictions of the people? Will it engender the support that creates political power? Many persons have expressed the opinion that the loss of the mainland would have been avoided if less attention had been given to military matters and more attention given to such matters as land reform and economic justice. *Min sheng* was Dr. Sun's principle for economic reconstruction and was a "platform plank" of the Kuomintang Party, which President Chiang Kai-shek heads.

However, even if *min sheng* had been more fully implemented on the mainland, there would still have existed deep, basic contradictions between the form of political organization and traditional Chinese morality and wisdom. It can be seen very plainly in a comparison of views of reality. Of necessity, China sought political power. But the whole idea of political power is itself alien to the Chinese conception of the universe as a sensed oneness, or unity, which includes the ordered totality of immediately observed phenomena. This view of reality leads to *harmony* of men in nature, through a spirit of all-embracing fellowship, compromise, adherence of each man and creature to his proper way, and attention to propriety. The Greek heritage in the conception of reality of Western nations is of minute entities, unseen and even unimaginable, postulated to exist behind and beyond the sensed man or the sensed earth, air, fire, and water, and to give rise to these sensed phenomena, and of a universe composed of such discrete entities joined in mathematical ratios and proportions into

70. President Chiang Kai-shek, in his speech at Tsungtsai, introducing the reform program of the Kuomintang in July, 1950, CHINA HANDBOOK 34 (1952-53).

one universal rational order, knowable by man and increasingly subject to his control. This view of reality leads to *power* of men over nature and other men, and to *justice* through a constituted order of men in accordance with true knowledge of the rational order in the universe. (The idea that men constitute the social order is the seed of constitutional law.) This latter view of reality is also the root of modern science. Thus the introduction of modern science and of Western political forms into China every day wrought myriad contradictions with the dictates of traditional Chinese morality and knowledge. The very success of building political power wore away the foundations of power in the common faith of China—which was still that of the traditional view of reality.

Many of the best minds of China were never brought to bear on the task of building a new faith for modern China. China was transported overnight into a Republic. For three thousand years it had been right for the emperor to serve the people and the people to be loyal to the emperor. Now all at once it was wrong. Formerly government had run up to the emperor. Now it was to run down to the people. China was literally in an upside-down world where right was wrong and up was down. The peoples of Western civilization have redefined truth and right every few hundred years and revolved in every aspect of political, social and personal authenticity. This had never happened to China in all her recorded history prior to 1911. China had known many revolutions, but only dynasties had revolved. Apparently the revolutionaries, including Dr. Sun himself, had no clear realization that their actions implied such a complete and thorough revolution. Dr. Sun thought the ancient Chinese morality and social knowledge the best that any people had ever developed. The old morality, the old truth of social accommodation were to be kept. The new physical sciences and modern political organization were simply to be used to make China strong enough to live in her old ways. But the revolutionary fathers of the Republic nevertheless set China on the path of fundamental change by rejecting what had been politically true in China for three thousand years. All the recent studies of culture and society have shown that a society is all one piece. If part of what a society has believed is found to be wrong then a whole redefinition of its truth must be made, and its common faith must undergo a corresponding change.[71]

Nothing in the thought of China prepared Chinese intellectuals to realize the significance of the basic contradiction between trying to introduce new political truth while keeping the same moral truth.

71. SOROKIN, SOCIAL AND CULTURAL DYNAMICS (1937); see TOYNBEE, A STUDY OF HISTORY (1937); KROEBER, CONFIGURATIONS OF CULTURE GROWTH (1945); NORTHROP, THE MEETING OF EAST AND WEST (1946).

Nothing like this had happened before. When Buddhism had come into China it had come at the fundamental level of belief, not at the subsidiary level of one phase of human action. Furthermore, it was quite compatible with the Taoist element already present in Chinese thought. Since fundamental truth had always remained essentially unchanged in the Chinese tradition, the Chinese people had been free to give their attention to the application of that truth to practical affairs. There was little interest in, or even awareness of, fundamental premises of Chinese society. The Chinese were so deeply immersed in living what was true for them that it was indeed reality itself and beyond knowing as conscious belief. Chinese intellectuals who saw that Western truth was inseparably imbedded in Western forms of political organization and saw the danger of harboring conflicting social truths found it almost impossible to arouse others.

