

THE DECLINE OF THE LAW

The dogma, that absolute power may, by the hypothesis of a popular origin, be as legitimate as constitutional freedom, began . . . to darken the air.

—Lord Acton

1. Earlier in our discussion we devoted more attention than is usual to developments in Germany, partly because it was in that country that the theory, if not the practice, of the rule of law was developed furthest, and partly because it was necessary to understand the reaction against it which commenced there. As is true of so much of socialist doctrine, the legal theories which undermined the rule of law originated in Germany and spread from there to the rest of the world.

The interval between the victory of liberalism and the turn toward socialism or a kind of welfare state was shorter in Germany than elsewhere. The institutions meant to secure the rule of law had scarcely been completed before a change in opinion prevented their serving the aims for which they had been created. Political circumstances and developments which were purely intellectual combined to accelerate a development which proceeded more slowly in other countries. The fact that the unification of the country had at last been achieved by the artifice of statesmanship rather than by gradual evolution strengthened the belief that deliberate design should remodel society according to a preconceived pattern. The social and political ambitions which this situation encouraged were strongly supported by philosophical trends then current in Germany.

The demand that government should enforce not merely “formal” but “substantive” (i.e., “distributive” or “social”) justice had been advanced recurrently since the French Revolution. Toward the end of the nineteenth century these ideas had already profoundly affected legal doctrine. By 1890 a

The quotation at the head of the chapter is taken from Lord Acton, “Sir Erskine May’s *Democracy in Europe*,” *History of Freedom*, p. 78 [Liberty Fund edition, *Essays in the History of Liberty*, p. 68]. The title of the chapter is borrowed from Georges Ripert, *Le Déclin du droit* (Paris: Pichon and Durand-Auzias, 1949).

leading socialist theorist of the law could thus express what was increasingly becoming the dominant doctrine: “By treating in a perfectly equal manner all citizens regardless of their personal qualities and economic position, and by allowing unlimited competition between them, it came about that the production of goods was increased without limit; but the poor and weak had only a small share in that output. The new economic and social legislation therefore attempts to protect the weak against the strong and to secure for them a moderate share in the good things of life. This is because today it is understood that there is no greater injustice than to treat as equal what is in fact unequal!”¹ And there was Anatole France, who scoffed at “the majestic equality of the law that forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.”² This famous phrase has been repeated countless times by well-meaning but unthinking people who did not understand that they were undermining the foundations of all impartial justice.

¹Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen* (1890) (3rd ed.; Tübingen: H. Laupp, 1904), p. 30. [The original German reads: “Indem man nun alle Staatsbürger ohne Rücksicht auf ihre persönlichen Eigenschaften und auf ihre wirtschaftliche Lage völlig gleich behandelte und zwischen ihnen einen zügellosen Wettbewerb zuließ, bewirkte man zwar, dass die Gütererzeugung ins unendliche stieg, zugleich aber auch, dass die Armen und Schwachen an den gesteigerten Gütermengen nur einen sehr geringen Anteil hatten. Daher die neue wirtschaftliche und Sozialgesetzgebung, welche bestrebt ist, den Schwachen gegen den Starken zu schützen und ihm an den Gütern des Lebens wenigstens einen bescheidenen Anteil zu sichern. Man weiss eben heute, dass es keine grössere Ungleichheit gibt, als das Ungleiche gleich zu behandeln.”—Ed.] The full consequences of this conception are worked out in that author’s later book, *Neue Staatslehre* (Jena: Gustav Fischer, 1903). About the same time the great German criminologist, Franz Eduard von Liszt could already comment (*Strafrechtliche Aufsätze und Vorträge*. Vol. 2: 1892 bis 1904 [2 vols.; Berlin: J. Guttentag, 1905], p. 60): “Das heranwachsende sozialistische Geschlecht, das die gemeinsamen Interessen schärfer betont als seine Vorgänger, für dessen Ohren das Wort ‘Freiheit’ einen archaischen Klang gewonnen hat, rüttelt an diesen Grundlagen.” [“The coming socialist generation, which emphasizes common interests with greater force than did its predecessors and for whose ears the word ‘freedom’ has an archaic ring, is buffeting the foundations (of justice).”—Ed.] The infiltration of the same ideas into England is well illustrated by David George Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (1894) (3rd ed.; London: Allen and Unwin, 1916), p. 258: “The claim of equality, in its widest sense, means the demand for equal opportunity—the *carrière ouverte aux talents*. The result of such equality of opportunity will clearly be the very reverse of equality of social condition, if the law allows the transmission of property from parent to child, or even the accumulation of wealth by individuals. And thus, as has often been pointed out, the effect of the nearly complete triumph of the principles of 1789—the abolition of legal restrictions on free competition—has been to accentuate the difference between wealth and poverty. Equality in political rights, along with great inequalities in social condition, has laid bare ‘the social question’; which is no longer concealed, as it formerly was, behind the struggle for equality before the law and for equality in political rights.”

²Anatole France, *Le Lys rouge* (Paris: Calmann-Lévy, 1894), p. 118. [The original reads: “La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.”—Ed.]

2. The ascendancy of these political views was greatly assisted by the increasing influence of various theoretical conceptions which had arisen earlier in the century and which, though in many respects strongly opposed to one another, had in common the dislike of any limitation of authority by rules of law and shared the desire to give the organized forces of government greater power to shape social relations deliberately according to some ideal of social justice. The four chief movements which operated in this direction were, in descending order of importance, legal positivism, historicism, the “free law” school, and the school of “jurisprudence of interest.” We shall only briefly consider the last three before we turn to the first, which must detain us a little longer.

The tradition which only later became known as “jurisprudence of interest” was a form of sociological approach somewhat similar to the “legal realism” of contemporary America. At least in its more radical forms it wanted to get away from the kind of logical construction which is involved in the decision of disputes by the application of strict rules of law and to replace it by a direct assessment of the particular “interests” at stake in the concrete case.³ The “free law” school was in a way a parallel movement concerned mainly with criminal law. Its objective was to free the judge as far as possible from the shackles of fixed rules and permit him to decide individual cases mainly on the basis of his “sense of justice.” It has often been pointed out how much the latter in particular prepared the way for the arbitrariness of the totalitarian state.⁴

Historicism, which must be precisely defined so that it may be sharply distinguished from the great historical schools (in jurisprudence and elsewhere)

³The tradition traces back to the later work of Rudolph von Ihering (1818–1882). [Von Ihering’s most important works were probably *The Spirit of the Roman Law* (1852–65), originally published in German under the title *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (4 vols.; Leipzig: Breitkopf und Härtel, 1852–65); *The Struggle for Law* (1879), translated from the 5th German ed. of *Der Kampf um’s Recht* (Vienna: Manz, 1877); and *Law as a Means to an End*. Vol. 1: 1877; Vol. 2: 1883, which was a translation of the first volume of the 4th ed. of Ihering’s *Der Zweck im Recht* (Leipzig: Breitkopf und Härtel, 1904–05). These works underscored Ihering’s theory that self-interest was of crucial importance in shaping the law and that the process by which legal rules were maintained was self-regulating.—Ed.] For the modern development see the essays collected in *The Jurisprudence of Interests: Selected Writings of Max Rümelin*, Magdalena Schoch, ed. (Twentieth Century Legal Philosophy Series, vol. 2; Cambridge, MA: Harvard University Press, 1948).

