

Fall 2007

Five Steps to a New World Order

Phillip Allott

Recommended Citation

Phillip Allott, *Five Steps to a New World Order*, 42 Val. U. L. Rev. 99 (2007).
Available at: <http://scholar.valpo.edu/vulr/vol42/iss1/4>

This Lecture is brought to you for free and open access by the School of Law at ValpoScholar. It has been accepted for inclusion in Valparaíso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Lectures

FIVE STEPS TO A NEW WORLD ORDER

Philip Allott*

I feel honored to have been invited to give this year's lecture to celebrate the memory of Edward Seegers. From what I have heard of his life and work, the wide-ranging focus of the lecture-series seems especially appropriate.

I. LAW'S PARADOX

It is difficult to get lawyers to recognize *the true social significance of law*. That may seem a surprising proposition, given the law-saturated societies in which we live and given the social power of the lawyer-caste in all our societies. Perhaps it is a *tactic* on the part of lawyers, not to go in for much philosophical self-analysis; a tactic designed to disarm the age-old dislike and distrust of lawyers, the traditional image of lawyers "dreaming of fees."

Pragmatism and realism are as far as most lawyers are willing to go. And pragmatism and realism, especially American pragmatism and realism, paint a reassuring picture of *law* as one social process among all the others, and of *lawyers* as one species of *specialists* alongside all the others, such as neurosurgeons and car-mechanics.

It is strange, too, that lawyers naturally assume that law is a *good thing*. Law must surely be a good thing because a society without law would obviously be a bad thing. That was how Thomas Hobbes, in particular, among many others, offered to the *governing* class a *justification* of their dominant social power and gave to the rest of society (the *governed* class) an *explanation* for the fiercely coercive nature of society.

There must be law; and there must be law-makers; and the law must be enforced. *Anarchy*, we tell the people, would be nasty and brutish (not that we have ever actually tried anarchy as a social system) even if

* Professor Emeritus of International Public Law, Cambridge University; Author of *Eunomia*, *New Order for a New World* (1990/2001); *The Health of Nations. Society and Law beyond the State* (2002); *Towards the International Rule of Law; Essays in Integrated Constitutional Theory* (2005); and *Invisible Power, A Philosophical Adventure Story* (2005); Fellow of the British Academy.

society-under-law is also nasty and brutish for very many people, for very much of the time.

Lawyers nowadays, including international lawyers, are keen to proclaim the *sophisticating and humanising* power of modern law. They are proud that the law explicitly recognizes the principle of the so-called “Rule of Law,” the idea that took us centuries to establish, the idea that everyone is subject to the law, even the law-makers and the law-enforcers.

Lawyers are proud of the development of so-called human rights, or fundamental, constitutionally-protected “rights.” They are proud of the use of the law to correct structural and systematic social wrongs: inequalities, forms of discrimination, and exploitation. They are proud of the development of so-called international humanitarian law to moderate the horrors of war. Lawyers sometimes even claim that the law is the protector of *liberty and equality*.

But it may be that lawyers use these claims as a screen or an analgesic to mask another legal reality.

One can equally well say that law is the *cause* of social inequality, an *instrument* of social oppression, a *source* of crime, a *means* for the dehumanising of human beings, and a *weapon* of social violence. The truth is that the law is also all of these things, as it always has been.

Wealth and poverty, the unequal distribution of property, is an effect of law. From a society’s distribution of wealth flows all kinds of social inequality: inequalities of education, health, quality of life, and life-chances in general. And, from these, flow unequal propensities to commit crime and other forms of anti-social behavior.

The law determines what is to be treated as anti-social behavior, protecting property and other legally-derived social advantages by the use of society’s crudest and most primitive weapon, the criminal law, based ultimately on physical violence.

The law may determine that a poor person who steals a loaf of bread or who kills someone in a gang-war is an enemy of society, liable to be punished with all kinds of humiliation and even with death. Additionally, the law may determine that CEO’s who put thousands of people out of work in a merger of corporations or government leaders who take their people into murderous wars are, in the eyes of the law, law-abiding citizens.

