



Lawyers and Civilization

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LAWYERS AND CIVILIZATION *

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My theme was suggested by a small book that takes a pessimistic view of the future of civilization. It says "the fateful question" is whether men can master "the human instinct of aggression and self-destruction." For they "have gained control over the forces of nature to such an extent that . . . they would have no difficulty in exterminating one another to the last man. They know this, and hence comes a large part of their current unrest, their unhappiness and their mood of anxiety."

The passage sounds like one of those studies of man in the nuclear age. In fact it is from the concluding paragraph of Sigmund Freud's *Civilization and Its Discontents*,¹ written in 1930. Looking around him in Europe then, Freud had as strong a reason for putting the hands of humanity's clock at three minutes to midnight as the *Bulletin of Atomic Scientists* did in 1945. Aggression and self-destruction are not characteristic of only one period in human history, or one stage in technological development, or one set of economic arrangements.²

Anyone who claims to have invented a particular social or economic arrangement that will assure enlightened human behavior deserves our skepticism. Civilization will always be at risk from the inner nature of its creator, man. Nevertheless, we clearly make matters

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¹ S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 82 (rev. ed. 1963).

² We may note in passing with what prescient skepticism Freud viewed the Marxist notion that man's aggressiveness is caused by the institution of property. In 1930, before Stalin's terror, he wrote: "One only wonders, with concern, what the Soviets will do after they have wiped out their bourgeois." *Id.* 52.

better or worse by the way we organize our societies. We can increase or lessen the external strains and, with them, the individual's ability to deal with his own aggression. A person living under hateful conditions is not likely, unless he is a saint, to be at peace with himself. Freud saw the evolution of civilization as a struggle between what he called Eros and Death, the instincts of life and of destruction. We may find his terms difficult; but accepting them for the moment, we could say that man's inescapable duty is to struggle for social arrangements that will encourage in the largest number of individuals the instinct of life.

I. SOURCES OF PRESENT ANXIETIES

Today many would say that we live in an age of extreme discontent, of fear for the future of civilization. There is always a danger of thinking one's own time uniquely dangerous. Mary Renault, drawing on her knowledge of the ancient world, has warned against this fallacy. In the Stone Age, she says, when isolated human settlements perished of hunger or disease, the last survivor "must have believed himself the last of his kind in all the universe. Our imagination today can scarcely grasp the horror of these lonely deaths."³

It is a nice question whether it would be more horrible to face death in the ignorant loneliness of a Stone Age survivor or in the bitter knowledge of anyone who survived a nuclear or ecological catastrophe in our century. Suffice it to say that there are powerful reasons now for those who are part of the developed world's civilization to feel it threatened. I shall suggest a number of those reasons—by no means an exhaustive list.

The oncoming crisis of the natural environment is for me the first source of discontent. Mary Renault's savage feared the infinite; we are learning to fear the finite. We have suddenly realized, those who have thought about it, that life is sustained by a thin crust of earth and air and water—an environment by no means infinite and already pressed near its limits by industrial society. That awareness shatters tranquility. If we do not shrink from the knowledge, we must recognize that the explosive economic "growth" and "progress" of the last century have been based on a fraud. They are not a self-sustaining process but one dependent on plunder of limited environmental resources. One hardly needs to be a scientist to notice the consequent strains now, the pressures of population, the loss of beauty and amenity. There can be dispute about this figure or that, but only the ignorant or the foolish can believe any longer in the dream of a world with two cars in every

³ Renault, *The Survivor and the Hero*, ENCOUNTER, Dec. 1971, at 94.

garage. We shall survive only by the most heroic change in the ethos of our civilization, from growth to stability, from wasting to conserving.

In politics as in the environment there is a sense of things being out of control. We live in a world of juggernauts—aggregations of scientific and industrial and military power so huge and so remote from us that we wonder whether any government can regulate them. Doubt, even despair, is understandable when the citizen finds that a democratic system apparently provides no way of stopping an unwanted war. If our political leaders do not or cannot stand up to the road-builders and the concrete-manufacturers, can we have confidence in their will or ability to stop the mad accumulation of weapons of mass destruction? As the problems grow larger, the politicians seem smaller. Does despair somehow breed political mediocrity, or is that only an illusion, a trick effect? The difficulty of control may arise not only from concentrated power but from a phenomenon at the other end of the contemporary scale: the triumph, especially in the United States, of the revolution of individualism. There is no turning back now from the idea of individual responsibility and freedom; we cannot again merge our identity with that of king or priest. But there does seem to be a price. A society without the cohesion of shared beliefs, with little deference to rank or tradition, can be an undisciplined society, selfish, even corrupt to judge by what we are learning about American law enforcement these days. Certainly it is a society difficult to govern.

