RHETORIC, CONSISTENCY, AND HUMAN PROGRESS, LEGAL OR OTHERWISE†

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There is a passage towards the end of the monumental *Treatise of Human Nature*, in which Hume addresses himself to the question of how good government and human progress are at all possible. Hume, it will be recalled, starts from two important premises: first, that men are naturally endowed with only limited altruism; and second, that they have a natural tendency to prefer short-run advantages, even at the expense of what is in their long-term interest. How then is the material and social betterment of the human condition possible? To answer that question in the affirmative—because Hume does have an optimistic view of man's possibilities—Hume resorts to an ingenious expedient. He suggests that an affirmative answer is possible because in a well-functioning society, such as the Great Britain of his day, one can create a class of leaders and load them down with economic and social advantages. One thereby creates a ruling class which has a short-term interest in maintaining the stability and proper functioning of society. More than that, through this arrangement, one can do more than maintain the *status quo*. In Hume's own words:

> But government extends farther its beneficial influence; and not contented to protect men in those conventions they make for their mutual interest, it often obliges them to make such conventions, and forces them to seek their own advantage, by a concurrence in some common end or purpose. There is no quality in human nature, which causes more fatal errors in our conduct, than that which leads us to prefer whatever is present to the distant and remote, and makes us desire objects more according to their situation than their intrinsic value. Two neighbors may agree to drain a meadow, which they possess in common; because 'tis easy for them to know each others mind; and each must perceive, that the immediate consequence of his failing in his part, is the abandoning the whole

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> project. But 'tis very difficult, and indeed impossible, that a thousand persons shou'd agree in any such action; it being difficult for them to concert so complicated a design and still more difficult for them to execute it; while each seeks a pretext to free himself of the trouble and expence, and wou'd lay the whole burden on others. Political society easily remedies both these inconveniences. Magistrates find an immediate interest in the interest of any considerable part of their subjects. They need consult no body but themselves to form any scheme for the promoting of that interest. And as the failure of any one piece in the execution is connected, tho' not immediately, with the failure of the whole, they prevent that failure, because they find no interest in it, either immediate or remote. Thus bridges are built; harbours open'd; ramparts rais'd; canals form'd; fleets equip'd; and armies disciplin'd; every where, by the care of government, which, tho' compos'd of men subject to all human infirmities, becomes, by one of the finest and most subtle inventions imaginable, a composition, which is, in some measure, exempted from all these infirmities.[1]

One must admit that Hume makes a noble effort, but it is fairly clear that his solution to the question he has posed is unsatisfactory. For one thing, Hume has not told us how to identify the long-term interests of society. The most he has done is to show how the perceived short-term and intermediate-term interests of a substantial portion of the population can be translated into community goals. But what if the short-term interest of the governing elite—such as, for example, their interest in retaining their offices and privileges—conflicts with the long-term interest of society? Every society, for example, has had its Watergate. And, if Watergate is an extreme instance in our own society—as I believe it is—it would nevertheless be naive not to recognize that, if the prize is great enough, there are few indeed among us who would be above pandering, to some extent, to the short-term interest of substantial segments of the populace, i.e., to the prejudices of what is pejoratively called "the crowd," in order to win the prize.

What are we to conclude then? That there is no room for optimism about the future of humanity? I appreciate that what might be considered human progress is not altogether free from controversy. I start from the premise, however, that a society in which the life span of the average person is dramatically greater than it was, in which most people are literate, in which it has been possible to achieve such great expansions of human knowledge as the development of atomic theory and the discovery of DNA, in which slavery has been abolished, and in which there is a positive commitment to

1. D. HUME, A TREATISE OF HUMAN NATURE, bk. III, § vii, at 538-39 (L. Selby-Bigge ed. 1888).

the social and legal equality of the sexes, is a better society than one which has not achieved these results. I submit that Western society is a society which has indeed succeeded in producing these results, and that it is thus meaningful to talk about human progress. But to return to Hume's question, how has this progress been possible? In particular, how has it been possible, despite all the countervailing short-term pressures, to free the human mind of the shackles which would have limited the scope of human inquiry? How has it been possible to make such tremendous progress in granting to all men and women social equality?