In other words, law may be seen in one light as a system of liberty, equality, and stability, and, in another light, as a system of inequality, injustice, and oppression.

Summum ius summa iniuria, as the Romans used to say; “the highest law can be the highest injustice.”¹

I have to say that in traditional international law, the area of law with which I have been mainly concerned, this paradoxical ambiguity of the law is much more plain to see. You can’t miss it.

Inequality, injustice, and oppression are contained in the intrinsic structure of the existing international system. I will return to that theme a little later.

What determines the action of the law, whether for good or evil? How can we judge the social performance of the law in a given society? How can we use the better potentiality of the law to make a better world?

To answer those questions we have to take a closer look at how the law functions in society.

II. LAW’S FUNDAMENTAL FORCES

Law is a transforming process. Law transforms something produced in general social life into a special and specific form that is law.

Law’s transforming process has two aspects. Understand these two aspects of law’s transforming process, and you understand the true nature and purpose of law.

The first aspect of law’s transforming process is universalizing and particularizing. In law-making, the law universalizes all the particulars of human behavior and transactions, translating them into general and abstract patterns. Then, those general and abstract patterns are available for application by another form of legal process, to all the particulars of human behavior and transactions.

An interaction between two people can produce what the law calls a *contract*, an abstract and general thing, and then, all sorts of

¹ MARCUS TULLIUS CICERO, DE OFFICIIS 34 (Walter Miller trans., Harvard University Press 1990). Cicero calls it ‘the now familiar saw.’ *Id.* Miller’s translation is ‘more law, less justice.’ *Id.*

102 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

consequences flow from the fact that the particular behavior of those people conforms to the law's pattern of a contract.

The same is true of all the other countless abstract patterns of the law: treaty, negligence, murder, corporation, property, plaintiff, defendant, court, and so on.

The second aspect of the law's transforming process is the *legal relation*. The abstract and general patterns of the law take a quite special and specific form, known as a legal relation. The term legal relation is the general label for what we all know as a right, duty, power, liability, freedom, or immunity.

It is another strange fact that lawyers can learn the law, practice the law, and even make the law, without understanding the law's functional principles.

I have listed six kinds of legal relation, based on the work of the American legal scholar, Wesley Hohfeld. Many people had tried to make such an analysis before Hohfeld, not the least of which, Jeremy Bentham a century earlier, and many successors have sought to refine Hohfeld's work.

But the precise list of legal relations doesn't matter. What matters is to understand that the whole vast edifice of the law rests on a very small, finite set of mechanisms; as physicists tell us that the whole of the physical world consists of the interaction of three or four fundamental forces: gravity, the weak and strong binding forces, and electromagnetism.

The physical world is not a collection of objects. It is a changing set of interactions of particular forms of forces. Also, the law is not a set of rules. The law is a changing collection of formalised potential interpersonal relationships.

Legal relations govern each moment in the lives of every person in society, every single event involving human beings.

Legal relations are an infinite, interlocking, seamless network covering the whole of human existence. They are a potentiality until the moment when our behavior, or some event, slots into an existing legal relation: we offer to buy a car; we dial a number on our cell-phone; we cast our vote in an election; we become a parent; we are born; we die and so on, *ad infinitum*.

It is as if there is a second reality, a legal reality, a sort of second, invisible atmosphere which embraces everything. We breathe law even when we are unconscious of it.

This applies across the world. As we travel, we pass from one legal reality to another; but national legal realities overlap, especially in the case of cross-border economic transactions to which two or more sets of legal relations may apply, leading to some wonderfully complex legal problems.

And then, of course, there is international law; which, in principle, applies the universalizing and particularizing process to all behavior and events everywhere.

All of this leads to the obvious next question. How is the substance of the law determined? How is the distribution of the law's benefits and burdens decided?

The *benefits* of the law are rights, powers, immunities, and freedoms. A right is a claim to have someone else do something; a power is a discretionary decision to cause a change in someone else's legal situation; an immunity is an exemption from the application to you of some aspect of the law; and a freedom is a discretionary choice of action which is protected by other legal relations.

In contrast, the burdens of the law are duties and liabilities. A duty is action required by the law; and a liability is subjection to someone else's legal power.