⁴See, e.g., Fritz Fleiner, *Ausgewählte Schriften und Reden* (Zurich: Polygraphischer Verlag, 1941), p. 438: “Dieser Umschwung [zum totalitären Staat] ist vorbereitet worden durch gewisse Richtungen innerhalb der deutschen Rechtswissenschaft (z.B. die sogenannte Freirechtsschule), die geglaubt haben, dem Rechte zu dienen, indem sie die Gesetzestreue durchbrachen.” [“This change (this transformation toward the totalitarian state) was adumbrated by certain tendencies that marked German jurisprudence (e.g., the so-called school of free-law) that held that it was possible to serve the law by violating its integrity.” (Interpolation Hayek’s).—Ed.]

that preceded it,⁵ was a school that claimed to recognize necessary laws of historical development and to be able to derive from such insight knowledge of what institutions were appropriate to the existing situation. This view led to an extreme relativism which claimed, not that we are the product of our own time and bound in a large measure by the views and ideas we have inherited, but that we can transcend those limitations and explicitly recognize how our present views are determined by circumstances and use this knowledge to remake our institutions in a manner appropriate to our time.⁶ Such a view would naturally lead to a rejection of all rules that cannot be rationally justified or have not been deliberately designed to achieve a specific purpose. In this respect historicism supports what we shall presently see is the main contention of legal positivism.⁷

3. The doctrines of legal positivism have been developed in direct opposition to a tradition which, though it has for two thousand years provided the framework within which our central problems have been mainly discussed, we have not explicitly considered. This is the conception of a law of nature, which to many still offers the answer to our most important question. We have so far deliberately avoided discussing our problems with reference to this conception because the numerous schools which go under this name hold really different theories and an attempt to sort them out would require a separate book.⁸ But we must at least recognize here that these different schools of the law of nature have one point in common, which is that they address themselves to the same problem. What underlies the great conflict between the

⁵About the character of this historicism see Menger, *Untersuchungen*, and Sir Karl Raimund Popper, *The Poverty of Historicism* (London: Routledge and Kegan Paul, 1957).

⁶Cf. my *The Counter-Revolution of Science: Studies in the Abuse of Reason* (Glencoe, IL: Free Press, 1952), pt. 1, chap. 7 ["The Historicism of the Scientific Approach," pp. 64–79; *Collected Works* edition, vol. 13, pp. 126–41].

⁷On the connection between historicism and legal positivism cf. Hermann Heller, "Bemerkungen zur staats- und rechtstheoretischen Problematik der Gegenwart," *Archiv für öffentliches Recht*, 16 (1929): 336.

⁸The best brief survey of the different "natural-law" traditions that I know of is Alessandro Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (Hutchinson's University Library; London: Hutchinson, 1951). [This book is the outcome of eight lectures delivered at the University of Chicago in April 1948.—Ed.] It may also be briefly mentioned here that modern legal positivism derives largely from Thomas Hobbes and René Descartes, the two [The 1971 German edition reads: "three" and includes "Francis Bacon."—Ed.] men against whose rationalistic interpretation of society the evolutionary, empiricist, or "Whig" theology was developed, and that positivism gained its present-day ascendancy largely because of the influence of Hegel and Marx. For Marx's position, see the discussion of individual rights in the Introduction to his *Kritik der Hegelschen Rechtsphilosophie*, in Karl Marx and Friedrich Engels, *Historisch-kritische Gesamtausgabe, Werke, Schriften, Briefe*, David Borisovic Rjazanov [David Borisovic Gol'dendach], ed. (11 vols.; Berlin: Marx-Engels Archiv, Marx-Engels Verlag, 1927–32), vol. 1, pt. 1.

defenders of natural law and the legal positivists is that, while the former recognize the existence of that problem, the latter deny that it exists at all, or at least that it has a legitimate place within the province of jurisprudence.

What all the schools of natural law agree upon is the existence of rules which are not of the deliberate making of any lawgiver. They agree that all positive law derives its validity from some rules that have not in this sense been made by men but which can be "found" and that these rules provide both the criterion for the justice of positive law and the ground for men's obedience to it. Whether they seek the answer in divine inspiration or in the inherent powers of human reason, or in principles which are not themselves part of human reason but constitute non-rational factors that govern the working of the human intellect, or whether they conceive of the natural law as permanent and immutable or as variable in content, they all seek to answer a question which positivism does not recognize. For the latter, law by definition consists exclusively of deliberate commands of a human will.

For this reason, legal positivism from the very beginning could have no sympathy with and no use for those meta-legal principles which underlie the ideal of the rule of law or the *Rechtsstaat* in the original meaning of this concept, for those principles which imply a limitation upon the power of legislation. In no other country did this positivism gain such undisputed sway in the second half of the last century as it did in Germany. It was consequently here that the ideal of the rule of law was first deprived of real content. The substantive conception of the *Rechtsstaat*, which required that the rules of law possess definite properties, was displaced by a purely formal concept which required merely that all action of the state be authorized by the legislature. In short, a "law" was that which merely stated that whatever a certain authority did should be legal. The problem thus became one of mere legality.⁹ By the turn of the century it had become accepted doctrine that the "individualist" ideal of the substantive *Rechtsstaat* was a thing of the past, "vanquished by the creative powers of national and social ideas."¹⁰ Or, as an authority on administrative law described the situation shortly before the outbreak of the first World War: "We have returned to the principles of the police state [!] to such an extent that we again recognize the idea of a *Kulturstaat*. The only difference

⁹Cf. Hermann Heller, *Rechtsstaat oder Diktatur?* (Tübingen: Mohr, 1930); John Hamilton Halliwell, *The Decline of Liberalism as an Ideology, with Particular Reference to German Politico-legal Thought* (Berkeley: University of California Press, 1943); and *The Moral Foundation of Democracy* (Chicago: University of Chicago Press, 1954), chap. 4, "Democracy and Liberalism," pp. 68–88, esp. p. 73.

¹⁰Richard Thoma, "Rechtsstaatsidee und Verwaltungstrechtswissenschaft," in *Jahrbuch des öffentlichen Rechts der Gegenwart*, 4 (1910): 199. [The German reads: "Diese individualistische Rechtsstaatsidee hat in der Tat ihre Rolle ausgespielt. Die schöpferische Kräfte der nationalen und der sozialen Ideen haben sie überwunden. Es wird das häufig betont und niemand zweifelt daran."—Ed.]

is in the means. On the basis of laws the modern state permits itself everything, much more than the police state did. Thus, in the course of the nineteenth century, the term *Rechtsstaat* was given a new meaning. We understand by it a state whose whole activity takes place on the basis of laws and in legal form. On the purpose of the state and the limits of its competence the term *Rechtsstaat* in its present-day meaning says nothing.¹¹

It was, however, only after the first World War that these doctrines were given their most effective form and began to exert a great influence which extended far beyond the limits of Germany. This new formulation, known as the “pure theory of law” and expounded by Professor H. Kelsen,¹² signaled the definite eclipse of all traditions of limited government. His teaching was avidly taken up by all those reformers who had found the traditional limitations an irritating obstacle to their ambitions and who wanted to sweep away all restrictions on the power of the majority. Kelsen himself had early observed how the “fundamentally irretrievable liberty of the individual . . . gradually recedes into the background and the liberty of the social collective occupies the front of the stage”¹³ and that this change in the conception of