I would suggest that the answer lies in large part in man's power of speech, in the fact that man has a tendency to become trapped by his own rhetoric. Western man at least—I say at least because I know Western man best but I strongly suspect that all men are similarly inclined—is naturally given to pontification. It seems to be a function of human nature. Talk, of course, is easy when no significant practical interests are at stake. Sooner or later, however, we are confronted with factual situations which test our pontifications. To put the matter as concisely as possible, and in Humean terms: For some of us more frequently than for others, but for almost all of us some of the time, the short-term interest in not appearing ridiculous by behaving inconsistently forces us, however reluctantly, to practice what we preach. I would suggest that the ending of slavery, and now of racial segregation, and of the inferior status of women, are instances where exactly this has happened. If we claim that human beings are created equal and purport to act on that basis in dealing with some groups of people, sooner or later the requirement of consistency will force us to behave accordingly in our dealings with other groups of people. Otherwise, we will have to admit openly that we are either irrational or, what on a moral level is an analogous notion, insincere.

In this bicentennial year, we shall be reminded often enough—whether or not we needed any reminder—that Thomas Jefferson wrote those magnificent lines in our Declaration of Independence:

> We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.[2]

2. As Jefferson actually drafted the Declaration the phrase "with certain inalienable rights" read instead "with inherent and inalienable rights," a form of expression which seems even more inconsistent with the recognition of slavery. THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 22 (Mod. Lib. ed. A. Koch & W. Peden 1944) [hereinafter cited as LIFE AND SELECTED WRITINGS]. Indeed, in a portion of his draft completely excised by the Continental Congress, Jefferson berated George III because:

Jefferson, of course, owned a substantial number of slaves throughout his entire adult life. He was well aware of the contradiction between the ringing words of the Declaration and the social practice of his time, particularly in his beloved Virginia. It was a constant source of intellectual embarrassment for him, which he sought to alleviate by accepting the justice and inevitability of the eventual abolition of slavery,[3] by recognizing how impractical it would be to abolish slavery immediately in a society where the ownership of slaves represented such a substantial portion of the total wealth of the community,[4] and by convincing himself that, in some important characteristics, black people were inferior to whites, such as in a capacity for poetry or in the appreciation of painting and sculpture.[5] The discomforting embarrassment felt by Jefferson was felt by other men and the rationalizations grew less and less convincing. Few historians doubt, whether we had a civil war or not, that slavery would have been abolished in this country during the course of the nineteenth century as it was in the British Empire.

With regard to the change in the status of women, which is rapidly evolving during the present age, I will content myself by way of illustration with a brief reference to the status of women in higher education, particularly to the history of one institution, Yale. When Yale first seriously considered

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> He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation hither. This piratical warfare, the opprobrium of INFIDEL powers, is the warfare of the CHRISTIAN king of Great Britain. Determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying off former crimes committed against the LIBERTIES of one people, with crimes which he urges them to commit against the LIVES of another.

Id. at 25-26.

3. *Id.* at 278-79, 698-99.

4. *See* F. BRODIE, AN INTIMATE HISTORY 466 (1974); D. MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 208-09 (1962) (this is volume III of Malone's JEFFERSON AND HIS TIME). A much cited statement by Captain Edmund Bacon, Jefferson's overseer for over 20 years, is contained in H. PIERSON, JEFFERSON AT MONTICELLO: THE PRIVATE LIFE OF THOMAS JEFFERSON 110-11 (1862).

5. LIFE AND SELECTED WRITINGS, *supra* note 2, at 258-62. For this reason Jefferson believed that after emancipation the former Negro slaves should be transported to a distant place where they could live among themselves and not come in contact with white society. *Id.* at 262. These were the sorts of notions, of course, behind the founding of Liberia.

admitting women undergraduates in 1966 and explored the possibility of a merger with Vassar College, which was ultimately rejected by the Vassar trustees, the thinking at Yale was that women undergraduates should be assigned to a coordinate college with its own faculty and curriculum but with cross-registration with Yale.[6] This was the tack that planning took even after the failure to reach agreement with Vassar. In the words of the *Yale Alumni Magazine* in December 1967 (quoting President Kingman Brewster): "[t]he value of the coordinate relationship as opposed to admitting women to Yale is that it allows a university to 'educate women not as a direct by-product of educating men.' Because most women 'do not plan to go on to advanced study after receiving their baccalaureates,' their curriculum could be 'less departmental, more problem oriented and more divisional.' "[7] Within a year, however, Yale adopted a plan to admit 250 freshmen and 250 upper-classmen, a total of 500 women, as full members of Yale College.[8] Having passed that hurdle, the next question was the percentage of women. At first 20 percent was suggested, then 40 percent.[9] The outcome, of course, was a commitment to a sex-blind institution, even if that meant breaking what many Yale alumni understood to be a commitment that, however many women were admitted, there would be no decrease in the number of male undergraduates at Yale.[10] Given the rhetoric with which college presidents and other educators addressed the "concerned" students of the sixties, could there have been any doubt as to the eventual result even if the individual speechmakers did not clearly appreciate what they were committing themselves to? I would close this portion of my remarks by stressing again what a wonderful gift speech is, not only because it permits us to convey information, or to convey our feelings, but because its structural requirements make so important a contribution to man's moral life.