Lacking guidance in their own tradition many Chinese intellectuals turned to Western thought. But, as I have indicated above with respect to jurisprudence, our scholars were occupied with instrumental problems, and current thought of Western civilization did not contain the wisdom of its revolutionary experience. The social and political sciences were separate, autonomous, and factual. By looking to them one could not discover that political truth could ever be in conflict with moral truth. In this respect, with the exception of Whitehead, philosophy of that period was little better. Current political science and philosophy both adjured the scholar to be morally neutral. John Dewey's pragmatic philosophy was very influential among those Chinese scholars and educators who in turn were most influential in Chinese thought.

China needed a new basis for strong and stable political institutions, or new political institutions that would be in harmony with and draw support and sustenance from the old morality. But while moral purpose and social cohesion were being worn away by the devastation of prolonged war and by the contradictions between moral truth and political truth, the men most capable of rebuilding concord remained aloof from that task. This is not a matter for personal recriminations, but true tragedy. They shunned the task not for base reasons but out of intellectual conviction.

Into this situation the Communists came, bearing a new faith, new hope, new promise, new certainty after years of torturing contradictions, and promises of a bright new world to be built by the masses. They came as bearers of a faith and they advanced by being sowers of doubt. The Communists have developed a new kind of warfare that destroys political power by inducing doubt about the truth a people have lived by and thus drying up the energy in support of that truth. China was particularly vulnerable to this form of warfare

because of the situation just outlined above. The more so because of corruption in the ruling party. (But it must not be forgotten that a common faith is what raises men above self-interest to action for the common good. When that faith has been undermined, probity in public office is more difficult to find.) It was comparatively easy to create unrest, dissatisfaction, doubt, political paralysis. Then the Communists took over the mainland with inferior military strength.

If the foregoing analysis be true, then it is clear that a reform that only reorganizes political institutions or replaces individuals will not touch China's real problem. The problem is not one of political organization, but of political dynamism. Democratic centralism was devised as the most efficient means of concentrating the power of a minority party and wielding it in such a way as to control the masses, thereby acquiring the political power of the masses without waiting to bring them to political awareness. Its genius in a country with illiterate and politically inert masses is that it enables men in positions of political authority to acquire great political power without the political dynamism of a common faith being at work among the masses. But in order for democratic centralism to be successful *that dynamism must be at work among the members of the party.* If they have no common faith to direct, sustain and inspire them, they will have no political power of their own with which to act on the masses to create more power—though they may be held together by the sternest discipline in the tightest unity of organization. And if the dynamism is not in them it will not be in the nation they lead. Leninism without Marxism will die unless it is wedded to some other version of man's destiny and the proper ends to be achieved by the political power acquired.

The faith that is the dimension of depth in the constitution of China will rest upon a new perception of the Chinese view of reality. But if China is to keep the forms of political organization and the physical science she has borrowed, that view of reality will include the latest results of Western postulational science as well as the valid immediate-apprehension observations that led to the traditional Chinese view of reality. China can not borrow scientifically and organizationally from the West and at the same time deny her truth. She must spurn all the fruits of the West or come to terms with its moral truth. But this emphatically does not mean that China must deny her own moral truth. It only means she must find the synthesis.

Such a synthesis can only be found by going to the common root of the particular aspects of truth represented in morality, ethics, political science, economics. That which is unquestionably true about the nature of man and the universe is to be obtained through the interpretation of man's most objective knowledge about himself and

the universe. Therefore, it would be principally encompassed in a philosophy of science and a philosophical anthropology.

There is another consideration that suggests that the only solution to the problems of modern China is to go to the roots of human cooperation and perceive what it is that Chinese now hold to be true, and the implications of that truth for morality, ethics, and social and political order. This consideration is the fact that China's revolution also sought, to a greater or lesser extent, a redistribution of wealth, respect, and the other things men value. By limitation to be imposed on governing power it also sought an area of personal freedom. None of these things can be attained without the influence of a commonly held view of reality, that, as a directing idea is the criterion for resolving conflicting interests, and as a common faith is the source of the inner government of morality that sustains in practice the legal delineation of these personal rights.

There is no real conflict between personal freedom and effective political action once a people has found its common faith and has achieved an awareness of its implications. Personal freedom *within a common faith* does not weaken but in fact strengthens political action, because the common faith channels the many separate acts of individuals into furtherance of the common good. Many more minds are brought to bear on the society's problems than when all is left to the few in government. Many more backs are willingly bent to common tasks.