III. LAW AND POLITICS

As lawyers, we know that the substantive content of the law is a product of extra-legal or meta-legal forces in society, a product of the total social process of society.

Since ancient Greece, social philosophy has focused on the question of the location of the ultimate law-making authority in society, what has traditionally been called the question regarding the location of sovereignty in society.

This is a question about the factual location of the formal source of law. But the location of sovereignty in a given society also determines the political character of that society. Since ancient Greece, we have identified various primary forms of political society—tyranny,

monarchy, oligarchy, democracy—defined in terms of the location of sovereignty.

And, the location of sovereignty in a given society is, of course, itself a product of the past total social process of that society, often the product of great historical struggle.

The drafters of the U.S. Constitution in 1787 did an ingenious thing in leaving the location of sovereignty obscure. The then-American-ruling-class took great care to create something that was neither a monarchy nor a democracy, but a cloudy mixture of the two, following closely the unwritten British constitution which was and is the constitution of a monarchical republic, with the King and the House of Lords re-packaged and re-labelled in America as the President and the Senate.

The French Constitution of 1792 said, as does the 1958 Constitution, “national sovereignty belongs to the people.” The Federal German Constitution says, as did the Weimar Constitution of 1919: “All state authority (Staatsgewalt) is derived from the people.” These are not sentiments that the founders of the U.S. Constitution could have put in writing, as the masses needed no encouragement for threatening the security of property.

But, whether or not it can be expressed in a simple formula, every legal system must have a formal source of law.

We are also familiar with the idea that liberal democracy is a political form whose ideal is the widest possible participation in the social process from which the law emerges, the process by which the distribution of the benefits and burdens of the law is determined.

What we call politics is an intermediate system between the everyday activity of society and the law-making process. Politics is a bridge between the law-making process and the everyday activity of society in the private lives of individual citizens and in collective social activities including, above all, collective economic activities.

Politics process the desires and interests of individual citizens and of society’s sub-societies into a form which can be subjected to the transformatory process of the law, translating the net outputs of politics into the form of legal relations and imposing what we have identified as legal reality onto the totality of non-legal social reality.

So, we can see law as a sort of permanent social miracle. Law carries past states of society through the present state of society to make the future of society.

Law carries past states of society in the form of constitutional structures and systems and in all previously created legal relations. These are effective in every present moment of society, conditioning people's behavior to conform with the inherited substance of the law, and making a future which more or less conforms with what society has determined the future to be.

So the law is a wonderful integrating of the static and the dynamic, an endless compromise between what was, what is, and what will be. The law is a wonderful machine for protecting social stability while managing social change.

But there is another remarkable feature of the law.

Politics is not only the preparatory work of law. Politics is also, at least ideally, a collective effort to find the common interest of society: some sort of reconciliation of all the conflicting interests of society's members, including subordinate societies such as corporations. They seek to influence the formation of the law in every area of law: family law, property law, criminal law, and economic law in its infinite variety.

The universalizing and particularizing movement of the law universalizes the self-interest of the members of society in the form of law and then particularizes the common interest of society when the law is applied to the infinite particularity of everyday life.

The law is a reciprocating engine, constantly moving from particular interests to the common interest and from the common interest to particular interests.

And the common interest of society is perceived as the common good of society, so that when the common interest is enacted as law, the law becomes, presumptively at least, the expression of what society considers to be the common good. Every time we give effect to a legal relation, every time we act in conformity with the law, we are, *ex hypothesi*, implementing the common good of society.

Every law-abiding citizen is an agent of society's common good.

And the law is not only a reciprocating engine. The law is an engine of progress. Every moment of every day, the law is seeking to improve itself and, hence, to improve society. The struggle of politics is a struggle about social improvement.

Every law-maker is, in principle at least, the maker of a better common good. Every judge is, in principle, the maker of a better common good.

And that leads to the next obvious question. What is the relationship between the values enacted by law and the rest of society's values? What is the relationship between law and the values that transcend society? Is law a moral enterprise, or merely a practical and pragmatic enterprise?