The human urge for consistency is well known. Yet, we are also all aware of the abuse of the human penchant to pontificate through the misuse

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6. YALE ALUMNI MAGAZINE, Dec. 1966, at 18; N.Y. Times, Nov. 21, 1967, at 1, col. 5.

7. YALE ALUMNI MAGAZINE, Dec. 1967, at 18. *See also* N.Y. Times, Nov. 21, 1967, at 1, col. 5.

8. N.Y. Times, Nov. 15, 1968, at 1, col. 1.

9. *Id.*, Dec. 11, 1972, at 43, col. 1.

10. *Id.*, June 3, 1973, § 1, at 39, col. 1. The Harvard Faculty of Arts and Sciences has adopted a plan to unify Harvard and Radcliffe and the implementation of a sex-blind admissions policy to begin with the Class of 1980 (which entered Harvard in the Fall of 1976). 1975 HARVARD ALMANAC, at 7. Since 1972, all public institutions of higher education receiving federal assistance, and all such private institutions, *except* private undergraduate institutions, are obliged to institute sex-blind admissions policies. 20 U.S.C. § 1681(a) (Supp. 1972).

of the human need at least to appear consistent. These abuses are typically the result of focusing on a spurious semantic consistency at the expense of all substantive considerations; that is, at the expense of what we might loosely call the underlying logic of the situation. For example, there will always be arguments made that, since Congress can make no laws restricting speech or the press, it cannot tax the profits of newspapers.[11] And then there is the boy in *Tristram Shandy* who argued with his father that he was entitled to sleep with his grandmother. " 'You lay, Sir, with my mother' . . . 'why may not I lie with yours.' "[12] But as Emerson said, it is not consistency but a foolish consistency which is the hobgoblin of little minds.[13]

That our concept of rationality itself, as well as even the mere possibility of human communication and of purposeful human activity, depends on a belief in and a commitment to consistency is self-evident. To recognize this is not, of course, to ignore man's great creative capacities, but man does not create in a conceptual vacuum. However serendipitous a creative insight or discovery might be, it achieves its true value by being integrated into the existing body of thought or by forcing man to construct a new intellectual framework to organize his world.[14] Historically, and here again I add in an excess of caution, at least in the Western world, the human commitment to consistency has been shown nowhere more clearly than in the law. Why

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11. In Associated Press v. NLRB, 301 U.S. 103 (1937), it was argued that the National Labor Relations Act could not constitutionally be applied to cover editorial personnel of the AP. The Court summarily rejected the argument. The petitioner relied on Grosjean v. American Press Co., 297 U.S. 233 (1936), where the Court struck down a Louisiana tax on newspapers with a circulation of over 20,000, but the Court in *Grosjean* specifically declared that "[t]he tax here involved is bad not because it takes money from the pockets of appellees." *Id.* at 250. Rather, it was because it was specifically aimed at newspaper circulation. *See also* Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act may be applied to newspapers). In 1971, Senator Cranston suggested that wage and price controls could not be applied to newspapers, broadcasters, and other media. Senators Hart and Packwood, among others, disputed his contention. *See* 117 CONG. REC. 43,510-20 (1971). An amendment proposed by Senator Cranston to incorporate his views in the pending legislation eventually failed. *Id.* at 43,519-20. For the unsuccessful argument that a prosecution for violation of the Mann Act was unconstitutional because the purpose of the transportation was to make a pornographic movie, *see* United States v. Roeder, 526 F.2d 736, 739 (10th Cir. 1975).

12. L. STERNE, THE LIFE AND OPINIONS OF TRISTAM SHANDY, bk. IV, ch. 29, at 300 (World Classics ed. 1951).

13. R. EMERSON, *Self Reliance*, in ESSAYS: FIRST SERIES (Random House ed. 1944).

14. If any citation is necessary, *see* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). In the process of reconstruing his intellectual framework it is also sometimes the case that one ends up by having a different view of what his "world" really is.

is this so and what is its significance for the present age? It is to these questions that I now turn.