A third area of concern, after the environmental and political, is the economic. Here again liberal optimism has been confounded. The Western World has had a period of spectacular prosperity and growth. But the result in human terms, even putting the ecological problem aside entirely, has been less than satisfactory. We might have expected on the one hand more individual contentment from private prosperity, on the other a better social infrastructure from public investment. We have neither. We have a society of lonely people who know that possessions have not made them happy yet remain so greedy for more that they feed inflation and keep public life in a state of squalor. Nor has our prosperity been used to narrow the socially destructive gap between rich and poor. The distribution of income is no more egalitarian than it was in the bad old days. The rich grow richer, and some of the richest still pay less of their income in taxes than the rest of us. What is one to say of a country in which hundreds of thousands of people do not have enough to eat but a single family *reports* spending \$4.6 million to elect one of its own governor of New York? ⁴ A hundred years after Disraeli we still do not understand that allowing two nations to exist

⁴ N.Y. Times, Nov. 28, 1970, at 24, col. 3.

within a society threatens the whole. But it is not only the discontent of those *most* deprived that should worry the United States; all of us are damaged by a system devoted to the promotion of personal wealth.

Finally, among the reasons for concern, I mention some social and psychological disappointments. For American liberals the most immediate is the state of relations between black and white. Gunnar Myrdal, when he published *An American Dilemma* in 1944, spoke of the Negro problem as both America's greatest failure and her greatest opportunity. We had only to follow the "deepest convictions" of our moral history and end discrimination, he said, to increase our well-being at home and our prestige abroad immensely. "America can demonstrate that justice, equality and cooperation are possible between white and colored people."⁵ We shared that optimism and thought the necessary process of change had begun in 1954. It had, but race turned out to be an immensely more complicated question than we had understood. Nowadays some would even doubt Myrdal's admiring assumption about America's "deepest convictions." We have been told by an official commission that the white majority has an intractably racist strain in its attitudes.⁶ Many whites, for their part, understandably fear black racism. The whole question of race has become mixed up with the American social illnesses of crime, violence, and urban decay. But racial hate and fear are not unique to the United States, nor is disappointment at their continuing reality. Indeed, liberal thought everywhere embodied the hope that as man freed himself from dogma and took responsibility for his own actions, he would put aside the intolerant cruelties of his history. To speak of that hope leaves a bitter taste after the Nazi death camps and Stalin's terror. And those episodes have still not taught us enough. All over the world men continue to torment one another for reasons of race or color or religion or politics or ideas. Whites commit callous cruelties to blacks in South Africa; Moslems kill Moslems of a different origin in Bengal; Christians hate other Christians in Northern Ireland. In the Soviet Union the psychiatric ward has joined the Arctic labor camp as punishment for dissent. Every continent has had its recent victims: Greece, Nigeria, Brazil, Vietnam.

II. FORMS OF REACTION: REJECTION OF REASON

It is an age of extremes: of prolific life and automated death, of mass education and mass foolishness, of unexampled wealth and novel forms of misery, of science that ennobles the human spirit and science

⁵ G. MYRDAL, *AN AMERICAN DILEMMA* 1021 (rev. ed. 1964).

⁶ NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 91 (1968).

that could unravel all life. With due caution for the fallacy of gloom about one's own time, I think those who live in the last third of the Twentieth Century are entitled to feel that they live under extremely testing conditions. At any rate many do believe it, and their belief has consequences of its own. When people think their civilization is at the edge, they may react in extreme ways.

One characteristic reaction of our day is a deadly violence of language. We know the slogans: "burn, baby, burn," Jerry Rubin's "kill your parents" and a hundred others. I went to an Angela Davis rally in London last year; because the tone of most discourse in London remains so polite, the angry words in the hall made more impression than they might here. The United States was called "a fascist military state," its courts and legislatures determined on "genocide" of black people. Such rhetoric is deadly in two senses of the word. First, it numbs perception by its hyperbole; it clouds meaning; it strikes at the purpose of language, communication. If one throws the word "fascist" at the United States, where for all that is wrong there remains an astonishing freedom of expression, what is there left to say about places where repression really exists? How would one explain to Aleksandr Solzhenitsyn? But such violence of expression is not only costly to truth but deadly in the sense of dangerous, because it encourages violence of spirit, violence in deed. The Nazis spoke their racial fantasy before they acted it; so did the members of Southern lynch mobs.

It is an old illusion to conceive of the world as divided into good and evil classes of beings. That makes life so simple. Instead of having to think, the angry man simply identifies the enemy—capitalists, Jews, "pigs"—and announces that utopia can be achieved by wiping them out. Unfortunately, reality is more complicated, the distribution of good and evil in humanity more subtle. How odd to have to say that. It verges on the incredible that Manichean thought persists in the face of awareness that aggression is a problem of individual psychology, an instinct from which no group or person is exempt. It is especially sad when young radicals mimic the emotional-ideological generalizations of the past, only with different targets. We count on them to understand better than previous generations that social problems involve human beings, complex creatures who cannot be lumped together under slogans, and that problems are not solved by fantasies of mass slaughter. But our culture is expert at producing fantasies. Film techniques are so artful that they can turn violence into a poetry of vision and sound.