IV. LAW AND VALUE

Before discussing the relationship between law and value, I should, perhaps, interpolate here an explanation of the form of argument I am pursuing and begin to anticipate what will be my conclusions.

What I will be suggesting is that we cannot consciously improve the human world and we cannot meet the necessary and urgent need for a quantum-leap in human social progress, unless we have a good and reliable idea of how society works, of how society is able, consciously, to improve itself.

And I will be suggesting that the requirement of lucidity about human social progress applies, above all, to society at the global level, the social life of humanity as a whole.

We must make ourselves able to identify, coolly and methodically, the steps that might enable us to make a better human world. And, I hope I am beginning to convince you that the law and lawyers have an exceptional responsibility of leadership in the new humanising of humanity.

So, if we have introduced the word "good" into the discussion, and the ideas of "better" and "improve" and "progress," that means we have moved into the realm of value and value-judgment.

I drew your attention earlier to the fact that not all law is necessarily good law, far from it. So how do we tell good law from bad law?

The law is the agent of the common good, but that means the common good as seen by a given society at a given time. Thus, seen from another point of view, the common good of a given society may be perceived as an egregious evil.

The common good of a given society may be a form of collectivised evil. The twentieth century provided many tragic instances of that sad fact.

So, how *do* we judge a society? How *do* we judge the law, its actual state and its potential state?

A society's law is a mirror of that society's values. Thus, a given society's law cannot be better than that society's values.

A society is not merely a collection of people; it is also a collection of values. A society is a collective consciousness.² In my work, I say that a society has a "public mind."

A society's collective consciousness explains the society to itself and justifies the society to itself. Each society has what I call a *theory*, its theory of itself.

A society's theory identifies the society's particular identity as compared with other societies. It explains and justifies the constitutional structures and systems, the distribution of public power, when the term "public power" means legal power, designed to be exercised in the public interest; that is to say, exclusively to serve the common good and not to serve the self-interest of the power-holder.

A society's theory of itself may, for example, use religion as its ultimate explanatory and justificatory theory. Or, it may use a theory such as "the divine right of kings" or "communism." Or, it may use what the French call "republicanism" or the Germans call "constitutionalism," indigenous forms of democracy. Or, a society may explain and justify itself more generally in terms of a theory called "liberal democracy."

² EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 422 (J.W. Swain trans., New York: Free Press 1947) (1915). The American sociologist Franklin Henry Giddings used the expression "social mind[.]" "The social mind is the phenomenon of many minds in interaction, so playing upon one another that they simultaneously feel the same sensation or emotion, arrive at one judgment and perhaps act in concert." FRANKLIN H. GIDDINGS, *PRINCIPLES OF SOCIOLOGY* 134 (Macmillan and Co Ltd. 1896).

108 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

No two societies will have exactly the same theory, given that a society's theory is itself the product of the whole of a society's past, the continuation of a particular historical reality.

But there are two general aspects of a society's theory which are of particular interest for us as we seek to imagine society at the level of the whole of humanity.

The first aspect is the problem of unity-from-diversity or diversity-in-unity. How unified does a society have to be in its thinking? How much diversity can a society tolerate? How far should a society impose a common way of thinking in its public mind and in the private minds of its citizens?

And that raises the general question of the law's role as an enforcer of ideas and values.

The United States is a remarkable example of unity-in-diversity, diversity-in-unity, quite consciously responding to the challenge of how much mental integration is required for the survival and prospering of a society which is intensely dynamic and intensely complex in its cultural presences.

We in Europe are facing, yet again, similar challenges. How mentally integrated should the European Union be made to be, given our national idiosyncrasies? How can our intense national subjectivities accommodate new cultural presences, especially religious presences and especially the cultural presence of Islam in what are essentially post-Christian societies?

The second aspect of a society's theory is the question of the relevance of transcendental values, values that have their root beyond particular societies.

We are not merely members of particular societies. As human beings, we also participate in universal human capacities and potentialities, in the inheritance and the potentiality of all human beings, and in species-characteristics of the human species.

Evolution has, very kindly, left within the human mind three capacities for universalizing thought: religion, philosophy, and natural science.

Some observers have placed those three in progressive-historical order suggesting that science makes metaphysical philosophy redundant, as metaphysical philosophy made religion redundant.