The term law has, of course, always carried with it connotations of regularity. From time immemorial the perceived regularities in the physical world have been described in terms of laws of nature. Among the ancient Greeks, particularly in the thought of the Stoics, the term law or *nomos* also described the immutable and eternal principles of justice to which man must conform if he is to live in harmony with nature.[15] In the course of the succeeding centuries the scholastic philosophers of the middle ages developed from these notions what we have since called the natural law. This, of course, is all well known. What I find intriguing is that the need to find order and consistency in the moral as well as in the physical universe led Aquinas to insist even on the identity of God and the eternal law.[16] Later, natural lawyers, such as Grotius, Pufendorf, and Locke, wrestled with the question of whether the natural law was binding on man because God willed it or because it was inherently just and right and God adopted it, so to speak, because he was forced to. In other words, could God have made it morally proper to tell lies or to take the lives of other human beings, such as when God commanded Abraham to sacrifice Isaac? Pufendorf and Locke, at least, tried to resolve the dilemma by arguing that God had the freedom to create man or not, as well as the freedom to decide what sort of creature man would be.[17] But, having created him in the form that he did, it was then necessary that the moral precepts of the natural law should apply to man. As we can see from these brief illustrations, for many people law, and the qualities of order and consistency which law carries with it, have been considered constitutive of the physical universe, of the moral universe, and even of God himself.[18]

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15. For the various ways the ancient Greeks used the term "law," see 2 R. POUND, JURISPRUDENCE 18-25 (1959). For a discussion of the Stoics' contribution to the development of the natural law, see G. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 78-85 (1973).

16. *See* T. AQUINAS, THE SUMMA THEOLOGICA Part 1 of the 2d Part, Q. 91, A. 1 (Eng. Dominican Frs. transl. 1922). *See also id.* at Q. 93, A. 1, where the eternal law is described as "the type of Divine Wisdom" by which "all things are created" and which directs "all actions and movements."

17. S. PUFENDORF, DE JURE NATURAE ET GENTIUM, bk. II, c. iii, § 4, 184-85 (C. and W. Oldfather transl. 1934, The Classics of International Law Series, Vol. II); J. LOCKE, *Essay VII*, ESSAYS ON THE LAW OF NATURE 199-201 (W. von Leyden transl. 1954). For Grotius' view, which seems to suggest that God had no choice at all in the matter, see H. GROTIUS, DE JURE BELLI AC PACIS, bk. I, c. I, § 10(5), at 40 (F. Kelsey transl. 1925, The Classics of International Law Series).

18. It might be urged that, among the ancient Greeks, the gods were more capricious. But it should also be noted that the ancient Greeks felt obliged to super-

From an early time, however, man has realized that whatever patterns of regularity the laws of society may have imposed, these laws are, or at least can be, the product of human will. Laws may have had their source in custom or tradition, but even when custom and tradition were paramount in the law, as they were in the middle ages during the height of feudalism, men, however much they may have tried to hide the fact from themselves, realized that law could be changed by human declaration. Indeed, it was so changed. Certainly Aquinas was very much aware of these social realities.[19] Men in the middle ages were torn between their almost instinctive association of the qualities of regularity and immutability with the idea of law, and their recognition that in important ways law could and was being changed by acts of human will backed up by the power of enforcement. How did men reconcile these conflicting notions about the law? In many important respects they did not. It is part of my thesis that in some respects we still have not.

Thus, in medieval times, many changes in the law were introduced ostensibly as procedural devices[20] and in this way the fact of change could in varying degrees be disguised. Sometimes, indeed, the changes were achieved by way of legal fictions which made it particularly difficult for someone to detect the change;[21] but the changes wrought through the use of procedural devices were not always so covert.[22] At any rate, however, there were also important changes in 12th and particularly in 13th century English law that could not be disguised as mere procedural changes.[23] The social reaction to these unmistakable facts was often stubbornly to resist change wherever possible. For example, we have the spectacle of the English barons in 1236 refusing to change the rule that an illegitimate child was not legitimized by

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impose even upon the Olympian gods the notion of inexorability, represented by the three fates, who numbered even the days of the Olympians. There was a similar superimposition on the Germanic and Norse gods who had their "Gotterdammerung," or in the Scandinavian version, "Ragnarok."

19. *See* T. AQUINAS, *supra* note 16, at Q.'s 90, 95-97.

20. The Assize of Novel Disseisin, issued by Henry II—it may only have been an instruction to the royal judges—and the three other possessory assizes were in theory summary actions which tried only the question of possession. The question of title was reserved for the proprietary actions, such as the Writ of Right, of which the feudal courts retained cognizance. *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 137-38, 145-46 (2d ed. 1898); 2 *id.* at 45-67.