¹¹ Edmund Bernatzik, *Die Ausgestaltung des Nationalgefühls im 19. Jahrhundert. Rechtsstaat und Kulturstaat: Zwei Vorträge gehalten in der Vereinigung für staatswissenschaftliche Fortbildung in Cöln im April 1912* (Hanover: Helwing, 1912), p. 56. [The German reads: “Wir Heutigen kehren zu den Principien des Polizeistaates insofern zurück, als wir seine Kulturstaatsidee wieder anerkennen. Der einzige Unterschied liegt in den rechtlichen Mitteln. Auf Grund von Gesetzen gestattet sich der heutige Staat alles noch viel mehr als der Polizeistaat. Und so gelangte man im Laufe des 19. Jahrhunderts zu einer neuen Bedeutung des Ausdrucks ‘Rechtsstaat.’ Man verstand jetzt darunter einen Staat, dessen ganze Tätigkeit sich auf Grund von Gesetzen in rechtlichen Formen abspielt. Über den Staatszweck und die Grenzen der staatlichen Kompetenz sagt das Wort ‘Rechtsstaat’ in seiner heutigen Bedeutung gar nichts mehr aus und in dieser neuen Bedeutung steht daher das Wort auch nicht mehr in einem Gegensatz zum Kulturstaat.”—Ed.]. Cf. also the same author’s “Polizei und Kulturpflege,” in *Systematische Rechtswissenschaft* (Berlin: Teubner, 1906) [pt. 2, sec. 8 of *Die Kultur der Gegenwart. Ihre Entwicklung und ihre Ziele*, edited by Paul Hinneberg], pp. 387–426.

¹² The victory of legal positivism had been secured earlier, mainly through the relentless efforts of Carl Bergbohm, *Jurisprudenz und Rechtsphilosophie: kritische Abhandlungen* (Leipzig: Duncker und Humblot, 1892), but it was in the form given to it by Hans Kelsen that it achieved a widely accepted and consistent philosophical basis. We shall here quote mainly from Kelsen’s *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925), but the reader will find most of the essential ideas restated in his *General Theory of Law and State*, Anders Wedberg, trans. (Twentieth Century Legal Philosophy Series; Cambridge, MA: Harvard University Press, 1945), which also contains a translation of an important lecture on *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Charlottenburg: Verlag Rolf Heise, 1928). [An English translation of Kelsen’s *Die philosophischen Grundlagen* appears on pp. 391–446 of his *General Theory of Law and State*.—Ed.]

¹³ Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Tübingen: J. C. B. Mohr, 1920), p.10 [The German reads: “die im Grunde genommen unrettbare Freiheit des Individuums tritt allmählich in den Hintergrund und die Freiheit des sozialen Kollektivums in den Vordergrund.”—Ed.]. The phrase “im Grunde unrettbare Freiheit des Individuums” [“the fundamentally irretrievable

freedom meant an “emancipation of democratism from liberalism,”¹⁴ which he evidently welcomed. The basic conception of his system is the identification of the state and the legal order. Thus the *Rechtsstaat* becomes an extremely formal concept and an attribute of all states,¹⁵ even a despotic one.¹⁶ There are no possible limits to the power of the legislator,¹⁷ and there are no “so-called fundamental liberties”;¹⁸ and any attempt to deny to an arbitrary despotism the character of a legal order represents “nothing but the naïveté

freedom of the individual”—Ed.] becomes in the second edition of 1929 “im Grunde unmögliche Freiheit des Individuums” [“the in fact impossible freedom of the individual”—Ed.] (*Von Wesen und Wert der Demokratie* [2nd ed.; Tübingen: J. C. B. Mohr, 1929], p. 11).

¹⁴ “Lösung des Demokratismus von Liberalismus,” Hans Kelsen, *Vom Wesen und Wert der Demokratie*, p. 10.

¹⁵ Hans Kelsen, *Allgemeine Staatslehre*, p. 91. Cf. also his *Hauptprobleme der Staatsrechtslehre: entwickelt aus der Lehre vom Rechtssatze* (2nd ed.; Tübingen: J. C. B. Mohr, 1923), p. 249, where his approach leads him consistently to assert that “a wrong of the state must under all circumstances be a contradiction in terms.” [“Ein Unrecht des Staates muß unter allen Umständen ein Widerspruch in sich selbst sein.”—Ed.]

¹⁶ Hans Kelsen, *Allgemeine Staatslehre*, p. 335; the relevant passages read in translation: “Entirely meaningless is the assertion that under a despotism there exists no order of law [*Rechtsordnung*], [that there] the arbitrary will of the despot reigns. . . . The despotically governed state also represents some order of human behavior. This order is the order of law. To deny to it the name of an order of law is nothing but naïveté and presumption deriving from natural-law thinking. . . . What is interpreted as arbitrary will is merely the legal possibility of the autocrat’s taking on himself every decision, determining unconditionally the activities of subordinate organs and rescinding or altering at any time norms once announced, either generally or for a particular case. Such a condition is a condition of law even when it is felt to be disadvantageous. It has also its good aspects. The demand for dictatorship not uncommon in the modern *Rechtsstaat* shows this very clearly.” [“Vollends sinnlos ist die Behauptung, daß in der Despotie keine Rechtsordnung bestehe, sondern Willkür des Despoten herrsche. . . . stellt doch auch der despotisch regierte Staat irgendeine Ordnung menschlichen Verhaltens dar, weil ja ohne eine solche Ordnung überhaupt kein Staat, ja überhaupt keine Gemeinschaft möglich, kein Mensch als Herrscher, König, Fürst qualifizierbar wäre. Diese Ordnung ist eben die Rechtsordnung. Ihr den Charakter des Rechts absprechen, ist nur eine naturrechtliche Naïvität oder Überhebung. . . . Was als Willkür gedeutet wird, ist nur die rechtliche Möglichkeit des Autokraten, jede Entscheidung an sich zu ziehen, die Tätigkeit der untergeordneten Organe bedingungslos zu bestimmen und einmal gesetzte Normen jederzeit mit allgemeiner oder nur besonderer Geltung aufzuheben oder abzuändern. Ein solcher Zustand ist ein Rechtszustand, auch wenn er als nachteilig empfunden wird. Doch hat er auch seine guten Seiten. Der im modernen *Rechtsstaat* gar nicht seltene Ruf nach Diktatur zeigt dies ganz deutlich.”—Ed.] That this passage still represents the author’s views is explicitly acknowledged by him in his essay “Foundations of Democracy,” *Ethics*, no. 1, pt. 2, 66 (1955):100, n. 13; see also an earlier version of the same argument, entitled “Democracy and Socialism,” in *Conference of Jurisprudence and Politics*, Scott Buchanan, ed. (Chicago: University of Chicago Law School, 1955), pp. 63–87.

¹⁷ Hans Kelsen, *Allgemeine Staatslehre*, p. 14.

¹⁸ Hans Kelsen, *Allgemeine Staatslehre*, pp. 154ff. [the phrase is “die sogenannten Freiheitsrechte.”—Ed.]

and presumption of natural-law thinking.”¹⁹ Every effort is made not only to obscure the fundamental distinction between true laws in the substantive sense of abstract, general rules and laws in the merely formal sense (including all acts of a legislature) but also to render indistinguishable from them the orders of any authority, no matter what they are, by including them all in the vague term “norm.”²⁰ Even the distinction between jurisdiction and administrative acts is practically obliterated. In short, every single tenet of the traditional conception of the rule of law is represented as a metaphysical superstition.