Two centuries later, we have reason to believe that religion, philosophy, and science are here to stay, in a deeply challenging relationship, a relationship on which, one must say, the future happiness of humanity depends, perhaps even, the survival of the human species.

Religion is a natural and necessary response of the human mind to what the mind sees as humanity's participation in the supernatural, that is to say, in what lies beyond what the human mind regards as both the human world and the natural world. In other words, religion takes the view that philosophy and natural science are not a sufficient response to the situation in which humanity finds itself.

Philosophy is the mind thinking in an orderly way about its own activity.³

Natural science is the mind thinking in an orderly way about the natural world, including human beings as an integral part of the natural world.

All three forms of universalizing thought have very great effects on everyday human life, including everyday social life. All three generate powerful sub-sets of value, conditioning the way we think and act.

So, each society has to choose its own ways of integrating the products of religion, philosophy, and natural science, which are transcendental ideas, universal ideas, ideas applicable in principle to any and all societies.

We use the word "totalitarian" to describe a society which seeks to control its citizens socially and in body and mind, even the products of the universalizing mind. Examples are Stalinist Russia, Hitlerite Germany, Maoist China.

In our own societies, the law is used to control aspects of scientific research and its social applications. Law is used to determine the place of religion in society. The law even does philosophy, in the sense that we are well advised to think in the same way that the law thinks and in

³ G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* 69 (J. Sibree trans., Willey Book Co. 1944). Hegel described philosophy as "the Thinking of Thinking[.]" *Id.*

110 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

the sense that the law thinks in its own very peculiar way, even about interesting philosophical categories, such as causation, intention, insanity, reasonableness, and truth.

V. FICTION, ILLUSION, AND PATHOLOGY

Is President George W. Bush fact, fiction, or illusion? Is the United States of America fact, fiction, or illusion?

As lawyers, we know that "the President" is the name for something within legal reality, something separate from the person George W. Bush. "President" is the name for the focus of a unique set of legal relations, especially legal powers: the powers of the Commander-in-Chief, powers to nominate and appoint to public offices, to take part in legislation, to sign treaties, and so on. In January 2009, George Bush will take off that legal persona and someone else will put it on.

The same is true of "the United States of America." It is a name within the legal reality of international law, the focus of a unique set of legal relations in international law, and, presumably also, the focus of some legal relations in U.S. law: when a treaty is applied internally, for example, or when it is necessary to identify the territory of the United States for some legal purpose.

But "the President" and "the United States" are also part of general social reality. In general, social reality takes effect as ideas, works of the imagination, fictions. People may show respect to "the President" and take pride in "the United States."

And that is true of everything social, including the law itself.

Society is made in the human mind and exists only in the human mind. Society is a collection of ideas, works of the imagination, and fictions. Society is conceived not perceived.

An interesting philosophical tradition has drawn attention to the implications of this fact. Francis Bacon, early in the seventeenth century, made an excellent *avant garde*, not to say post-modern, observation. We worship socially generated ideas, as if they were idols. And Bacon

suggests that great systems of ideas are like stage-plays in which we each play our part, acting out a script written by someone else.⁴

Democracy and capitalism, seen in this Baconian way, are great systems of ideas authored by someone else, in which we are the *dramatis personae*. We play our respective parts and act in the way that is expected of us, taking on the role of a voter, a representative of the people, a judge, a capitalist, a worker, a lawyer, whatever may be our assigned role.

The law, above all other social phenomena, presents itself openly and aggressively as *theatre*, a sort of mystery play or thriller, in which members of the audience sometimes find themselves involved as actors, more or less randomly, to their great cost and occasional benefit.

Later, Giambattista Vico and Georges Sorel would speak of “social poetry” –in another brilliant phrase– social consciousness as a work of the imagination, a work of which we are all potentially co-authors.

Jeremy Bentham analyzed the necessary “fictions” of politics.

Karl Marx told us that society manufactures ideas, creating a mental superstructure which determines the functioning of all social structures and systems and conditions the thinking and the behavior of everyone in society.