21. On legal fictions and their use, see L. FULLER, LEGAL FICTIONS (1967).

22. *See* note 20 *supra.*

23. *See, e.g.*, the introduction of a royal criminal law and procedure that commenced with the Assize of Clarendon in 1166, *discussed in* J. SMITH, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 165-73, 182-83 (1965). Major changes in the law of real property were made by the statutes, DE DONIS CONDITIONALIBUS, 13 Ed. I, c. 1 (1285), and by QUIA EMPTORES, 18 Ed. I., St. I, c. 1 (1290).

the subsequent marriage of his parents and could not inherit real property. The law of the Church was to the contrary. But, when asked at Merton to conform to the rule applied by the Church, the barons supposedly responded "with one voice, *Nolumus leges Angliae mutari.*"[24] "We do not wish to change the laws of England." I have no idea, of course, why the barons were so perverse on that occasion. I do, however, believe that the general unwillingness to make substantial changes in the law was to a large extent because, in the turbulent world of plagues, famines, and intermittent warfare in which medieval man lived, law and custom were things to which a man clung. They, together with the Church, were the few stable things to which he could cling. In a sense the law and the Church were constitutive of medieval man's universe. Beyond these institutions were inconsistency and disorder. Aquinas recognized these feelings and tried to accommodate them. On the one hand, Aquinas was in many ways almost a 19th century positivist with regard to human law. Whatever moral qualities human law might also need to possess, law was, for Aquinas, the product of human will and was backed up by force.[25] That law required force to back it up was one of the reasons why only political authority could enact laws.[26] And yet, even though law was an act of political will and was capable of change, Aquinas cautioned against unnecessary change in the law, "because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave."[27] Aristotle, of course, as Aquinas acknowledged, had said something like this a long time before.[28]

But we live in a different age. We recognize that law can be changed and, despite Aquinas and Aristotle, we are often insistent that it should be changed even if there is only a small benefit to be gained. Law has been recognized as an instrument of "social engineering."[29] Indeed, law has become the principle vehicle through which our rhetoric can be translated into reality and by which the material and spirtual advance of mankind is made possible.

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24. J. SMITH, *supra* note 23, at 34, quoting from the preface, dated 1615, of the first English edition of Davies, *Report of Cases and Matters in Law Resolved and Adjudged in the King's Courts in Ireland* (1762).

25. T. AQUINAS, *supra* note 16, at Q. 90, art. 1 and 3; *id.* at Q. 92, art. 2.

26. *Id.* at Q. 90, art. 3; *id.* at Q. 92, art. 2.

27. *Id.* at Q. 97, art. 2.

28. ARISTOTLE, POLITICS, bk. II, c. 8 (1269a 10-28).

29. The use of the term is associated with Roscoe Pound and appears in a number of places in Pound's work, including R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (rev. ed. 1954), a work first published in 1922. This influential work provides an overview of Pound's methodological approach and of his basic thought about the law.

Holmes' pithy statement that "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV,"[30] was eventually applied with a vengeance.

In the process of reaching this happy state man was not immediately ready, however, to renounce his association of the term law with notions of stability and of a rigid, almost inflexible, consistency. Man coined the term rule of law and separated out the legislative from the judicial function. The legislature, Parliament, could and should change the law as occasion required; the law courts, however, should apply the timeless body of law. Thus, at least one facet of the law was stable as long as the legislature kept its nose out of it. In the late 18th century the notion of a written constitution which could not be changed by the legislature took root in our country so that an appreciable portion of the law applied by the courts was now immune even from legislative change save by only the most extraordinary and difficult of procedures, amendment of the Constitution.

But, in the 19th century, perceptive legal philosophers pointed out that even judges engage in legislation,[31] and the great energies expended in historical research after the middle of the 19th century confirmed that judges had always done so.[32] The forms and forums in which judicial legislation took place, as well as its intensity, varied from time to time but there was always, as we now realize, some form of judicial legislation.[33] The development of the action of trespass and then particularly of trespass on the case are worth noting.[34] As the common law became increasingly rigid and lost much of its creative spark, one witnesses the rise of equity.[35]

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30. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

31. Two important thinkers who pointed this out were Jeremy Bentham, who largely decried the phenomenon, and Austin, who accepted it as inevitable. Austin stated his view in the last paragraph of his lengthy and well-known note at the end of his fifth Lecture. 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 218-19 (5th ed. R. Campbell 1885). For a discussion of Bentham's thought on the subject and appropriate situations, see G. CHRISTIE, *supra* note 15, at 467-68. Another important, but later, thinker, who insisted that judges do, and inevitably must, legislate is John Chipman Gray whose *The Nature and Sources of the Law*, first published in 1909, was widely read by lawyers.

32. For a list of some of the great names associated with this effort, see G. CHRISTIE, *supra* note 15, at 642 n.9.

33. For a demonstration that, even in the field of statutory construction, courts have over the ages allowed themselves a tremendous liberty of interpretation, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 330-41 (5th ed. 1956).

34. For an overview, see T. PLUCKNETT, *supra* note 33, at 366-73, 460-62, 465-72; J. SMITH, *supra* note 23, at 118-19, 273-79.