In addition to the various ideological doctrines of absolute good and evil, we have what could be called cults of irrationality. There are

those who seek the answer in mysticism, as there have been in every age. There are some who act out their aggressive dreams in bombing or murder without rational motive. There are even those who in the name of mental health preach the holiness of unreason. The pocket Savonarolas of our day have numerous followers. It must be that, as at the end of the Fifteenth Century, people mistake signs of deep change in the organization and values of society for the approach of the apocalypse.

In all these phenomena—the use of language as an assault, the appeal of violence, the spread of mysticism and unreason—we may see signs of an unwillingness to face the difficulties of social existence. It is the old wish to resign from civilization because it is so trying: “Stop the world, I want to get off,” as the title of a Broadway musical has it. Freud had a particularly piercing insight that is apposite here. Confessing that he could not meet the desire of his fellow men for prophecy, he said: “I can offer them no consolation: for at bottom that is what they are all demanding—the wildest revolutionaries no less passionately than the most virtuous believers.”⁷ Consolation indeed.

The rejection of reason and moderation is not a new development in Western thought. There is a romantic strain going far back that sees man at his noblest when he lays thought aside for passion. The archetype among political writers is Georges Sorel, who thrilled to both the Bolshevik revolution and the rise of fascism.⁸ What astonishes and distresses many people is that the violent and the irrational should have such wide appeal in an age when man has mastered technology, when at last he can plan his existence. But that precisely misses the point: What we have done in the name of reason inspires rebellion.

The society developed by the bureaucrats and the scientists and the businessmen ought to give anyone ground for concern. We all know how much empty commerce there is in it, how much vulgarity and covetousness, how little moral purpose. The writers of books about the repellent values of the consumer society have had the ironic triumph of commercial success because they strike a sensitive chord in ordinary people. But the indictment is more severe. For this supposed century of the rational has produced crimes against the human spirit as fearful as any in those past ages we call dark. Men who thought themselves civilized led two-year-old children by the hand to concentration camp incinerators. Others have tried to advance Western ideals by bombing a peasant society and poisoning its vegetation. The most con-

⁷ FREUD, *supra* note 1, at 82.

⁸ See Berlin, *Creighton Lecture*, reprinted in *The Times* (London), Dec. 31, 1971 (Literary Supplement), at 1617.

ventional of us middle-aged, middle-class liberals should have learned a great deal in the last few years about what can be done under the claim of reason.⁹

The question is whether the failures of our society are an argument against reason itself. Those who reject the notion of civilized order are fortified in that view by the fact that they live after Freud and can cite him on the importance of emotion in the life of man, the psychological cost of burying the instinctual passions. We must give full play to the instinctive drives, they say, to the dark side of man, to the unconscious.

But if the attempt is to enlist Sigmund Freud on the side of unreason, that is a farcical misreading of his teaching. The supposed prophet of the unconscious said, in a letter to Albert Einstein: "The ideal condition of things would of course be a community of men who had subordinated their instinctual life to the dictatorship of reason."¹⁰ Freud knew the power of emotion, of instinct, but his hope was that reason would prevail. "The voice of the intellect is a soft one," he said, "but it does not rest until it has gained a hearing. Ultimately, after endlessly repeated rebuffs, it succeeds. This is one of the few points on which one may be optimistic about the future of mankind" ¹¹ Professor Richard Wollheim, to whose book on Freud I owe deep acknowledgment, put it that Freud thought man's mind was swayed by rational considerations "once it listens to them. But . . . he will, when comfort demands it, do all he can not to listen to them. Freud's life work, we might say, was a research into the deafness of the mind."¹²

Freud's point was not that the unconscious should prevail but that its existence should be recognized. He taught that no one can safely deny the emotional life. He might have said that the civilized ideal is reason, but that nothing deserves the name of reason unless it acknowledges the emotions.

⁹ An outstanding recent example of unreason done in reason's name is illuminated in this comment on Lyndon Johnson's memoirs:

It is extraordinary, and terrifying, that a President of the United States can write hundreds of pages about a war he directed, discuss in detail dozens of decisions to start and stop bombings for tactical and political reasons, and give no sense that he knew these bombs killed people.

Dworkin, Book Review, 87 THE LISTENER 88, 89 (1972).

¹⁰ 22 S. FREUD, *Why War?*, in STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS 213 (1933). Freud indicated his view of emotion's place in a rational world:

Our best hope for the future is that intellect—the scientific spirit, reason—may in process of time establish a dictatorship in the mental life of man. The nature of reason is a guarantee that afterwards it will not fail to give man's emotional impulses and what is determined by them the position they deserve.

New Introductory Lectures on Psychoanalysis, id. 171.

¹¹ S. FREUD, THE FUTURE OF AN ILLUSION 93 (1955).

¹² R. WOLLHEIM, FREUD 234 (1971).