This logically most consistent version of legal positivism illustrates the ideas which by the 1920s had come to dominate German thinking and were rapidly spreading to the rest of the world. At the end of that decade they had so completely conquered Germany that “to be found guilty of adherence to natural law theories [was] a kind of social disgrace.”²¹ The possibilities which this state of opinion created for an unlimited dictatorship were already clearly seen by acute observers at the time Hitler was trying to gain power. In 1930 a German legal scholar, in a detailed study of the effects of the “efforts to realize the socialist State, the opposite of the *Rechtsstaat*,”²² was able to point out that these “doctrinal developments have already removed all obstacles to the disappearance of the *Rechtsstaat*, and opened the doors to the victory of the fascist and bolshevist will of the State.”²³ The increasing concern over these developments which Hitler was finally to complete was given expression by more than one speaker at a congress of German constitutional lawyers.²⁴

¹⁹ Hans Kelsen, *Allgemeine Staatslehre*, p. 335. [The original quotation reads: “Ihr den Charakter des Rechts absprechen, ist nur eine naturrechtliche Naivität oder Überhebung.”—Ed.]

²⁰ Hans Kelsen, *Allgemeine Staatslehre*, pp. 231–35ff.; cf. the same author’s *General Theory of Law and State*, p. 38.

²¹ Erich Voegelin, “Kelsen’s Pure Theory of Law,” *Political Science Quarterly*, 42 (1927): 269.

²² Friedrich Darmstädter, *Die Grenzen der Wirksamkeit des Rechtsstaates. Eine Untersuchung zur gegenwärtigen Krise des liberalen Staatsgedankens* (Heidelberg: Carl Winters, 1930), passim. (On socialism see esp. pp. 48–51.) Cf. Hallowell, *The Decline of Liberalism as an Ideology and The Moral Foundations of Democracy*. On the further development under the Nazis see Franz Leopold Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (2nd ed.; New York: Oxford University Press, 1944), and Aurel Kolnai, *The War Against the West* (New York: Viking Press, 1938), pp. 299–310.

²³ Darmstädter, *Die Grenzen der Wirksamkeit des Rechtsstaates*, p. 95. [The German reads: “Tendenz das Wesen des Rechtsstaates im Staatsbegriff schlechthin untergehen zu lassen, . . . dem Siege und der Alleingeltung des faschistischen und bolschewistischen Staatswollens . . . derart von der Staatslehre her ein grundsätzliches Hindernis nicht mehr entgegen [stellt].”—Ed.]

²⁴ Heinrich Triepel, Comment on “Die Reform des Wahlrechts” (pp. 194–98), and Gerhard Leibholz, “Die Wahlrechtsreform und ihre Grundlagen” (pp. 159–90), in *Entwicklung und Reform des Beamtenrechts. Die Reform des Wahlrechts*, Hans Gerber, ed. (Series title: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer: Vol. 7; Berlin: Walter de Gruyter, 1932).

But it was too late. The antilibertarian forces had learned too well the positivist doctrine that the state must not be bound by law. In Hitler Germany and in Fascist Italy, as well as in Russia, it came to be believed that under the rule of law the state was “unfree,”²⁵ a “prisoner of the law,”²⁶ and that, in order to act “justly,” it must be released from the fetters of abstract rules.²⁷ A “free” state was to be one that could treat its subjects as it pleased.

4. The inseparability of personal freedom from the rule of law is shown most clearly by the absolute denial of the latter, even in theory, in the country where modern despotism has been carried furthest. The history of the development of legal theory in Russia during the early stages of communism, when the ideals of socialism were still taken seriously and the problem of the role of law in such a system was extensively discussed, is very instructive.

²⁵ Aleksandr Leonidovitch Malitzki, quoted by Boris Mirkin-Getzewitsch, *Die rechtstheoretischen Grundlagen des Sowjetstaates* (Leipzig: Franz Deuticke, 1929), p. 117. [Translated from the French by Rita Willfort, *La théorie générale de l'état soviétique* (Paris: Marcel Giard, 1928).] [The quotation to which Hayek is referring reads: “Die Lehre vom *Rechtsstaat* sagt die Sowjettheorie, ‘ist in ihren Grundzügen eine Doktrin vom unfreien Staat.’” (“The rule of law, according to Soviet theory, has as its fundamental principle the doctrine of the unfree state.”)—Ed.] Cf., however, a similar discussion in Rudolph von Ihering, *Law as a Means to an End*, Isaac Husik, trans. (Boston: Boston Book Co., 1913), pp. 314–15: “Exclusive domination of the law is synonymous with the resignation on the part of society, of the free use of its hands. Society would give herself up with bound hands to rigid necessity, standing helpless in the presence of all circumstances and requirements of life which were not provided for in the law, or for which the latter was found to be inadequate. We derive from this the maxim that the State must not limit its own power of spontaneous self-activity by law any more than is absolutely necessary—rather too little in this direction than too much. It is a wrong belief that the interest or the security of right and of political freedom requires the greatest possible limitation of the government by the law. This is based upon the strange notion [!] that force is an evil which must be combated to the utmost. But in reality it is a good, in which, however, as in every good, it is necessary, in order to make possible its wholesome use, to take the possibility of its abuse into the bargain.” Cf. Otto Friedrich von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien: zugleich ein Beitrag zur Geschichte der Rechtssystematik* (Breslau: W. Koebner, 1880), p. 304, in which he remarks about the theory of the *Rechtsstaat* put forward by Kant and Humboldt: “Dieser *Rechtsstaat* wäre, wenn seine Verwirklichung überhaupt denkbar gewesen wäre, mit der vollen Unfreiheit und Ohnmacht der Staatsgewalt erkauf worden.” [“The *Rechtsstaat* could have been purchased only at the cost of the total impotence and incapacity of the state, were it even conceivable.”—Ed.]

²⁶ Giacomo Perticone, “Quelques aspects de la crise du droit public en Italie,” *Revue internationale de la théorie du droit / Internationale Zeitschrift für Theorie des Rechts*, 5 (1931–32): 2. [The full French quotation reads: “En se passant de toute l'évolution de la pensée juridique, on a cru pouvoir considérer l'État de droit comme l'État prisonnier du droit, incapable, par conséquent, de mouvement, de volonté, de puissance; un État aboulique, neutre, et ce qui s'ensuit.” (“During the whole of the evolution of juridical thought, one was led to the conclusion that a regime of law was one in which the State was a prisoner of the law, and as a consequence incapable of action, of will, of power, a State indecisive, emasculated, and all that which follows.”)—Ed.]

²⁷ See Carl Schmitt, “Was bedeutet der Streit um den ‘Rechtsstaat,’” *Zeitschrift für die gesamte Staatswissenschaft* [*Journal of Institutional and Theoretical Economics*] (Tübingen), 95 (1935): 190.

In their ruthless logic the arguments advanced in these discussions show the nature of the problem more clearly than does the position taken by Western socialists, who usually try to have the best of both worlds.