35. *See* Spence, *The History of the Court of Chancery*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 219 (1908). This is a reprint of the first four chapters of Spence's THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY (1846).

Eventually, towards the end of the 17th century equity itself showed signs of ossification.[36] In the 18th century, however, with Lord Mansfield in the lead, the common law, in a burst of creative development, absorbed much of the law merchant that had developed to meet the needs of an increasingly commercial society.[37] Nevertheless, for a long time the citizenry at large, and many members of the bar as well, refused to believe the philosophers, and if they accepted the lessons of the historians they considered them as evidence merely of a turbulent past out of which the stable present had evolved. Changes that could not be explained away were rationalized by thoughtful lawyers as being the emanations of an evolving collective conscience rather than the products of the wills of individual judges.[38] Gradually, however, the profession could no longer shut its eyes to reality. Lawyers were assisted in their awakening by the judicial willingness to grant broad declaratory relief in class actions and then, finally, the judicial use of the thoroughly legislative device of the prospective overruling of precedent.[39] Eventually, most lawyers were even forced to recognize that the Constitution itself has no such fixed meaning that the courts cannot find within it the authority to do a whole host of things, many of them at cross purposes. In time, the overruling of constitutional decisions, prospectively as well as retrospectively, became a fairly commonplace occurrence. Indeed, we have now witnessed the phenomenon of the Supreme Court staying the effectiveness of a ruling declaring an act of Congress unconstitutional.[40]

Although it is clearly an overstatement, there is nevertheless some truth to the contention that what now marks the difference between legislative decisions and judicial decisions are the procedural rules, principally the rules of evidence and the rules on the burden of proof or persuasion; in other respects, the two modes of decision-making are remarkably similar. Both forms of legal decision-making are now recognized as vehicles for social engineering,

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See also 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 395-476 (1922); T. PLUCKNETT, *supra* note 33, at 673-707.

36. *See* 1 W. HOLDSWORTH, *supra* note 35, at 467-69; T. PLUCKNETT, *supra* note 33, at 692, 702-07.

37. *See* C. FIFOOT, LORD MANSFIELD 82-157 (1936).

38. *See* J. CARTER, LAW: ITS ORIGINS, GROWTH, AND FUNCTIONS (1907). This book together with an earlier article by Carter, a distinguished New York lawyer, *The Provinces of the Written and Unwritten Law*, 24 AM. L. REV. 1 (1890), was the subject of sharp and extended criticism by John Chipman Gray. J. GRAY, THE NATURE AND SOURCES OF THE LAW 93, 99-100, 233-39, 283-92 (2d ed. 1921).

39. For a brief discussion of the problems created by the device of prospective overruling for the assumption that judicial decision-making is an objective process, see G. Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306, 1311 n.14 (1975).

40. Buckley v. Valeo, 424 U.S. 1, 142-43 (1976).

and many people have not only welcomed this recognition but have indeed been exhilarated by the prospects for social reform it has laid open before us. Indeed, the recurrent phenomenon of a legislature, impatient for "reform," setting up an administrative agency with a broad and ill-defined mandate to "do good" has often forced the courts to make legislative decisions, even if many of the judges would otherwise have wished to avoid this role.[41]

Meanwhile, what has happened to man? That he still requires order, stability, and consistency is incontrovertible. The wonderful thing about modern life is that it is more orderly and stable, more consistent if you will, than life in medieval Europe. The fear of death from unknown disease or from wanton violence is much diminished. It is possible to plan a trip over great distances and realistically look forward to arriving within one half hour of the time you expected to arrive. There is no waiting for weeks for favorable winds or for months while a bridge is repaired. Despite the rise of urban terrorism, it is still true, at least in the Western world, that brigandry and private warfare have been suppressed. The influenza epidemics that we must periodically endure are as nothing to the dreadful awaiting of the "Black Death." Social Security and other pension plans make old age less precarious. With so much of life so very ordered it is possible to indulge in one's whims, whether in the theater of the absurd or in pop art. As we have seen, we have even been able to live through the divorce of our concept of law and the notions of order and consistency, qualities to which our conception of law has been linked for thousands of years.

But I think we have reached a certain peak. We live in a world where every stabilizing institution that we have historically known, for example the family, the church, and the school, has had its authority eroded. (Whether for good or ill is not now my concern, but I would suspect that the most plausible answer would be sometimes for good and sometimes for ill.) Nowhere is this decline in institutional authority more evident than in our cities, where even physical security, which at least middle-class America took for granted, is breaking down. Religious leaders have noted the anxiety of modern man cast adrift in a disordered world and have found some comfort in the fact that the human need for stability and consistency in life seems to be leading more people back toward religion.[42] Whether this is a desirable motive for seeking religious truth I leave for others to determine.