Since all political power ultimately depends upon releasing the energy of millions of individuals, that society will be strongest in which the individuals most strongly hold the common faith, most fully consider a threat to it a personal threat to themselves, and most willingly assume *personal* responsibility to promote and protect the common welfare. Jean Brissaud put the matter well some fifty years ago: "The body draws its strength from the vitality of the cells; these must have a life of their own; it is the same with society; the more vigorous the individual, the more powerful the society. It is not the atrophy of the individual that should be sought, but his full development."[72]

LOVE AS A FACTOR IN ORDERING SOCIETY

The thoughts, indicated above, on the constitutional problem of modern China were well-received in Taiwan.[73] Subsequent reflection and events have not caused me to question the conclusions there

72. JEAN BRISSAUD, COURS D'HISTOIRE GENERALE DU DROIT FRANCAIS PUBLIC ET PRIVE § 26 (1904). The volume on public law is translated and published as Vol. 9 in "The Continental Legal History Series," under the title, HISTORY OF FRENCH PUBLIC LAW (1915).

73. The article was translated into Chinese and published in THE CHINA REVIEW, Hong Kong, a periodical of general circulation throughout Southeast Asia.

stated. But I have become aware of the fact that the analysis was still not complete. The piece that has just fallen into place is love.

Ortega y Gassett says ideas about life and the universe that have become unquestionable reality hold contending parties securely in one familiar world so that they are united in one *societas,* though they contend on a particular issue. But what if analogy is made to criminal, rather than civil, law? Is the man who does not live up to the letter of the law no longer a member of the society he has offended? Is he a "beast," a "mad dog," a "fiend"? And if so, why should he be expected to change his behavior so that when he emerges from prison he will obey the laws?

Gregory Zilboorg has recently reminded us of the point made by Thomas Aquinas that "punishment, in order to prove fully effective and therefore satisfactory and serve the purpose of rehabilitation, *must be accepted* by the one on whom the punishment is meted out."[74] Why should a man accept punishment? If he has demonstrated weaknesses of character, has failed to live by the law, what hope does he have to do better? Why should he want expiation and a new chance? The answer of Christian doctrine has usually been in terms of the salvation of the individual's soul in future existence. But the Christian Existentialists give an answer in terms of present existence that is relevant to the problem of making constitutions live. Paul Tillich writes:

> If I were asked to sum up the Christian message for our time in two words, I would say with Paul, it is the message of a "New Creation." Let me repeat one of his sentences (II Cor. 5: 17) in the words of an exact translation: "If anyone is in union with Christ he is a new being; the old state of things has passed away; there is a new state of things." Christianity is a message of the New Creation, the New Being, the New Reality which has appeared with the appearance of Jesus who for this reason, and just for this reason, is called the Christ. For the Christ, the Messiah, the selected and anointed One, is He who brings the new state of things.[75]

In comparison with the question of the new reality, Tillich says, "[E]verything else, even religion or non-religion, even Christianity or non-Christianity, matters very little and ultimately nothing."[76] The new reality enables us to be reconciled to an existence in which our good works are never good enough. We can put off "self-rejection, disgust, and even hate" of ourselves, because of the message that "a new reality has appeared in which you *are* reconciled."[77] Being in-

74. ZILBOORG, PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 97 (1954).
75. Tillich, *The New Being,* 19 RELIGION IN LIFE 511 (1950).
76. *Id.* at 513.
77. *Id.* at 515.

dividually reconciled, men are reunited with each other. The "social healing" of the new reality preserves mankind.

> Where one is grasped by a human face as human, although one has to overcome personal distaste, or racial strangeness, or national conflicts, or the differences of sex, of age, of beauty, of strength, of knowledge, and all the other innumerable causes of separation—*there* new creation happens![78]

Jack L. Pierson states the Christian Existentialist view of forgiveness in these words:

> Forgiveness does not mean that the sin isn't there—that we pretend the sin never happened. Forgiveness is the willingness to restore the relationship while fully recognizing the existence of the evil—of the sin in the situation. The problem is one of restoring the relationship that was destroyed. And the Christian Gospel is that the relationship has been restored because God has taken upon Himself the cost of accepting us as we are.[79]

Tillich writes: "Resurrection happens *now,* or it does not happen at all."[80] Resurrection occurs when the power of separation of man from man is overcome by the power of reunion. This can never occur if acceptance must be earned by "doing right," because all men are fallible.