Those who tell us that our assumptions must change are quite right. If anything is clear, it is that more acquisitiveness will not solve the problems of either contemporary society or its individual members. But I find it hard to believe that the immense shifts required in values and social organization will be brought about by grass growing up through the sidewalks. I understand and indeed admire young people who express their discontent with the acquisitive ethic by trying to work abandoned farmland or make furniture. But if the most idealistic members of the next generation give up on organized society, who will lead the way to necessary change? I think also that there are dangers in medievalism. I shall never forget a course I had at Harvard with Gaetano Salvemini, a refugee from Mussolini's Italy, elderly, with a white beard, but uncompromisingly passionate. The course was on the Italian Renaissance. The first day, Salvemini noted that there had lately been a revival of admiration for the Middle Ages, for medievalism. He then read us a chronicle of the period before the Renaissance, the diary of a monk who lived in perhaps the Eleventh Century. The monk recorded what he saw around him in decaying Rome: plague, violence, famine, finally people cutting up the dead for food. Salvemini looked up, his eyes flashing, and said: "This was the middle ages: cannibalism!" We must take care that in rejecting an empty technological society we are not misled by romance into savagery.

III. THE LAWYERS' ROLE: CONSCIENCE AND SOCIAL INSTRUMENT

My subject is Lawyers and Civilization. If you have followed this far, you may feel that there has been a good deal of moody speculation about one but nothing about the other. What have lawyers to do with civilization and its discontents?

When Freud sought to define civilization, he spoke of technological accomplishment and the love of beauty. He mentioned cleanliness, order, and respect for ideas. But "the decisive step of civilization," he said, was the replacement of brute force, the individual's power, by "the power of a community."¹³ And so he concluded that civilization's first requisite was justice: that is, law administered impartially, for the community's sake, without favor to any individual.

If law plays so critical a role in the civilizing of man, then in a time of discontent about society, the doubts will inevitably go to law itself. Sixty years ago, Holmes spoke of an "unrest that seems to wonder vaguely whether law and order pay."¹⁴ That is certainly one feature

¹³ FREUD, *supra* note 1, at 32.

¹⁴ O.W. HOLMES, *Law and the Court*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 169 (1962).

of our distempered age. I think again of that London rally for Angela Davis. One of the speakers talked of the crime that Miss Davis was charged with assisting, the seizure of a California judge at gunpoint. The speaker praised the kidnappers for not having been "deterred by the mystique of the courtroom itself." Others shouted, "power to the people."

"Power to the people." Would minorities in the United States really benefit from a populist system without respect for law, without the restraints of the Constitution? Would they be better off without "the mystique of the courtroom?" They ought to shudder at the idea. American history has enough cruelties on its pages. How much worse they would have been if there were no limits—limits enforced by law—on the power of the majority to stamp out unpopular views and treat particular groups as outcasts.

A lawyer, one who calls himself radical, wrote recently: "[I]n the last analysis, due process of law is exactly what the high and mighty say it is."¹⁵ That statement could be taken as a mere truism, because our constitutional ideas of due process are defined from time to time by a handful of highly-placed judges. But plainly the author meant more; in the phrase "high and mighty" he was suggesting that judges are mere mouthpieces for the dominant forces in American society. Of course law and the courts have played a repressive role in the United States from time to time. Of course Supreme Court justices have not always been progressive-minded: far from it. But with all that, I put it to you that the radical lawyer's statement is concentrated nonsense.

For a very long time, as we measure history these days, American courts have been vindicating rights that could hardly be called the program of the reactionary power-brokers. As long ago as 1925 the Supreme Court defined "due process of law" to protect freedom of speech.¹⁶ Was that the cynical wish of the high and mighty? Was it when the Court in the 1930's upheld the right of Communists to assemble freely,¹⁷ or of extremists to publish an anti-semitic newspaper?¹⁸ Was it, in the same period, when the Court said that a criminal conviction based on a coerced confession did not provide due process of law?¹⁹ When it held that the due process clause guaranteed free counsel to poor

¹⁵ Kunstler, *Open Resistance: In Defense of the Movement*, in *LAW AGAINST THE PEOPLE* 267, 268 (R. Lefcourt ed. 1971).

The eventual acquittal of Angela Davis at trial could be regarded as a comment on the whole thesis that law is only what those who hold political power in society want it to be.

¹⁶ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁷ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

¹⁸ *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

criminal defendants?²⁰ Or when, in the 1930's, it began the long series of cases establishing that segregated public education denied the equal protection of the laws?²¹ All this was before anyone considered the Court an instrument of liberal reform.