In the twentieth century, Hans Vaihinger told us that all our supposed knowledge consists of imaginary models which we treat as if they were reality. Michel Foucault, following Nietzsche, showed how such phantoms, with contingent but specific historical roots, take over our minds and determine not only how we think but also how we behave, how we organize society, how we see ourselves, and how we treat other people—say, socially produced ideas about madness, morality, sexuality, or power.

It is a defining moment in one’s life when one first realizes that the human world is an imaginary world. We human beings have a habitat, the natural world. But we have made a second habitat, the human world. And the human world is made by, in, and for the human mind.

⁴ FRANCIS BACON, *THE NEW ORGANON AND RELATED WRITINGS* 49 (Fulton H. Anderson ed., The Bobbs-Merrill Co., Inc. 1960).

112 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

It is a defining moment when we realize this, but it is also a very troubling moment, since we know that the human mind is not only capable of inventing fictions. It is also capable of fantasy, illusion, delusion, neurosis, and psychosis. The public mind has its psychology which is the psychology of our private minds magnified and collectivized and then sent back into our private minds in its collectivized form, a collectivized form which may be a diseased form.

Actually, this can also be a reassuring discovery. Surely there has to be some explanation for the behavior of people who go out to murder people by the million in the name of some imagined identity or religion or for some other delusional cause. Surely there must be some explanation for societies that treat human beings as if they were little more than animals, to be herded and exploited and, if necessary, killed or left to die.

The public mind, social consciousness, can become pathological.

But the discovery that human minds make the human world can also be a great moment of enlightenment, encouragement, and inspiration. If the human mind has imagined the human world as it is, it follows that the human mind could imagine a different human world and could make a better human world.

Maybe, even the law, that wonderful and paradoxical engine of both social stability and social change, might take on a revolutionary role, a healing role, creating a new and better legal reality to serve as a prescription for a new and better social reality. This is an interesting hypothesis. The legislative and judicial transformation of British society in the nineteenth century can easily be seen as what the Duke of Wellington called "a revolution by due course of law."⁵

VI. DEMOCRACY-CAPITALISM AND THE DE-HUMANISING OF HUMANITY

Revolutionary therapeutics is now immeasurably more difficult than it was in the nineteenth century, thanks to a certain social phenomenon that dominates all other social phenomena and has come to dominate modern society, the social phenomenon that is spreading its shadow across the whole face of the human world, democracy-capitalism. It is important to understand that democracy-capitalism is not just another

⁵ MATTHEW ARNOLD, *CULTURE AND ANARCHY. AN ESSAY IN POLITICAL AND SOCIAL CRITICISM* 91 (Smith, Elder and Co. 1869).

category of political system to add to the list of possible forms of *polis* that we inherited from the ancient Greeks.

Democracy-capitalism is a new kind of human social existence, a form of human social existence which is a *re-forming* of what it is to be a human being.

Democracy-capitalism is the ultimate totalitarian social system, in which human beings are taken over, body and mind, by society and know themselves only as social beings.

In democracy-capitalism the human being is not merely a sociable animal, not merely a *zōon politikon*. In democracy-capitalism the human being becomes, essentially, a social being whose essence is to be integrated in society.

Democracy-capitalism is also the ultimate legal system. Democracy is a highly efficient machine for producing the masses of law and government required by capitalism. To make capitalism possible, the law ceaselessly invents fictional forms, fictional entities (property, contract, employment, money, stocks and bonds, corporations, limited liability, intellectual property, insolvency, and so on), all of them works of the imagination, existing only in our minds. All of these imaginary legal-economic phenomena are structures of legal relations, networks of legal relations of phenomenal density and complexity.

Corruptissima re publica plurimae leges; the most corrupt state has the most laws.⁶

From the beginning of modern democracy-capitalism, perceptive observers, friends *and* enemies of the new kind of society, saw that the new kind of society would have a profound effect on human beings, not merely on their daily lives but also on their personal consciousness, on their self-consciousness.