A comparison of the Old and New Testaments shows an emphasis on law in the former, on love—redeeming love—in the latter. The Pentateuch lays down precise and detailed rules of behavior and sounds in retribution. But Christ puts the requirements of love over the laws of Moses and the Romans, and admonishes forgiveness. "On these two commandments [to love the Lord, and your neighbor as yourself] hang all the law and the prophets,"[81] Jesus is quoted by Matthew as saying in reply to a lawyer's question.

In terms of reason itself, the use of love in ordering society can be seen. As between a view of reality proved wrong by methods of rational investigation and a view of reality not yet proved wrong, there is objective basis for choosing the latter. But using force to build the structure of society implied by that view of reality is an equivocal enterprise because that view of reality has behind it only human, and therefore fallible, authority. And it may be proved wrong tomorrow. The principle to be derived is that the social reformer's zeal must be tempered by love for the human beings he is attempting to reform, or else his professed help is in fact tyranny. The genocide

78. *Id.* at 516.
79. From a lecture (one of a series of four) on theology from a Christian Existentialist point of view by Jack L. Pierson, March 24, 1954 in St. Louis, Mo. I wish to thank Mr. Pierson for the benefit of a copy of his lectures and for guidance, by private discussion and bibliography, on the thought of Christian Existentialism.
80. Tillich, *op. cit. supra* note 75, at 517.
81. MATTHEW 22: 35-40.

convention and the Declaration of Human Rights are concrete recognitions of this principle.

Love is also useful to temper reason. This function of love is found in such widely disparate places as the traditional Chinese conception of the method of ordering society and the Anglo-American common law.

The classic Chinese statement on ordering society is in the *Great Learning,* attributed to Confucius. There it is said of "the Ancients," who were credited with superior wisdom,

> [I]n order to govern well their state, they began by establishing good order in their family; in order to establish good order in their family, they began by perfecting themselves; in order to perfect themselves, they began by obtaining rectitude of heart; in order to obtain rectitude of heart, they began by obtaining sincerity in their intentions; in order to obtain sincerity in their intentions, they began by perfecting their knowledge.
>
> The perfecting of knowledge consists of pursuing the study of things.[82]

In this Chinese conception, perfecting of knowledge was accomplished by "rectification of names." "Rectification of names" was quite similar to modern semantics. The purpose was to keep thoughts and actions in accord with reality. But "rectification of names" did not give sincerity.[83] Sincerity is obtained by *Jen.*[84] Liang Chi-chao writes, of the meaning of *Jen:*

> [I]n order to know what "Jen" is, it is necessary first to know what man is. What is the origin of the conception of "Man"? By inference from the existence of ourselves we know of the existence of others like us. As we have round heads, flat feet, horizontal eyes, and intelligence, therefore any being of similar appearance and possessing similar qualities we recognize as our own species "Man." The conception "Man" is therefore derived from recognition of others and self. This recognition is "Jen." Therefore is the Chinese character "Jen" formed from the combination of the characters two and man. . . . Without the association of one man with another the conception "Man" cannot be formed. In other words, if there were only one man living on earth, that which we call personality would have no way of exhibiting itself.
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> . . . .
>
> Confucius says, "When one who is 'Jen' desires to establish himself, he must establish others; wishing to elevate himself he must elevate others. To understand another's desires by inference from one's own desires is the way to 'Jen.'" *(The Analects)* . . . The

82. Y.M. HU, ÉTUDE PHILOSOPHIQUE ET JURIDIQUE DE LA CONCEPTION DE "MING ET DE "FEU" DANS LE DROIT CHINOIS 43-44 (1932), quoted in Dorsey, *Two Objective Bases for a World-Wide Legal Order,* in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 443-44. (Northrop ed. 1949). (The translation from the French is mine.)