Even the failures of the Supreme Court on issues of civil liberty may serve a purpose. The majority was insensitive to the claim of free speech during World War I, but we remember Holmes on free trade in ideas.²² Another majority found no constitutional limits whatever to official wiretapping, but we remember—and a later court applied—Brandeis' warning that "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."²³

The point missed by the radical critic is that the *process* of constitutional adjudication, whatever the result, focuses attention on moral considerations. There are closed minds in the Supreme Court on this issue or that. But on the whole it is a more open forum, more subject to persuasion, less moved by money or influence than any other institution of government. Anyone who sits in that courtroom and watches even briefly must be impressed by the simplicity of access, the directness of the process, the very real consideration given to interests that have little power in the material world. The Court listened to blacks when Congress did not, and to Communists, and to pornographers. Would prisoners under death sentence be more likely to get a sympathetic hearing today from a state governor or legislature or from the courts? It would be very hard to convince me that the despised and rejected in our society would be better off if we gave up our vision of law in Freud's sense, one marked by detachment, and went over to what could be called revolutionary justice, committed to particular interests.

The cynical view of American justice seems to me a corruption of something healthy—the skepticism of the realist critics. Holmes taught that law was not logic or eternal truth, as judges liked to pretend, but the reflection of a people's experience and, sometimes, of a judge's conscious or unconscious sympathies. But from that insight he hardly argued that impartiality or detachment were useless judicial objectives. Quite to the contrary. He wanted all those involved in the law-making

²⁰ Powell v. Alabama, 287 U.S. 45 (1932). In Betts v. Brady, 316 U.S. 455 (1942), this holding was construed to require appointed counsel only in capital cases or those posing special circumstances. *Betts* was overruled in Gideon v. Wainwright, 372 U.S. 335 (1963), holding that indigent state criminal defendants were constitutionally entitled to free counsel in all serious cases.

²¹ Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

²² Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

²³ Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion). *Olmstead* was subsequently overruled. Katz v. United States, 389 U.S. 347 (1967).

process to become aware of their own biases—of the Can't Helps in their makeup—so as to guard against being pushed too far by them.

I thought it was wrong, during the years of the Warren Court, when some civil libertarians urged the majority to press its views without a sense of restraint or moderation. One law professor asked rhetorically whether we could imagine some future conservative justice restraining his natural tendency to declare minimum wage laws unconstitutional because, years before, Justice Frankfurter "had commendably restrained himself from using the judicial power vigorously to protect free speech."²⁴ He assumed that the answer had to be no, but I think it is yes. I *can* imagine judges, liberal or conservative, conscientiously reflecting on history and their function and moderating a view. Perhaps it is naive, but I continue to believe that Supreme Court justices should have other objectives than advancing their private certainties in every case.

To confuse law and politics may have dangerous consequences. Consider a somewhat grotesque example. Last summer the Supreme Court of South Vietnam ruled Nguyen Cao Ky out of the presidential election because, it found, he had not met the requirements of the election law. But when only the incumbent president, Thieu, was left on the ballot, that proved embarrassing to Mr. Thieu. The Court thereupon reversed its decision and put Ky back in the race. Why? One of the nine justices, when asked, said: "It was better to have two candidates rather than one."²⁵

At just about the same time last summer, President Nixon was being widely praised by liberal commentators for élan and decisiveness in reversing his established positions on China and the economy.²⁶ Why, then, did it seem so shocking, even absurd, for the South Vietnamese court to reverse itself on prudential grounds? Because we expect something more of courts than pragmatism. We expect principle, an attempt at rational persuasion—and if of course not perfect consistency, then at least reasoned continuity. Change in judicial law should appear not as an abrupt break with an inconvenient past but as the result of a process of reconsideration required by reason and experience. I am convinced that that concept of law fills a deep need in society and that we corrupt it at our peril. Especially in this age, when tradition and authority are so weak and the ties of community under such strain, we need law as a source of authority deeper than temporary passions.

²⁴ Black, *Old and New Ways in Judicial Review*, BOWDOIN COLLEGE BULL., Mar. 1958, at 17.

²⁵ N.Y. Times, Aug. 23, 1971, at 2, col. 1.

²⁶ See, e.g., Shenker, *Galbraith Corrects Galbraith's Errors*, N.Y. Times, Aug. 25, 1971, at 39, col. 7.

One more word on radicalism and law. We have lately had a political trial in which law became theater—the theater of the absurd. Lawyers joined their clients in showing disregard for the system by heaping indignities upon the judicial process. There had been extreme provocation: I have no doubt of that. But I fail to see how the damage done by a malicious judge could be cured by defendants and their counsel behaving like delinquent schoolboys. The answer to unreason in a courtroom is not more unreason. Nor is that the courageous course, as some would have it who romanticize the affair. Both courage and wisdom would have lain in responding to indignity by dignity. Lawyers should be the last people to indicate, by example, that disorder is likely to increase the sum of human wisdom. And lawyers as well as judges might think humility a quality worth cultivating. It is only fair to add that some pillars of the bar, in focusing upon defense counsel's behavior at the Chicago trial, show a certain one-sidedness. The judge's performance was at least as worthy of attention, and it would have been reassuring to see the organized bar showing concern about it at a very early stage.