The Russian legal theorists deliberately continued in a direction which, they recognized, had long been established in western Europe. As one of them put it, the conception of law itself was generally disappearing, and "the center of gravity was shifting more and more from the passing of general norms to individual decisions and instructions which regulate, assist, and co-ordinate activities of administration."²⁸ Or, as another contended at the same time, "since it is impossible to distinguish between laws and administrative regulations, this contrast is a mere fiction of bourgeois theory and practice."²⁹ The best description of these developments we owe to a non-Communist Russian scholar, who observed that "what distinguishes the Soviet system from all other despotic government is that . . . it represents an attempt to found the state on *principles* which are the opposite of those of the rule of law . . . [and it] has evolved a *theory* which exempts the rulers from every obligation or limitation."³⁰ Or, as a Communist theorist expressed it, "the fundamental principle of our legislation and our private law, which the bourgeois theorist will never recognize is: everything is prohibited which is not specifically permitted."³¹

²⁸R. Archipov, *Law in the State* (in Russian), quoted in Boris Mirkin-Getzewitsch, *Die rechtstheoretischen Grundlagen des Sowjetstaates*, p. 108–9. [The German reads: "Ein Sowjetjurist behauptet, daß 'der Schwerpunkt sich mehr und mehr von der Erlassung genereller Normen zur Setzung individueller Akte und Instruktionen verschiebe, welche die Tätigkeit der Verwaltung regeln, fördern und koordinieren.'"—Ed.]

²⁹Peter Ivanovitch Stuchka, *Uchenie o gosudarstve proletariata i krest'ianstva i ego konstitutsii: SSSR / RSFSR [Theory of the State of the Proletarians and Peasants and Its Constitution]* (5th ed.; Moscow: Gos. izd-vo, 1926), quoted in Boris Mirkin-Getzewitsch, *Die rechtstheoretischen Grundlagen des Sowjetstaates*, p. 70ff. [The French translation of the Russian text (Petr Ivanovitch Stoutchka, *La théorie de l'État prolétarien et paysan et ses constitutions* [5th ed.; Moscow, 1926], p. 194) reads: "Dans l'impossibilité où l'on est de distinguer où finit la loi et où commence l'ordonnance administrative, cette opposition n'est qu'une pure fiction de la science et la pratique bourgeoise."—Ed.]

³⁰Mirkin-Getzewitsch, *Die rechtstheoretischen Grundlagen des Sowjetstaates*, p. 107. [The German reads: "Aber was gerade das Sowjetsystem von sämtlichen übrigen despotischen Staatsformen der Gegenwart und Vergangenheit unterscheidet, ist, daß es nicht nur die faktische Gewalt kennt, die tatsächliche Ungesetzlichkeit, sondern daß es außerdem auf einer sozialen Basis von ungeheurer Ausdehnung einen Versuch darstellt, den Staat auf Grundsätzen zu begründen, die denen eines Rechtsstaates entgegengesetzt sind. . . . Der Sowjetstaat hingegen hat eine Theorie ausgearbeitet, die Herrschenden von jeder Verpflichtung, von jeder Beschränkung ausnimmt."—Ed.]

³¹Malitzki, quoted by Mirkin-Getzewitsch, *Die rechtstheoretischen Grundlagen des Sowjetstaates*, p. 89. [The full quotation reads: "Hieraus folgt der fundamentale Grundsatz unserer Gesetzgebung und unseres Zivilrechtes, den die bürgerlichen Theorien niemals anerkennen werden: Alles, was nicht speziell erlaubt worden ist, ist verboten," denn "entgegen der europäischen Doktrin erklären wir, daß Subjekt der Gewalt, Quelle des Rechtes nicht der Einzelne, sondern der Staat

Finally, the Communist attacks came to be directed at the conception of law itself. In 1927 the president of the Soviet Supreme Court explained in an official handbook of private law: “Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with antagonistic interests, law will disappear altogether.”³²

The reasons for this stage of the development were most clearly explained by the legal theorist E. Pashukanis, whose work for a time attracted much attention both inside and outside Russia but who later fell into disgrace and disappeared.³³ He wrote: “To the administrative technical direction by subordination to a general economic plan corresponds the method of direct, technologically determined direction in the shape of programs for production and distribution. The gradual victory of this tendency means the gradual extinction of law as such.”³⁴ In short: “As, in a socialist community, there was no

ist.” (“From this follows that the fundamental principle of our legislation and our private law, which bourgeois theories will never recognize, is: everything that is not specifically permitted is prohibited” because “in contrast to European teaching, we hold that the subject of power and the source of law is not the individual but the state.”)—Ed.] It has to be admitted, however, that this principle is also to be found in Aristotle, *Nicomachean Ethics*, 1138a.1 [bk. 5, chap. 11]: “Whatever [the law] does not bid it forbids.”

³² Quoted by Vladimir Gsovski, *Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime; Comparative Survey and Translation of the Civil Code, Code of Domestic Relations, Judiciary Act, Code of Civil Procedure, Laws on Nationality, Corporations, Patents, Copyright, Collective Farms, Labor, and Related Laws* (2 vols.; Ann Arbor: University of Michigan Law School, 1948–49), vol. 1, p. 170; quoted in Peter Ivanovitch Stuchka, *Entsiklopediia gosudarstva i prava [Encyclopedia of State and Law]* (3 vols.; Moscow: Izd-vo Kommunisticheskoi Akademii, 1925–27), p. 1593.

³³ Concerning Pashukanis’s fate, Roscoe Pound observes in his *Administrative Law: Its Growth, Procedure, and Significance* (Pittsburgh: University of Pittsburgh Press, 1942), p. 127: “The Professor [Evgenii Bronislavovich Pashukanis] is not with us now. With the setting up of a plan by the present government in Russia, a change of doctrine was called for and he did not move fast enough in his teaching to conform to the doctrinal exigencies of the new order. If there had been law instead of only administrative orders it might have been possible for him to lose his job without losing his life.”

³⁴ Evgenii Bronislavovich Pashukanis, *Allgemeine Rechtslehre und Marxismus: Versuch einer Kritik der juristischen Grundbegriffe*, trans. from the 2nd Russian edition by Edith Hajós (Vienna: Verlag für Literatur und Politik, 1929), p. 117. [The German reads: “Die verwaltungstechnische Leitung durch Unterwerfung unter einen allgemeinen Wirtschaftsplan ist analog der Methode der direkten technologisch bestimmten Leitung in der Gestaltung der Programme für die Produktion und Verteilung. Der allmähliche Sieg dieser Tendenz bedeutet die allmähliche Aufgabe des Rechts als solchem.”—Ed.] An English translation of this and of a later work by Pashukanis has been published in *Soviet Legal Philosophy*, Hugh Webster Badd, trans., Introduction by John Newbold Hazard (Cambridge, MA: Harvard University Press, 1951). For discussions, see Hans Kelsen, *The Communist Theory of Law* (New York: Praeger, 1955); Rudolph Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (2nd ed.; London: Routledge and Kegan Paul, 1951); Lon Luvois Fuller, “Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory,” *Michigan Law Review*, 47 (1948–49): 1157–66; and Samuel Dobrin, “Soviet Jurisprudence and Socialism,” *Law Quarterly Review*, 52 (1936): 402–24.

scope for autonomous private legal relations, but only for regulation in the interest of the community, all law was converted into administration; all fixed rules into discretion and utility.³⁵

5. In England developments away from the rule of law had started early but for a long time remained confined to the sphere of practice and received little theoretical attention. Though, by 1915, Dicey could observe that “the ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline,”³⁶ the increasingly frequent infringements of the principle attracted little notice. Even when in a 1929 book called *The New Despotism*³⁷ appeared, in which Lord Justice Hewart pointed out how little in accord with the rule of law was the situation which had developed, it achieved a *succès de scandale* but could do little to change the complacent belief that the liberties of Englishmen were safely protected by that tradition. The book was treated as a mere reactionary pamphlet, and the venom which was directed at it³⁸ is difficult to understand a quarter of a century later, when not only liberal organs like the *Economist*³⁹ but also socialist authors⁴⁰ have come to speak of the danger in the same terms. The book did indeed lead to the appointment of an official “Committee on Ministers’ Powers”; but its Report,⁴¹ while mildly reasserting Dicey’s doctrines, tended on the whole to minimize the dan-

³⁵This summary of Pashukanis’s argument is taken from Wolfgang Gaston Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens and Sons, 1951), p. 154.