83. Y.M. HU, *op. cit. supra* note 82, at 41, cited in Dorsey, *op. cit. supra* note 82, at 452.

84. Dorsey, *op. cit. supra* note 82, at 452.

> real meaning of "establishing others," and "elevating others" comprehends not individuals but the whole of mankind. Since the whole of mankind consists of others and self, to elevate the whole of mankind is to elevate oneself. To try to understand this principle by inferring the wants of others from our own desires, is the way to "Jen." To be lacking in "Jen" is to be like a benumbed hand or foot which is insensitive to pains in other bodily members. So the wholeness of personality which comes from the association of two or more persons lacks "Jen" when it is insensitive to the pains of another; it attains "Jen" when sensitiveness is keen. In short, the lack of "Jen" is insensitiveness to fellow-feeling; the fulfillment of "Jen" is the state of keen sensitiveness.[85]

The sensitivity to the pains and desires of fellow men—or, as it might as well be put, sensitivity to the requirements of love for fellow men—prevented the detailed and pervasive Confucian ethics from becoming rigid and oppressive.

Paul Sayre includes love as a decisional factor in his theory of law. He has identified seven categories of the Good, including love, which together constitute "the ultimate test of the law."[86] I believe this is a wise perception of a role that love plays in Anglo-American jurisprudence.

My own conception of that role is that love mediates between rigid logic proceeding from inadequate premises, and the actual human beings who are what they are and need justice in accordance with their true nature. A judge who lets logic run its inexorable course when he *just knows* in every fiber of his being that the decision it requires is wrong, is obeying man's product and denying man. The legal realists' revelation that judges don't usually allow themselves to be misled by logic was a little like coming from a conference behind the barn and announcing to your mother that there are two sexes. From the unstartling revelation that judges reach a decision and then justify it by logic, I do not believe a conclusion can validly be drawn that the judging process is irrational. It is just that the facts must be laid against *two realities*—the ideals, principles, and rules of the particular society's conceptualized view of reality, and the *new reality*, as Tillich calls it, in which obligations are gauged by the requirements of love. If we live in these two realities at once, it is "rational" to weigh decisions in the scales of both realities.

Furthermore, I do not believe that it is an admission of irrationality even to accept Judge Hutcheson's statement that the judge,

> [B]rooding over the cause, waits for the feeling, the hunch—that intuitive flash of understanding that makes the jump-spark

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85. C.C. LIANG, HISTORY OF CHINESE POLITICAL THOUGHT 38-43, quoted in Dorsey, *op. cit. supra* note 82, at 452-53.

86. P. Sayre, *An Ethical Approach to Legal Philosophy*, 7 J. LEGAL ED. 369 (1955).

> connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way.[87]

The judge makes this intuitive leap only "after canvassing all the available material at his command and duly cogitating on it."[88] Therefore the judge has before him all the facts and all the propositions of law that the parties claim are applicable. The decisional process that follows, as described by Judge Hutcheson, is perfectly reconcilable with the most rigorous of all rational calculation—theoretical physics. After the data of experience is all assembled, the real meaning of it can not be derived by deduction or logical abstraction, Albert Einstein tells us. The truth about reality, he says, can only be gained by a free leap of the imagination.[89] Of course the resulting theory—"the concepts and the laws connecting them with each other"—must be verified experimentally.[90]

The fact is that reason includes logic *and* the searching, postulating imagination. *However*, after imagination has leaped and landed, logic must verify against experience, and if it can not, imagination must leap again. So it must be for the judge—although with respect to social questions the proper term for the searching faculty of the mind is conscience instead of imagination. *If the judge can not justify his decision, he must try again.* The voice of the individual judge's conscience is checked against the cumulative experience of the community by the logic of the opinion. The growth of the common law has been in those occasional cases when none of the competing analogies satisfies and *responsible* conscience has leaped beyond logic *and experience* and brought back a principle or rule from the "new reality" of the brotherhood of man. An example of this process is the development of the fraud doctrines in the law of contracts and conveyances.[91]

I have presented evidence or argument to show that love is a stronger bond of society than faith,[92] that love restrains tyrannous violence, that love tempers reason. There is at least one more vital role that love plays in ordering society, and this possibly more important than all the rest. It is the *compulsion* of love; strength through complete vulnerability. Asians understand it. I believe love

87. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929), quoted in FRANK, LAW AND THE MODERN MIND 103 (1930).

88. FRANK, *op. cit. supra* note 87. The words quoted here are Judge Frank's summary of Hutcheson.

89. EINSTEIN, THE WORLD AS I SEE IT 36-38 (1934).

90. *Id.* at 36.