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41. For a brief discussion and a few illustrations see Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1349-50 (1969).

42. *See, e.g.*, 1975 Christmas message of Pope Paul VI, N.Y. Times, Dec. 26, 1975, at 1, col. 1.

I do note the obvious, however, that if one merely wants order and stability from his religion, there are any number of cults with their emphasis on fellowship which may well be more attractive than traditional religions, particularly to the young.

It is unrealistic, however, to expect a great religious revival in the Western world to supply the framework of order and consistency that man needs. I am afraid I see no institution that is currently able to fulfill that role other than the law. This has grave implications for the law and lawyers, and not all of them are good. The quintessence of a Catch-22 world is not so much that it is unbelievably complex, so that the individual is often at a loss to know what to do; it is, rather, that even if the individual takes the time and effort to find out what to do, it will not matter because the impersonal "they" will change the rules on him. Whether he tries to adopt a rational approach to his problems or not, the situation is hopeless. He might as well save his energy and lapse into apathy. For a release from his dismal sense of powerlessness to organize rationally the social milieu in which he exists, there is always the solace of drugs or of the bottle.

What I am suggesting, then, is that our emotional need for order, our belief that the universe can be comprehended in a rational manner, is forcing the law to play in our lives the structural role it played in medieval times. I see no other institution capable of playing that role anywhere now on the horizon. Because the legal system is being forced to bear all the structural weight, I see it as increasingly difficult to pursue immediate social objectives by legal means. This is in addition to the fact that there seems to be a growing sense of disillusionment with the effectiveness of government, a disillusionment that is heightened whenever there are frequent changes in executive or legislative policy that make the process of government seem to be merely a spinning of wheels. The inability of our nation, despite a sense of crisis, to come up with an overall policy with regard to the development and utilization of our total energy resources is a classic instance, but it is not the only one. The physical and moral improvement of the human condition may well have to be left to other than legal means and, if no such means exist, reform—which, as we have seen, can be described as the conforming of our actions to our rhetoric—may have to wait.[43] I see it as no accident

43. The former Dean of the Stanford Law School, Thomas Ehrlich, has decried what he calls "legal pollution." Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, § 6 (Magazine), at 17. It is interesting to note how drastic a change in the economic structure of society has been implemented by conscious legislation in Great Britain since 1945. The comparative smoothness of this change, I submit, was made possible by the strong extra-legal social structure that has characterized English society, and which permitted it to weather almost revolutionary economic changes. Now, however,

that our society is becoming muscle-bound in due process. Although I think there have been excesses, I do not decry the extension of due process to more and more aspects of life. It would, for example, be a callous person indeed who would be prepared to assert that the extension of greater due process protection to high school students is undesirable, even if he might have serious qualms about making the length of a student's hair the subject of protracted judicial controversy.[44] This extension of the protections of due process is what gives the structure, the sense of security that we need, to our lives. There are, of course, practical limits to the extent to which official conduct can be legally controlled. We have become enamoured of "Special Prosecutors." Will we need "Extra-special Prosecutors" to control the "Special Prosecutors?"[45]

Europeans decry the fact that Americans are so litigious. But, given the fluid state of our society, where else can a person seek reassurance? If his favorite ball club wants to move from San Francisco to Toronto,[46] if the

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that these legal changes have succeeded in undermining this social structure it has become increasingly difficult for British governments to pursue further change by legal means. There are too many people, ranging from doctors to coal miners, now prepared to disobey measures of which they disapprove. The British government, like ours, seems to have lost some of its ability to command.

44. For a recent review of the cases on the rights of students and others to wear long hair, see Comment, *Long Hair and the Law: A Look at Constitutional and Title VII Challenges to Public and Private Regulation of Male Grooming*, 24 U. KAN. L. REV. 143 (1975). The Supreme Court has uniformly denied certiorari in the student hair-length cases on the numerous occasions where it has been sought. *See id.* at 155, where the citations are given. Justice Douglas objected to the court's practice of denying certiorari in his dissent in Ferrell v. Dallas Independent School District, 393 U.S. 856, *denying cert. to* 392 F.2d 697 (5th Cir. 1968). The Courts of Appeals of the Fifth and Tenth Circuits have directed the district courts in those circuits to dismiss complaints raising the issue, at least with regard to high school students. *See* Comment, *supra* at 154-55. The Supreme Court did recently find against police officers complaining about hair style regulations, holding that the regulation was not so irrational as to be arbitrary; therefore, it was not a deprivation of liberty. Kelley v. Johnson, 425 U.S. 238 (1976).