It must also be said that there are some things more important than decorum in a courtroom. Decorum no doubt conduces toward the better administration of justice. But it is not a substitute for, nor should it be confused with, justice itself. The observer at a South African political trial will see how decorous and courteous the proceedings are, but how relevant is that to the justice of the judge's verdict or to the law he applies to reach it?

When the American Bar Association met in London last summer, much admiration was expressed for the decorum of English trials: the civility of counsel, the expertness of judges, the speed of proceedings. It is quite true that the scene in the law courts on the Strand is swift and orderly by our standards. The American profession would do well to emulate the competence of English trials and the dignity of their setting. But it would be quite another thing to suggest, as I thought I heard implied last summer, that Americans should take over the attitudes of the English bench and bar in general.

The admirable decorum in the English profession is accompanied by a less desirable remoteness from the concerns and passions of ordinary life. Not only in Dickens' courtroom is there the sense of a faint sneer, of a disdain for humanity. The English bar, with perhaps two thousand practicing members, is a club; judges are a more refined inner group. They are naturally not uniform, but as a generality it is not unfair to suggest that the English bench and bar seem to regard the rest of the world as something unkempt and more than a little nasty,

something to be kept at a distance. If that appears a harsh judgment from a foreigner, I give you the words of Lord Goodman, a distinguished member of the solicitors' branch of the English profession: "The Bar," he said, "has a coy terror of the human race."²⁷

The remoteness of English lawyers enables them to remain quite detached from the interests of their clients. That has great advantages: it protects a barrister from ostracism if he represents an unpopular client. But I think that is only possible because law in general in Britain is kept so distant from public issues. Courts hardly ever pass on social or political questions of the kind that are regularly framed in lawsuits in the United States. When a man wants to change the system of legislative representation or of race relations, he does not consult a lawyer. Nor do British lawyers play the same critical role as Americans in the affairs of business, labor unions, political parties, and government bodies.

Because the function of the American lawyer is different, he cannot be expected to have the same degree of detachment. Perhaps in theory one ought to be able to argue a case about the fourteenth amendment and capital punishment with the same detachment as one about a commercial contract. But in the real world, lawyers who are engaged in great social and political issues must be more committed than would be appropriate in the Strand. I do not regret that. I feel as Professor Benjamin Kaplan of Harvard evidently did after a year in London observing that legal system. "The American scene is disordered," he wrote, "but it is lively."²⁸

The larger question is whether it is a good thing for American law and lawyers to have the social function that they do. In Britain there are other means, notably a responsive Parliament, for dealing with the public discontents that are part of a lawyer's life here. I think doubts are growing among the British about the adequacy of the parliamentary forum. But in any case history rules out a narrowing of the lawyer's function in this country. We have come to rely too heavily on the law as a medium of social change. If we were suddenly to remit the discontented now to Congress and the state legislatures, the result could only be more frustration and social explosion.

After the bar meeting in London I wrote a column²⁹ suggesting that, in all the ceremonies of that occasion, the British could not have got a real sense of the extraordinary role of law in the United States—its function as conscience and social instrument. I mentioned the

²⁷ 69 *The Law Society's Gazette* (London), No. 1, at 10 (1972).

²⁸ Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 837 (1971).

²⁹ Lewis, *The Profession of Law*, N.Y. Times, July 26, 1971, at 25, col. 1.

radiating influence of a written constitution regularly reinterpreted by judges. I said that American legal education was much more challenging than English, the law schools a greater source of public ideas and public servants. I recalled Charles Evans Hughes fighting for the rights of socialists in 1921, and I noted some of the reforming and crusading movements of our day: poverty law, with its challenge to social assumptions; the consumer movement and its widening influence, inspired by Ralph Nader; the legal criticism of American war-making in Vietnam, led by men such as Francis T. P. Plimpton.

That column evoked a letter to the editor from Lois Smallwood of Bethesda, Maryland. "We who live down here on Main Street do not recognize the lawyer Mr. Lewis describes," she wrote.

Yes, we have a Ralph Nader, but at least 200,000 of his fellow lawyers have not yet achieved his level of moral development.

Yes, Charles Evans Hughes did show moral courage in 1921. Some unknown thousands did not.

Yes, Francis Plimpton does stand solidly against the Vietnam war, but a majority of the bar and judiciary have made no such public commitment. . . .

Where was the organized bar and judiciary in the red-baiting days of the 1950's?

[Mr. Lewis] has looked at the few great spirits who spend a lifetime swimming upstream against the apathy, greed, arrogance and almost total lack of social responsibility in their profession.³⁰

I am more optimistic than Mrs. Smallwood about American lawyers and about America. It remains a remarkably open society, one that can change. Just consider the racial question. There are still terrible disadvantages in being black, and no one can deny the existence of fear and hatred on both sides. But only someone who forgets where we were twenty years ago can deny the fact of progress. A recent survey showed nearly fifty percent of Southern whites in favor of integrated schools.³¹ It is not utopia, but it is dramatic evidence of change in attitudes.