91. Speaking of the doctrine of part performance of an oral contract to convey land, Corbin writes, "Even the tough-minded courts that are most insistent upon logic and consistency are human enough to be affected by a showing of severe hardship and injustice." 2 CORBIN, CONTRACTS § 435 (1950).

92. I am using "faith" here in the sense in which it is used above, namely, commitment to a view of reality and the social norms implied by it.

in this self-renouncing sense is the secret of child rearing among the Chinese, who cannot bear to strike a child. Hundreds of Chinese children will stand quietly in line waiting for a bus, because it is expected of them. Yet, put the same children in a school for American children abroad where discipline may be physical, and the Chinese will shove and shout with the best of them. The compulsion of love had delightful results when used by a baby on supposedly tough mobsters in Damon Runyon's story, *Little Miss Marker.*

Mahatma Gandhi made a revolution with love.

Conclusion and Applications

Throughout the preceding discussion I have assumed that the use of organized force by a power group called government is a factor in ordering society, as I believe it must be in any society short of a "City of God." Therefore, the discussion determines with four factors, namely, reason, faith, love, and force. No attempt has been made to assay the value of each. However, because it has been shown that reason, faith, and love are useful factors in the ordering process, I believe a conclusion can be drawn in this form: The limited use of organized force that distinguishes constitutional government from tyranny will be more or less effective to maintain civil order depending upon the presence or absence in the group sought to be governed of ties of reason, faith, and love.

Because this paper is already long, I shall be content to suggest, in summary form, the applications I think most urgent.

1. Strong, stable, non-Communist, independent nations in Asia and Africa are possible only if they receive political help as well as military and economic help. We must not boggle over the word "political" on the ground that such aid would be interference with internal affairs. The Communist aggression is political aggression. It destroys a people's ties (of reason, faith, and love) to each other and to government, and thus destroys power to act as a polity. Aid in combatting political paralysis can not avoid being political. If the polity is paralyzed, or wracking itself to death with internal factionalism, the triggers will never be pulled when the Communists come into the gunsights, and the plows will make furrows for Communist crops. In the Manila Pact we have recognized the need for help against political aggression. We must fully follow up this realization.

2. Political aid, to be acceptable and effective, must be given in ways compatible with the central theme of the preceding analysis—that men are essentially self-moved. Political power springs from the energy of individuals released by commitment and channeled into cooperation by love and a common faith. When a segment of humanity, struggling to be a nation, has no common faith—no political soul—you

can be sure they will want one. The abyss of chaos is frightening. We can help them to know themselves. This is the task of what Colonel Nasser has called the "second revolution."[93]

3. There are two basic reasons why we can help these peoples to know themselves. The first is that they are where we stood in 1776. The peoples of Asia and Africa have already possessed democracy in their dreams.[94] They will have it—or a package under the same label.

93. The leader of the Egyptian revolution, and now head of state, Col. Gamel Abdul Nasser, has written a most significant account of what happened after the overthrow of the old regime was accomplished. (In reading the quotation, it should be kept in mind that Colonel Nasser uses "political" in a narrower—and probably more orthodox—sense than I have used it in the preceding discussion. Matters of stability, cohesion, and purpose that I have discussed as political, he discusses as social.) Speaking of the period after the overthrow of the old regime on July 23, 1952, he writes:

> "I had imagined that the whole nation was ready and prepared, waiting for nothing but a vanguard to lead the charge against the battlements, whereupon it would fall in behind in serried ranks ready for the sacred advance toward the great objective. The facts became clear to me after the twenty-third of July.
>
> The vanguard performed its task and charged the battlements of tyranny, It threw out Farouk and then paused, waiting for the serried ranks to come up in their sacred advance toward the great objective. How long it had to wait! True, crowds came, there was no end to them.
>
> But how far the reality from the dream! The masses that came were disunited and divided groups of stragglers. The sacred advance toward the great objective was stalled, and there emerged a prospect dark and foreboding, full of danger.
>
> We were not ready for this. So we set about seeking the views of leaders of opinion and the experience of those who were experienced. It was our misfortune that we were not able to obtain very much. Every man we questioned had nothing to recommend except to kill someone else.
>
> Every idea we listened to was nothing but an attack on some other idea. If we had gone along with everything we heard, we would have killed off all the people and torn down every idea; and there would have been nothing left for us but to sit down among the corpses and ruins, bewailing our evil fortune and cursing our wretched fate!
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> . . . .
>
> Peoples preceding us on the path of human progress have passed through two revolutions, but they have not had to face both at once; their revolutions were in fact a century apart in time. But as for us, the terrible experience through which our people is going is that we are having both revolutions at once.
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> The political revolution, to be successful, must attain the objective of uniting all the elements of the nation, binding them together solidly, and instilling the idea of self-abnegation for the sake of the country as a whole.
>
> But the social revolution, from the moment of its first appearance, shakes values and loosens principles, and sets the citizenry as individuals and as classes to fighting each other. It gives free reign to corruption, doubt, hatred, and egotism."