45. *Cf.* H.R. 8388, 94th Cong., 1st Sess. (1975), which provides for a "National Security Solicitor" who would be appointed for a single 15-year term and who could be removed only by a concurrent resolution of both houses of Congress. This official would, *inter alia*, be responsible for prosecuting members of the Executive Branch who engage in the planning of, preparation for, or initiating or waging of a "war of aggression," and other similar acts, against the laws and customs of war. These include acts designed to overthrow the leadership of a nation with which the United States is not at war. *See also* PREVENTING IMPROPER INFLUENCE ON FEDERAL LAW ENFORCEMENT AGENCIES, REPORT OF THE ABA SPECIAL COMMITTEE TO STUDY FEDERAL LAW ENFORCEMENT AGENCIES 104-10 (1976). The Report's recommendations, among which was one opposing a permanent special prosecutor, were accepted by the ABA's House of Delegates in February 1976. 21 AM. B. NEWS, No. 2, Mar. 1976, at 2.

46. The suit, brought by the City of San Francisco, is briefly described in the N.Y.

Redskins are the victims of an official's bad call,[47] to whom can he turn but the courts? Indeed, the increased resort to judicial institutions to settle all manner of social disagreements can on occasion even be counterproductive and a source of additional instability and uncertainty because it can keep alive disputes that the parties would otherwise long since have forgotten or otherwise have resolved among themselves. Be that as it may, each new piece of legislation seems to expand the range of litigable questions, as not only the new statute's constitutionality but also its effect on previous legislation must be judicially determined. But we pay a price for this structure through which we attempt to make our world more secure and consistent. It is harder to do things quickly. It is harder still to implement quick changes in policy, even when there is a clear legislative majority in favor of such a change in direction. Indeed, because the legal process is most able to fulfill its stabilizing role when it reverts to its quintessential insistence on consistency as the *summum bonum*,[48] one could not expect any other result.

Whether the law can thus function as the preserver of stability and yet still be the principal vehicle of progress is to my mind, as I have already said, highly questionable. It can only perform both these roles if we revert to Aquinas' and Aristotle's view that change in the law, whether by legislative or judicial means, is itself undesirable and that we should only make changes when we are fairly confident that they are really necessary and likely to prove beneficial. A more active role is impossible.

Whether our nation's needs can be met within such a restricted scope for legal change, I do not know. It is perhaps a pessimistic note upon which to end a speech about law and human progress, but I think it is a delusion, indeed even dangerous, to hide these facts from ourselves. Moreover, I, for one, am optimistic. If one accepts, as I do, what Aristotle[49] and Aquinas,[50]

Times, Feb. 4, 1976, at 27, col. 6.

47. The suit, brought by some Washington Redskin fans, was dismissed. *See* Los Angeles Times, Dec. 2, 1975, pt. III, at 2, col. 1.

48. This insistence on the primacy of consistency is clearly shown in NAACP v. Alabama, 357 U.S. 449, 454-58 (1958), where the Court, per Justice Harlan, unanimously held that petitioner was not barred by the Supreme Court of Alabama's interpretation of the Alabama procedure for raising constitutional issues in contempt proceedings because there was no consistency in the application of the asserted Alabama rule of law. Nor would petitioner be barred by a state law that "may now appear in retrospect to form a consistent pattern of procedures to obtain appellate review." *Id.* at 457. A higher degree of consistency was necessary for a supposed rule to be recognized as state law applicable to petitioner.

49. "Neither by nature, then nor contrary to nature do the virtues arise in us; rather we are adapted by nature to receive them, and are made perfect by habit." ARISTOTLE, ETHICA NICHOMACHEA, bk. 2, ch. 1 (1103a 23-24). (The quotation is from IX THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (W. Ross transl. 1925)).

50. *See, e.g.*, T. AQUINAS, *supra* note 16, at Q. 94, art. 2; *cf. id.* at Q. 91, art. 2.

and even in a sense Hume,[51] maintained—that man is in some way inclined to the good—then we are entitled to believe that man, with his powers of thought and speech, has the capacity to develop his moral and social life. We are entitled to believe that if man needs a vehicle for the more active implementation of his ideals than is possible through the machinery of the law, he will in time create appropriate institutions through which his rhetoric can be put into practice in his everyday life. Rather than becoming unduly cynical or wringing his hands over the inability of law fully to perform this function at present, modern man should devote his energies to developing these institutions.

51. *See, e.g.*, D. HUME, *supra* note 1, bk. II, pt. III, § iii (417); *id.*, bk. III, pt. II, § ii (486-87); *cf. id.*, bk. III, pt. II (574-621).