³⁶Dicey, *Law of the Constitution* (8th ed.), p. xxxviii. [Liberty Fund edition, p. lv. The 8th ed. of Dicey’s book appeared in 1915.]

³⁷Gordon Hewart, Baron Hewart, *The New Despotism* (London: Ernest Benn Ltd., 1929).

³⁸Characteristic of the treatment which that well justified warning received even in the United States is the following comment by Professor (now Justice) Felix Frankfurter, published in 1938: “As late as 1929 Lord Hewart attempted to give fresh life to the moribund unrealities of Dicey by garnishing them with alarm. Unfortunately, the eloquent journalism of this book carried the imprimatur of the Lord Chief Justice. His extravagant charges demanded authoritative disposition and they received it” (foreword to “Current Developments in Administrative Law,” *Yale Law Journal*, 47 [1938]: 517). [Lord Hewart called attention to the dangers inherent in the increasingly common practice of Parliament delegating their powers to administrative tribunals, thus subverting Parliamentary government.—Ed.]

³⁹“What is the Public Interest?” *Economist*, June 19, 1954, p. 952: “The ‘new despotism,’ in short, is not an exaggeration, it is a reality. It is a despotism that is practised by the most conscientious, incorruptible and industrious tyrants that the world has ever seen.”

⁴⁰Richard Howard Stafford Crossman, *Socialism and the New Despotism* [Fabian Tracts, No. 298] (London: Fabian Society, 1956).

⁴¹Committee on Ministers’ Powers, *Report Presented by the Lord High Chancellor to Parliament by Command of His Majesty, April 1932* [the Donoughmore Report], chaired from 30 October 1929 to 2 May 1931 by the Rt. Hon. The Earl of Donoughmore. Cmd. 4060 (London: His Majesty’s Stationery Office, 1932); see also the Committee on Ministers’ Powers, *Memoranda Submitted by Government Departments in Reply to Questionnaire of November 1929 and Minutes of Evidence* (2 vols.; London: His Majesty’s Stationery Office, 1932).

gers. Its main effect was that it made the opposition to the rule of law articulate and evoked an extensive literature which outlined an antirule-of-law doctrine which has since come to be accepted by many besides socialists.

This movement was led by a group⁴² of socialist lawyers and political scientists gathered around the late Professor Harold J. Laski. The attack was opened by Dr. (now Sir Ivor) Jennings in reviews of the *Report* and the *Documents* on which the latter was based.⁴³ Completely accepting the newly fashionable positivist doctrine, he argued that the conception of the rule of law, in the sense in which it was used in that Report, means that "equality before the law, the ordinary law of the land, administered by the ordinary courts . . . taken literally . . . is just nonsense."⁴⁴ This rule of law, he contended, "is either common to all nations or does not exist."⁴⁵ Though he had to concede that "the fixity and certainty of the law have been part of the English tradition for centuries," he did so only with evident impatience at the fact that this tradition was "but reluctantly breaking down."⁴⁶ For the belief shared by "most of the members of the Committee, and most of the witnesses . . . that there was a clear distinction between the functions of a judge and the functions of an administrator,"⁴⁷ Dr. Jennings had only scorn.

He later expounded these views in a widely used textbook, in which he expressly denied that "the rule of law and discretionary powers are contradictory"⁴⁸ or that there is any opposition "between 'regular law' and 'administrative powers.'"⁴⁹ The principle in Dicey's sense, namely, that public authorities ought not to have wide discretionary powers, was "a rule of action for Whigs and may be ignored by others."⁵⁰ Though Dr. Jennings recognized that "to a constitutional lawyer of 1870, or even 1880, it might have seemed that the British Constitution was essentially based on the individualist rule of law, and that the British State was the *Rechtsstaat* of individualist political and

⁴² For the description of Harold Joseph Laski, Sir Ivor Jennings, William Alexander Robson, and Herman Finer as members of the same group see William Ivor Jennings, "Administrative Law and Administrative Jurisdiction," *Journal of Comparative Legislation and International Law*, 3rd ser., 20 (1938): 103.

⁴³ Sir William Ivor Jennings, "The Report on Ministers' Powers," *Public Administration* (London), 10 (1932): 333-51, and Book Review ["Official Ministers' Powers"], 11 (1933): 109-14.

⁴⁴ Jennings, "Report on Ministers' Powers," p. 342.

⁴⁵ *Ibid.*, p. 343.

⁴⁶ *Ibid.*, p. 345.

⁴⁷ *Ibid.*, p. 345. [The quotation actually appears in Jennings's review of "Official Ministers' Powers," *Public Administration*, 11 (1933): 111.—Ed.]

⁴⁸ Sir William Ivor Jennings, *The Law of the Constitution* (4th ed.; London: University of London Press, 1952), p. 54.

⁴⁹ *Ibid.*, p. 291.

⁵⁰ *Ibid.*, p. 292.

legal theory,"⁵¹ this meant to him merely that "the Constitution frowned on 'discretionary' powers, unless they were exercised by judges. When Dicey said that Englishmen 'are ruled by the law, and by the law alone' he meant that 'Englishmen are ruled by judges, and by judges alone.' That would have been an exaggeration, but it was good individualism."⁵² That it was a necessary consequence of the ideal of liberty under the law that only experts in the law and no other experts, and especially no administrators concerned with particular aims, should be entitled to order coercive action seems not to have occurred to the author.

It should be added that further experience appears to have led Sir Ivor to modify his views considerably. He begins and concludes a recent popular book⁵³ with sections in praise of the rule of law and even gives a somewhat idealized picture of the degree to which it still prevails in Britain. But this change did not come before his attacks had had a wide effect. In a popular *Vocabulary of Politics*,⁵⁴ for instance, which had appeared in the same series only a year before the book just mentioned, we find it argued that "it is therefore odd that there should be a prevalent view that the Rule of Law is something which some people have but other people do not have, like motor cars and telephones. What does it mean, then, to be without the Rule of Law? Is it to have no laws at all?" I fear this question correctly represents the position of most of the younger generation, grown up under the exclusive influence of positivist teaching.

Equally important and influential has been the treatment of the rule of law in a widely used treatise on administrative law by another member of the same group, Professor W. A. Robson. His discussion combines a commendable zeal for regularizing the chaotic state of the control over administrative action with an interpretation of the task of administrative tribunals which, if applied, would make them entirely ineffective as a means of protecting individual liberty. He aims explicitly at accelerating the "break-away from that Rule of Law which the late Professor A. V. Dicey regarded as an essential feature of the English constitutional system."⁵⁵ The argument commences with an attack on "that antique and rickety chariot," the "legendary separation of powers."⁵⁶ The whole distinction between law and policy is to him "utterly

⁵¹ *Ibid.*, p. 294.

⁵² *Ibid.*

⁵³ Sir William Ivor Jennings, *The Queen's Government* (Pelican Books; London: Penguin Books, 1954), pp. 9–13.

⁵⁴ Thomas Dewar Weldon, *The Vocabulary of Politics* (Pelican Books; London: Penguin Books, 1953), p. 68.