This is a translation of three articles written for the Egyptian weekly, "Akher Sa'A," on the occasion of the first anniversary of the revolution, quoted in Walter Lippmann's column published in the St. Louis Post-Dispatch, April 28, 1954, p. 3B, cols. 1-2. Colonel Nasser now has a book in print, EGYPTIAN LIBERATION: THE PHILOSOPHY OF REVOLUTION (1955), which I have not seen.

94. Edwin O. Reischauer writes: "The Asian revolution is in reality our revolution, fostered, however unconsciously, by the democratic peoples of the Western world." REISCHAUER, WANTED: AN ASIAN POLICY 207 (1955). For an account of more or less conscious fostering in Africa, see an article by Emory Ross, *Colonies and World Organization: Non-Governmental Responsibilities and Stimuli*, in FOUNDATIONS OF WORLD ORGANIZATION: A POLITICAL AND CULTURAL APPRAISAL 171 (Bryson, Finkelstein, Lasswell & MacIver ed. 1952). In a com-

If they get democracy, and not dictatorship of the proletariat, it will be democracy in terms of indigenous cultural traditions and in the light of their own problems of population, resources, educational level, etc. Not our unique results, but our experience in how to go about solving the problems is what is needed.

The second reason we can help is that we have stability. The almost poetic insight required to grasp the emerging truth that will guide a society after the violence of revolution requires a degree of contemplation nearly impossible in a situation of recurrent crisis.

I believe a conscious effort to aid peoples to know themselves and to gain a sense of political direction is worth making. Objection is made that this is the sort of thing that comes to a solitary thinker in some dusty garret. That may be. I can speak from experience about a preliminary try. In my Theory of Constitutional Law course in Taiwan, I broke down the conceptions of reality held by Democritus, Plato, and Aristotle into (1) sensed phenomena, (2) order, (3) ultimate reality, (4) scientific method, (5) categories used to classify experience, and (6) goal of the system of thought. Then I compared the Greek conceptions of these six elements of reality with corresponding Chinese conceptions. I also compared early Greek and Chinese answers to the following chain of questions: What is the *source* of the animation and order observed in the sensed world? What is the *nature* of the animation and order, and of that which is ordered? Is it one or many? Divided or undivided? These will be recognized, of course, as questions found in early Greek natural philosophy. I also attempted to correlate forms of political organization with prevailing views of reality at various stages in Western civilization. These were rough, one-man attempts at very big problems; but the intense interest of my students in finding an answer at this fundamental level convinced me that the people who must solve these problems—or endure a meaningless existence—very much want help in solving them.

4. The preceding analysis should enable us to make the distinction between dictatorships of necessity and dictatorships by intention.

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ment on Ross's article (published in the same book at pp. 201-02) Leland S. Albright writes:

> Personally I appreciate both the content and the forthrightness of the statement. I have been feeling for some time that the plans and program of UNESCO and of President Truman's Point IV are unconscious and belated tributes to the unselfish service rendered by Christian missions, philanthropic foundations, Christian college and service programs and certain governmental agencies in friendly assistance through agricultural and health projects. It is unfortunate that more has not been done along these lines, and tragic that the way for such unselfish service is not as open today as formerly. It is a case of "Too little and too late" in Asia. Will it be so in Africa also? Surely there ought to be a greatly augmented program for Africa while there is still time. Otherwise we may merely prepare more seedbeds for Communism.