Most of the change in race relations has been brought about by law. In this and other fields a public role has been played not only by the occasional great figure at the bar but increasingly by young lawyers and law students. The other day a young man from Tennessee told me

³⁰ N.Y. Times, Aug. 7, 1971, at 22, col. 5.

³¹ Greeley & Sheatsley, *Attitudes Toward Racial Integration*, SCIENTIFIC AMERICAN, Dec. 1971, at 13, 14.

about a local effort to make absentee owners of coal land in a poor valley pay a fair share of taxes and take responsibility for the effects of strip mining. Listening to him, I thought how characteristically American the story was. That kind of community legal crusade simply does not exist in Britain.

But still I wonder about Mrs. Smallwood. Is she wrong in saying that much of the American legal profession is sunk in apathy and greed? I remember when those trying to carry out the law of the land on race relations were met in some areas by official intimidation and perversion of the legal process itself; the organized bar did at length respond to that challenge, but only after much doubt and delay. How sensitive and helpful a role has the bar played on the question of war crimes in Vietnam, surely one of the most important tests this country's fidelity to law has ever faced? When the Supreme Court was under know-nothing attack in the late 1950's and 1960's, why did the organized bar sit silently by—or even join in the unworthy criticism?³² Mrs. Smallwood's doubts are not so easily put at rest.

The American legal profession has a duty to civilization. We cannot expect a company of heroes; the profession is too large and heterogeneous for that. But as a body it has a social responsibility that it will not be allowed to shirk. We depend too much on law, as a look back at our discontents will show.

If we had to characterize all the felt concerns of civilization today in a single phrase, I think we would speak of a sense of disintegration or, conversely, of a yearning for wholeness. In the natural world there is the fear that we have broken the life-sustaining circle of growth and decay and renewal. In the political society there is a loss of community: at the same time an atomization of groups into lonely individuals and a growth of remote power centers. In social and economic terms we feel a dangerous lack of wholeness, for people excluded from the benefits of a civilization on account of race or poverty or some other characteristic are unlikely to have much stake in civilized behavior. And finally there is concern for the wholeness, the integrity, of the individual. When any American citizen is abused by authority, or for that matter any Czech or Irishman, we are all diminished.

To list those concerns is to make clear the relevance to them of law and lawyers, especially in the United States. American law has focused to a remarkable degree in recent years on issues of social and individual integrity. The greatest single reforming effort has been the struggle

³² See, e.g., Resolutions and Report of the Special Committee on Communist Tactics, Strategy and Objectives, 84 REP. OF THE AM. BAR ASS'N 607 (1959). A committee of the Association of the Bar of the City of New York, it should be noted, criticized this report. 14 RECORD OF N.Y.C.B.A. 241 (1959).

to end racial separation in American society. Now attention has begun to turn to the rights of the poor as a class.³³ We can be sure that ecological concerns will follow, that the law will be used in attempts to make particular economic interests give way to a larger public interest in restoring the circle of nature. In politics, the courts have acted dramatically to restore the integrity of the system by insisting that democratic assemblies be representative.³⁴ And of course the theme running through all the Supreme Court's criminal law decisions that have aroused so much controversy—on confessions,³⁵ the right to counsel,³⁶ search and seizure,³⁷ and the like—is the need to protect the integrity of the human spirit. This reforming thrust of American law and courts is not going to die away. On the contrary, I put it to you that there will be increasing reliance on the legal process to deal with the forces threatening civilization. Society is losing confidence these days in the ability of governments to govern, and for good reason. Central authorities in this and other countries simply are not able to cope with the most obvious and serious problems; political will seems to be failing. In that situation the advocates of change will inevitably look for means outside of politics, and one path is the law. Judge Wyzanski wrote recently of his concern about the rising burden on the courts. Like it or not, he said, they will have to be prepared to resolve more social issues. "A passionate reformer," he said, faces "inertia, hostility and incompetence if he takes his cause to Congress or the Executive departments," but he can with "ease" get his plea heard in court.³⁸ So there he will go.

If the courts to some extent do replace Congress and the Executive as instruments of change, there may be a paradox for critics of the judicial function. One critical line, from Thayer through Holmes and Brandeis and Frankfurter, has argued that courts serve democracy by leaving the principal issues for decision by the political branches of government. But those critics were also believers in federalism, in the diffusion of power. At a time when state governments are increasingly impotent, when the democratic political process is often blocked, one effective way of diffusing power is arguably to let issues work their way through the legal system, for that leaves some initiative to local,

³³ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state courts must entertain civil divorce actions by impoverished persons without requiring payment of filing fees).

³⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964).

³⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁸ Letter from Charles E. Wyzanski, Jr., Senior United States District Judge, District of Massachusetts, to the author, Jan. 31, 1972.

community, and private interests. One thinks that Brandeis, the incandescent advocate of federalism, would have seen it that way in today's situation.