⁵⁵ William Alexander Robson, *Justice and Administrative Law* (3rd ed.; London: Stevens, 1951), p. xi.

⁵⁶ *Ibid.*, p. 16.

false,⁵⁷ and the conception that the judge is not concerned with governmental ends but with the administration of justice a matter for ridicule. He even represents as one of the main advantages of administrative tribunals that they “can enforce a policy unhampered by rules of law and judicial precedents. . . . Of all the characteristics of administrative law, none is more advantageous, when rightly used for the public good, than the power of the tribunal to decide the cases coming before it with the avowed object of furthering a policy of social improvement in some particular field; and of adapting their attitude towards the controversy so as to fit the needs of that policy.”⁵⁸

Few other discussions of these problems show as clearly how reactionary many of the “progressive” ideas of our time really are! It is therefore not too surprising that such a view as Professor Robson’s has rapidly found favor with the conservatives and that a recent Conservative party pamphlet on the Rule of Law echoes him in commending administrative tribunals for the fact that “flexible and unbound by rules of law or precedent, they can be of real assistance to their Minister in carrying out his policy.”⁵⁹ This acceptance of socialist doctrine by the conservatives is perhaps the most alarming feature of the development. It has gone so far that it could be said of a conservative symposium on *Liberty in the Modern State*:⁶⁰ “So far have we travelled from the conception of the Englishman protected by the courts from the risks of oppression by the Government or its servants that no one of the contributors suggests that it would now be possible for us to go back to that nineteenth century ideal.”⁶¹

Where these views can lead to is shown by the more indiscreet statements of some of the less-well-known members of that group of socialist lawyers. One commences an essay on *The Planned State and the Rule of Law* by “redefining” the rule of law.⁶² It emerges from the mauling as “whatever parliament as the supreme lawgiver makes it.”⁶³ This enables the author “to assert

⁵⁷ *Ibid.*, p. 433.

⁵⁸ *Ibid.*, pp. 572–73.

⁵⁹ Inns of Court, Conservative and Unionist Society, *Rule of Law: A Study* (London: Conservative Political Centre, 1955), p. 30.

⁶⁰ Conservative Political Centre, *Liberty in the Modern State: Eight Oxford Lectures* (London: Conservative Political Centre, 1957).

⁶¹ *Times Literary Supplement*, March 1, 1957 [Review of *Liberty in the Modern State: Eight Oxford Lectures*], p. 123. In this respect some socialists show greater concern than is noticeable in the official conservative position. Mr. R. H. S. Crossman, in the pamphlet quoted in n. 40 above (*Socialism and the New Despotism*, p. 19), looks forward to the next step “to reform the Judiciary, so that it can regain the traditional function of defending individual rights against encroachment.”

⁶² Wolfgang Gaston Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens and Sons, 1951), pp. 277–310. One of the essays in this collection, *The Planned State and the Rule of Law*, was published separately several years earlier (Melbourne: Melbourne University Press, 1948).

⁶³ Friedmann, *Law and Social Change in Contemporary Britain*, p. 284.

with confidence that the incompatibility of planning with the rule of law [first suggested by socialist authors!] is a myth sustainable only by prejudice or ignorance."⁶⁴ Another member of the same group even finds it possible to reply to the question as to whether, if Hitler had obtained power in a constitutional manner, the rule of law would still have prevailed in Nazi Germany: "The answer is Yes; the majority would be right: the Rule of Law would be in operation, *if* the majority *voted* him into power. The majority might be unwise, and it might be wicked, but the Rule of Law would prevail. For in a democracy right is what the majority makes it to be."⁶⁵ Here we have the most fatal confusion of our time expressed in the most uncompromising terms.

It is not surprising, then, that under the influence of such conceptions there has been in Great Britain during the last two or three decades a rapid growth of very imperfectly checked powers of administrative agencies over the private life and property of the citizen.⁶⁶ The new social and economic legislation has conferred ever increasing discretionary powers on those bodies and has provided only occasional and highly defective remedies in the form of a medley of tribunals of committees for appeal. In extreme instances the law has even gone so far as to give administrative agencies the power to determine "the general principles" whereby what amounted to expropriation could

⁶⁴ *Ibid.*, p. 310. It is curious that the contention that the rule of law and socialism are incompatible, which had long been maintained by socialist authors, should have aroused so much indignation among them when it was turned against socialism. Long before I had emphasized the point in *The Road to Serfdom*, Karl Mannheim, *Man and Society in an Age of Reconstruction: Studies in Modern Social Structure* (London: K. Paul, Trench, Trubner and Co., 1940), p. 180, had summed up the result of a long discussion in the statement that "recent studies in the sociology of law once more confirm that the fundamental principle of formal law by which every case must be judged according to general rational precepts, which have as few exceptions as possible and are based on logical subsumption, obtains only for the liberal-competitive phase of capitalism." Cf. also Franz Leopold Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Glencoe, IL: The Free Press, 1957), p. 50, and Max Horkheimer, "Bemerkung zur philosophischen Anthropologie," *Zeitschrift für Sozialforschung*, 4 (1935): esp. 14: "The economic basis of the significance of promises becomes less important from day to day, because to an increasing extent economic life is characterised not by contract but by command and obedience." [The original reads: "Die ökonomische Grundlage für die Bedeutung von Versprechungen wird daher schmaler von Tag zu Tag. Denn nicht mehr der Vertrag, sondern Befehlsgewalt und Gehorsam kennzeichnen jetzt in steigendem Maß den inneren Verkehr."—Ed.]

⁶⁵ Herman Finer, *The Road to Reaction* (Boston: Little, Brown and Co., 1945), p. 60.

⁶⁶ Cf. Winston Spencer Churchill, "The Conservative Case for a New Parliament," [Party Political Broadcast XI] *Listener*, February 19, 1948, p. 302: "I am told that 300 officials have the power to make new regulations, apart altogether from Parliament, carrying with them the penalty of imprisonment for crimes hitherto, unknown to the law." [Churchill further notes: "A rate of war-time taxation has been maintained in a manner which has hampered and baffled enterprise and recovery in every walk of life; 700,000 more officials, all hard-working decent men and women but producing nothing themselves, have settled down upon us to administer 25,000 regulations never enforced before in time of peace" (p. 302).—Ed.]

be applied,⁶⁷ the executive authority then refusing to tie itself down by any firm rules.⁶⁸ Only lately, and especially after a flagrant instance of highhanded bureaucratic action was brought to the attention of the public by the persistent efforts of a wealthy and public spirited man,⁶⁹ has the disquiet over these developments long felt by a few informed observers spread to wider circles and produced the first signs of a reaction, to which we shall refer later.

6. It is somewhat surprising to find that in many respects developments in this direction have gone hardly less far in the United States. In fact, both the modern trends in legal theory and the conceptions of the “expert adminis-

⁶⁷ Town and Country Planning Act (1947) [10 and 11 Geo. 6, chap. 51] sec. 70, subsec. (3), provides that “regulations made under this Act with the consent of the Treasury may prescribe general principles to be followed by the Central Land Board in determining . . . whether any and if so what development charge is to be paid” (p. 84 of the act). It was under this provision that the Minister of Town and Country Planning was able unexpectedly to issue a regulation under which the development charges were normally “not to be less” than the whole additional value of the land which was due to the permission for a particular development. [The Central Land Board was established by the Town and Country Planning Act of 1947, among whose duties was to assess and levy charges on new developments of land. When planning permission was granted for any development, a charge was payable on the enhanced value of the land. In cases of default the Board could issue an order for payment, together with a penalty, enforceable as a land charge, subject to appeal to one of the county courts or the High Court. Under the bill no development was permitted to take place without consent and where permission to develop was refused, there was no right to compensation.—Ed.]