When the element of a common faith is lacking—as it was in China[95] —decentralization of decision-making will result in chaos, not democracy, because no common standard of judgment will make decisions compatible and actions complementary. As Mr. Sulzberger put it with respect to Vietnam, "anarchic centrifugal forces would rip the state apart."[96] The best that can be hoped for in conditions like those prevailing in Korea, Formosa, and Vietnam, is that the strong personalities who exercise authoritarian government by necessity will also foster gradual release of authority to the electorate as it becomes responsible and achieves common purpose.

5. Internationally, we must realize that the "Big Four" can never bring peace in the world. They are attempting to do so with the factor of force alone. Before weapons became "absolute," unlimited use of force by nations maintained, though crudely, an order in the international community by repelling national claims and demands that other nations regarded as inimical to their own rights and interests. But with the development of nuclear weapons, unlimited force can be expected to produce only death, destruction, and disorder.

The only alternatives to nuclear war are a Communist-dominated world or a constitutional international community in which ties of reason, faith, and love exist and in which, because they exist, limited use of force will be effective to maintain order. With respect to the rational basis for such an international community, I have elsewhere suggested that it would be characterized by "international democracy," and have proposed for discussion a nucleus proposition for a Manifesto of International Democracy.[97] I do not believe the world is ready for federal government, but I believe peace is possible in a community of free, independent, sovereign nations, based on a respect for cultural diversity and self-determination. I have also dealt elsewhere with the place of Communist nations in such an international community.[98] A knowledge of the uses of love in ordering society is what Asia brings to world councils. The knowledge is invaluable. We must cease to spurn it and learn to use it. Of course, love alone is not enough. But clearly, force alone is not enough, either.[99]

Perhaps an institute is indicated, in which research would be car-

95. See pp. 273-81, *supra;* see also C.Y. Hu, CHINA: FROM CULTURAL VACUUM TO COMMUNISM, a pamphlet published by The Institute for the Study of Chinese Problems, Hong Kong (1950).

96. See p. 254, *supra.*

97. Dorsey, *The Necessity of Authority to Freedom,* in FREEDOM AND AUTHORITY IN OUR TIME 317 (Bryson, Finkelstein, MacIver & McKeon ed. 1953).

98. Dorsey, *The State, Communism, and International Law,* 1955 WASH. U.L.Q. 1.

99. Reports from the recent Bandung conference of Asian and African leaders stressed the emphasis on "moral force" as an instrument of peace. See the dispatch filed by Donald Grant from Bandung, St. Louis Post-Dispatch, April 19, 1955, p. 1c, col. 3.

ried out in international democracy, Korean democracy, Chinese democracy, Vietnamese democracy, and so on through the list of interested Asian and African nations, and emerging nations. Cross-fertilization of experience should in itself be worth the candle. I believe the candle would become a torch of freedom *and peace.*

CONTRIBUTORS TO THIS ISSUE

ERWIN N. GRISWOLD—Dean and Langdell Professor of Law, Harvard University Law School. A.B. 1925, A.M. 1925, Oberlin College; LL.B. 1928, S.J.D. 1929, Harvard University. Member of American Bar Association, American Law Institute, Director of American Judicature Society, and member of Massachusetts, Ohio, and Supreme Court Bars.

HAROLD I. ELBERT—Member of Missouri and Oklahoma Bars. A.B. 1942, LL.B. 1944, University of Oklahoma; LL.M. 1945, S.J.D. 1953, University of Michigan. W. W. Cook Research Fellow, University of Michigan, 1944-45. Lecturer St. Louis University Law School. Member of American Bar Association. Associated with Thompson, Mitchell, Thompson & Douglas, St. Louis, Missouri.

GREGORY M. REBMAN—Member of Missouri, Federal and Supreme Court Bars. LL.B. 1937, St. Louis University. Member of American Bar Association. Partner in law firm of LaTourette & Rebman.

GRAY L. DORSEY—Associate Professor of Law, Washington University School of Law. A.B. 1941, University of Kansas; LL.B. 1948, Yale Law School; Fellow 1948-50, American Council of Learned Societies; J.S.D. 1950, Yale Law School. Former Editor and Publisher, *The Cameron* (Mo.) *Sun.* Visiting Professor of Law 1952-53, National Taiwan University and Soochow University, Taipei, Formosa, for the Committee for Free Asia (now The Asia Foundation). Participant, Eleventh, Twelfth, and Thirteenth Conferences on Sciences, Philosophy and Religion.

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