But law is not a mere substitute for politics. Law has its own qualities and must be true to itself. For me the essential quality is a concern for process, not just results. Freud said the first requisite of civilization was justice, meaning an assurance that the rules would be applied to all without favor. I would phrase it slightly differently, though perhaps I mean the same. I think a civilized society is one that cares about means as well as ends.

If we look at the United States today, do we not sense, underneath all the disappointment and frustration over particular matters, an aching doubt about the *mechanisms* of our society and *their* integrity? It is not just the American lives lost in Vietnam that trouble us, or the damage we have done there in a dubious cause. It is the feeling that our leaders took us into Vietnam, and have kept us there, by concealing or distorting the truth. It is not only the discovery that American soldiers massacred women and children that horrifies us; it is our awareness now that nowhere in the entire machinery of command, from the field through the Pentagon to the President, was there enough courage, enough faithfulness to our proclaimed belief in law, to accept moral responsibility for uncovering and punishing the crimes. There is a domestic parallel in the killings at Kent State. The horror of those deaths is almost exceeded by the corrupt cynicism of the authorities, state and federal, in failing to seek the truth about them. In law enforcement generally there are worrying signs of the doctrine that the end justifies the means: the use of the investigative process to intimidate,³⁹ the official claim of a constitutional power to tap telephones without any effective restraint.⁴⁰ The men of zeal may win applause in the short run when they break the law in the name of enforcing it. But eventually, as Brandeis said in the wiretapping case, that "pernicious doctrine" must bring "terrible retribution."⁴¹ In Americans' concern for the honor of their institutions the retribution may be there already.

IV. CONCLUSION

Nations, like individuals, should know themselves. The price of ignorance is folly, and sometimes destruction. Perhaps here we can see a special role for lawyers. If Freud's life work was research into the deafness of the mind, then in a society as pervaded by law as ours

³⁹ See, e.g., N.Y. Times, Nov. 11, 1971, at 95, col. 4 ("F.B.I. Investigates Schorr of C.B.S.").

⁴⁰ United States v. United States Dist. Court, 444 F.2d 651 (6th Cir. 1971).

⁴¹ Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion).

we count on lawyers to attack the national deafness—that is, to strip away the illusions that are comfortable but obstruct reason.

I suggest twin models for that function: Freud and Holmes. They doubtless seem an odd pair to put together, the Viennese Jewish doctor and the Olympian Yankee lawyer, but they shared something fundamental: a belief in reason moderated by an awareness, after looking into themselves, of the imperfectibility of man.

They were both in a sense Victorians, born into a strongly moralistic tradition. Both surmounted that background and then, with singular courage, went through terrible personal struggles to achieve at length a skeptical serenity. For Holmes the first test was war.⁴² He survived three grave wounds in the Civil War, an experience that played its part in shaping his lifelong state of doubt about men's certainties. As a judge he insisted on looking for concealed motivations in his own and others' truths; he called them "can't helps" and said truth could be defined as "the system of my (intellectual) limitations."⁴³ At the age of eighty-seven he rejected pacifism but was able to say, against a majority of his colleagues, that a pacifist should not be excluded from American citizenship because she believed "more than some of us do in the teachings of the Sermon on the Mount."⁴⁴ Freud had to overcome Vienna's contempt for his race and for his ideas.⁴⁵ He put himself through a heroic effort of self-analysis that confirmed his findings on infant sexuality. Finally, amidst increasingly difficult political circumstances, he struggled for fifteen years against a wasting illness. Yet both men, through all their internal doubts and external troubles, maintained a faith in reason—in civilization. Holmes, speaking of the future sixty years ago, foresaw racial turmoil and spoke of a "fear that we are running through the world's resources at a pace we cannot keep." But he ended that prophecy with the hope that "man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace."⁴⁶

Many would find it hard now to look to the future with the faith of Holmes or with the courage of Freud, who relied on no faith except belief in reason. There lies the great challenge to the profession of law. Even as authority diminishes in every sphere—family, school, profes-

⁴² For the leading account of Holmes' early years, see M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS* (1957), *THE PROVING YEARS* (1963).

⁴³ O.W. HOLMES, *Natural Law*, in *COLLECTED LEGAL PAPERS* 310-11 (1920).

⁴⁴ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (dissenting opinion).

⁴⁵ See generally E. JONES, *THE LIFE AND WORK OF SIGMUND FREUD* (1957).

⁴⁶ O.W. HOLMES, *Law and the Court*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 173 (1962).

sion, politics—we still feel a deep yearning for order. But it must be an order made tolerable by reason and humanity, not the order of the grave. At a time of disturbance in nature and society and the individual, the function of law must be to show that reason remains the best hope of man. Every act in the name of law should ideally be an answer to those who say law is nothing but the will of the high and mighty. It is will, but will with the duty to understand and to persuade. The lawyer's obligation is to the open mind. He must eternally try to square the moral necessity for equality with the experienced need for diversity, our craving for ordered tranquility with our irrepressible desire for freedom. It is no accident that those are the themes of American constitutionalism. In this society I believe there is no higher calling than the law.