Jean-Jacques Rousseau, Adam Smith, William Godwin, Robert Owen, Charles Fourier, the brilliant Alexis de Tocqueville, Matthew Arnold, Marx and Engels, J.S. Mill, Thomas Carlyle, John Ruskin, William Morris, and countless other culture-critics discussed this problem already in the eighteenth and nineteenth centuries, discussing the problem of the *alienation* of personal identity in the new kind of

⁶ TACITUS, THE ANNALS 566 (J. Jackson trans., Harvard Univ. Press 1931). Jackson's translation is: "when the state was most corrupt, laws were most abundant[.]" *Id.*

114 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

society and the devaluing of all traditional high values as money-values come to dominate all other values.

But social philosophers, not least Rosuseau and Adam Smith, managed to implant in Europe and in America the optimistic and reassuring idea that the new social system is intrinsically rational, natural, and good.

According to Rousseau, in a true democracy we would at last find true freedom. As he notoriously and prophetically put it, in a true *society* we would be "forced to be free."⁷ Our self-interest would become identical with the common interest of society. In a true society, we individual citizens find that there is no distinction between our personal will and society's general will.

To put it in more modern and vaguely Freudian terms, our desire as individual human beings becomes desire for what society desires us to desire.

For Adam Smith, another remarkable prophet, a properly organized economic system produces ever-increasing wealth, necessarily and inevitably. A properly organized division of labor is an ideally efficient integration of labor. A properly functioning market is more intelligent than the human economic actors who participate in it.

Society becomes a vast wealth-making machine. And we ordinary citizens find our personal identity as well-adjusted, spare-parts of that vast wealth-making machine, as laborers and as consumers.

I cannot, here and now, do more than draw your attention to the famous existential problem of democracy-capitalism. A vast amount has been written and said about it.

But I must say a little more about one aspect of the problem, an aspect which is important in the context of this lecture, in the context of the possible universalizing of democracy and capitalism, in the context of what is called globalization.

Democracy-capitalism is not merely a particular social structure and a particular social system. It is not merely a monstrous legal system. It is not merely an ideology.

⁷ JEAN-JACQUES ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES 177 (G.D.H. Cole trans., J.M. Dent & Sons Ltd. 1973) (1913).

Democracy-capitalism is a state of mind, a philosophy, a religion almost. And we, in the humanities faculties of universities, are its theologians, more or less orthodox or protestant as we so choose. And holders of public power are democracy-capitalism's clergy.

Democracy and capitalism contain their own high values, high values which have the remarkable characteristic that they can override all other social values, overriding even what I referred to earlier as transcendental values, including humanity's ultimate ideals.

Democracy-capitalism is a new form of mythology, a mysteriously powerful leviathan.

Democracy has its own hallowed formulas to summarize and celebrate its self-contained and self-proclaimed virtues. A classic formula is *liberty, equality, and fraternity*.

But, strange to say, some troublesome people might be inclined to summarize the lived reality of democratic societies in a different formula: *slavery, inequality, and selfishness*.

Another classic formula is government of the people, by the people, for the people. Another possible dissenting formula might be government of the people by the age-old oligarchy of wealth and power.

Capitalism's self-proclaimed virtues are such things as wealth, freedom, competition, innovation, and efficiency. But some querulous people might be inclined to summarize the lived reality of capitalism as shameful socio-economic inequality produced by a ruthless struggle for survival.

Whatever view you take of the true virtues of democracy and capitalism, the important thing to understand is that their values are inherent, intrinsic, self-proving, and self-justifying. They are pragmatic values. And pragmatic values have no need of transcendental values, except to the extent that transcendental values happen to be incorporated pragmatically and instrumentally, values as marketable commodities or rhetorical tropes.

In their Declaration of Independence in 1776, the rebellious Americans inserted a characteristically eighteenth-century idea into the Declaration's essentially seventeenth-century rhetoric, the idea of "the pursuit of happiness."

116 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

The pursuit of happiness has turned out to be the “hunting of the snark.” We democratic-capitalists have no idea what “happiness” would be like, if ever we were to find it.

VII. INTERNATIONAL UNSOCIETY

And so, at last, we get to the problem of the international system, the place where the whole of humanity co-exists rather unhappily.

I said at the beginning that it is difficult to get lawyers to understand the true social significance of law. I have to say now that it seems impossible to get sensible people in general to recognize the lunacy of the international system in its present form.

Although, you would have thought that there was more than enough evidence.

Hundreds of millions of people were killed in the 20th century by wars and the misuse of public power by criminal gangs masquerading as “governments.”

Millions of people living in hopeless misery, with their children dying of treatable diseases. Children grubbing around in refuse dumps to find something to sell or food for their family.

And all this, while humanity in general is using the apparently limitless power of the human mind to achieve amazing levels of social organization and producing astonishing, world-transforming material effects through the application of science and engineering.

Humanity has never been more powerful; and yet humanity has never seemed more unsure of itself and its future in the world of its own making, the human world and the natural world transformed by human power.

Human power seems powerless in the face of things that human power has made: climate change, nuclear proliferation, the international arms trade, international organized crime, governmental and non-governmental violence, gross economic inequality and exploitation, and a sort of global de-humanising corruption of consciousness, a corrupting of human values and, especially, a corrupting of transcendental values.

All these negative phenomena are organized within an international legal system which provides a framework for a sort of pre-societal co-

existence of two hundred fictional legal entities known as “states,” which are deemed by law to be equal and independent and to be represented in relation to each other by fictional legal entities known as “governments.”

And those governments, however evil and undemocratic they may be, are deemed to represent all six billion human beings in all their infinite variety of interests and desires.

This is the form of the international *unsociety* we have inherited from the eighteenth century.

I will simply assert (it surely requires no supporting argument) that such a legal structure is not adequate to organize the relationship of all the peoples of the world, the overwhelming phenomena of globalization, the gross and global problems which plague our world, and the wonderful as yet unused potentialities of the human species.

In this lecture I have tried to show the dominant role that law plays in the making of society. But I have also tried to show the way in which law is structurally integrated into the rest of society’s constitutive phenomena, especially society’s values and the complex political process in the struggle to apply society’s values effectively and beneficially to everyday life.

So you will have gathered that when I speak of a “new world order,” I have in mind something much more far-reaching than a mere re-organizing of international institutions. I have in mind a complete re-thinking of the human world, a sort of New Enlightenment.

We have inherited the social structures in which we live; we have inherited the legal systems in which we live; and we have inherited the theories which explain and justify them.

All that I am saying is that we have a duty, and, as lawyers, a special duty, to think again, to imagine new kinds of society, new social theories, new values, new high values, new kinds of legal systems, and, above all, a new kind of international society. An international society in which international law will, at last, be able to realize law’s wonderful potentiality as the primary instrument for achieving the “good life” in society, international law as the primary agent of the common good of all-humanity.

VIII. FIVE STEPS TO A NEW WORLD ORDER

So, by way of a summary and conclusion, I will offer my list of steps that humanity must take to make a new world order, to make a New Enlightenment. It is my own personal list, but surely all thoughtful people should feel obliged to draw up their own prescription for humanity's self-redeeming:

1. Re-imagine the *human being*—as an autonomous and absolutely valuable being, not merely as a relatively-valued, replaceable spare-part in the machinery of society. Re-imagine the human being as the thinking, loving, and creating animal, whose ideal subjectivity contains enthusiasm, hope, and joy;
2. Re-imagine *human society*—as the source of the good life for all through the collective search for the common good and as an instrument for the self-perfecting of human beings, with a re-birth of politics as something more than the collusive manipulation of illusions by the governors and the governed and a re-birth of government as something more than a short-term macro-management function;
3. Re-imagine *the human mind*—saying thank-you to Marx, Freud, and Wittgenstein; but leaving them behind, re-asserting the human self-transcending power of religion, philosophy, and natural science. The corrupting of religion, the self-denying of philosophy, and the self-hegemonising of natural science are unnecessary forms of human self-wounding. They will be very difficult to heal in any New Enlightenment, if it is not already too late to do so;
4. Re-imagine *humanity*—re-imagine international society as a true society of all re-imagined human beings, the society of all re-imagined human societies with international law as its true law; and
5. Imagine *the human future*—choose the human future. Take power over the human future. Otherwise the human future will just happen and may contain something very different from human self-perfecting.