⁶⁸ Central Land Board, *Practice Notes (First Series): Being Notes on Development Charges Under the Town and Country Planning Act, 1947* (London: His Majesty’s Stationery Office, 1949), Preface [pp. ii–iii]. It is explained there that the Notes “are meant to describe principles and working rules in accordance with which any applicant can confidently assume his case will be dealt, unless either he shows good cause for different treatment, or the Board informs him that for special reasons the normal rules do not apply.” It is further explained that “a general working rule must always be variable if it does not fit a particular case” and that the board “have no doubt that from time to time we shall vary our policy.” For further discussion of this measure see chap. 22, sec. 6, below.

⁶⁹ Cf. the official report of the Minister of Agriculture and Fisheries, *Public Inquiry Ordered by the Minister of Agriculture into the Disposal of Land at Criche Down* (London: His Majesty’s Stationery Office, 1954) [Cmd. 9176]; and cf. also the less-known but nearly as instructive case of *Odlum v. Stratton* (1946), before Mr. Justice Atkinson, King’s Bench Division, a report of the proceedings of which has been printed by the *Wiltshire Gazette* [*Odlum v. Stratton: Verbatim Report of the Proceedings in the High Court of Justice, King Bench Division, before Mr. Justice Atkinson* (Devizes, Wiltshire: Wiltshire Gazette, 1946)]. [The case was the subject of comment on ministerial discretion by Lord Simon of Glaisdale in the House of Lords on 26 February 1996. Lord Simon remarked: “(*Odlum v. Stratton*) was a libel action in which the professional competence of a farmer was in question. A series of reports on his competence was in the hands of the Ministry of Agriculture. The Ministry claimed that it was immune from disclosure except for two documents. Those two documents told against the plaintiff. He wanted to see the others, but those were the only two for which immunity was waived. The judge had no doubt at all, nor do I think would anyone reading a transcript have had any doubt, that the documents were divulged precisely with the objective of discrediting the plaintiff” (*Hansard, Lords*, column 1265–66).—Ed.]

trator” without legal training have had an even greater influence here than in Great Britain; it may even be said that the British socialist lawyers we have just considered have usually found their inspiration more often in American than in British legal philosophers. The circumstances which have brought this about are little understood even in the United States and deserve to be better known.

The United States is, in fact, unique in that the stimulation received from European reform movements early crystallized into what came to be known significantly as the “public administration movement.” It played a role somewhat similar to that of the Fabian movement in Britain⁷⁰ or of the “socialists of the chair” movement in Germany. With efficiency in government as its watchword, it was skilfully designed to enlist the support of the business community for basically socialist ends. The members of this movement, generally with the sympathetic support of the “progressives,” directed their heaviest attack against the traditional safeguards of individual liberty, such as the rule of law, constitutional restraints, judicial review, and the conception of a “fundamental law.” It was characteristic of these “experts in administration” that they were equally antagonistic to (and commonly largely ignorant of) both law and economics.⁷¹ In their efforts to create a “science” of administration, they were guided by a rather naïve conception of “scientific” procedure and showed all the contempt for tradition and principles characteristic of the extreme rationalist. It was they who did most to popularize the idea that “liberty for liberty’s sake is clearly a meaningless notion: it must be liberty to do and enjoy something. If more people are buying automobiles and taking vacations, there is more liberty.”⁷²

It was mainly because of their efforts that Continental European conceptions of administrative powers were introduced into the United States rather earlier than into England. Thus, as early as 1921, one of the most distinguished American students of jurisprudence could speak of “a tendency away from courts and law and a reversion to justice without law in the form of revival of executive and even of legislative justice and reliance upon arbitrary governmental power.”⁷³ A few years later a standard work on administrative

⁷⁰ See Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (New York: Ronald Press Co., 1948), p. 70, n. 13; cf. also pp. 5, 15, and 40 of the same work.

⁷¹ See *Ibid.*, p. 79: “If any person is to count for less than one in the New Order it is the Lawyer!”

⁷² *Ibid.*, p. 73.

⁷³ Roscoe Pound, *The Spirit of the Common Law* (Boston: Marshall Jones Co., 1921), p. 72; cf. also Charles Howard McIlwain, *Constitutionalism and the Changing World: Collected Papers* (Cambridge: Cambridge University Press, 1939), p. 261: “Slowly but surely we are drifting toward the totalitarian state, and strange to say many if not most of the idealists are either enthusiastic about it or unconcerned.”

law could already represent it as accepted doctrine that “every public officer has, marked out for him by law, a certain area of ‘jurisdiction.’ Within the boundaries of that area he can act freely according to his own discretion, and the courts will respect his action as final and not inquire into its rightfulness. But if he oversteps those bounds, then the court will intervene. In this form, the law of court review of the acts of public officers becomes simply a branch of the law of *ultra vires*. The only question before the courts is one of jurisdiction, and the court has no control of the officer’s exercise of discretion within that jurisdiction.”⁷⁴

The reaction against the tradition of stringent control of the courts over not only administrative but also legislative action had, in fact, commenced some time before the first World War. As an issue of practical politics it became important for the first time in Senator La Follette’s campaign for the presidency in 1924, when he made the curbing of the power of the courts an important part of his platform.⁷⁵ It is mainly because of this tradition which the Senator established that, in the United States more than elsewhere, the progressives have become the main advocates of the extension of the discretionary powers of the administrative agency. By the end of the 1930s, this characteristic of the American progressives had become so marked that even European socialists, when “first faced with the dispute between the American liberals and the American conservatives concerning the questions of administrative law and administrative discretion,” were inclined “to warn them against the inherent dangers of the rise of administrative discretion, and to tell them that we [i.e., the European socialists] could vouch for the truth of the stand of the American conservative.”⁷⁶ But they were soon mollified when they discovered how greatly this attitude of the progressives facilitated the gradual and unnoticed movement of the American system toward socialism.

The conflict referred to above reached its height, of course, during the Roosevelt era, but the way had already been prepared for the developments of that time by the intellectual trends of the preceding decade. The 1920s and

⁷⁴John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge: Harvard University Press, 1927), p. 41.

⁷⁵Cf. Robert Marion La Follette, *The Political Philosophy of Robert M. La Follette as Revealed in His Speeches and Writings*, Ellen Torelle, ed. (Madison, WI: Robert M. La Follette Co., 1920), esp. pp. 179–81. [Art. 14 of the La Follette Progressive Republican Platform of 1920 reads: “We denounce the alarming usurpation of legislative power, by the federal courts, as subversive of democracy, and we favor such amendments to the constitution, and thereupon, the enactment of such statutes as may be necessary, to provide for the election of all federal judges, for fixed terms not exceeding ten years, by direct vote of the people” (p. 419).—Ed.]

⁷⁶Alexander Haim Pekelis, “Administrative Discretion and the Law of Rule,” *Law and Social Action: Selected Essays of Alexander H. Pekelis*, Milton Ridvas Konvitz, ed. (Ithaca, NY: Cornell University Press, 1950), p. 88; cf. Also Hans Kelsen, “Foundations of Democracy,” *Ethics*, no. 1, pt. 2, 66 (1955): 77ff.

early 1930s had seen a flood of antirule-of-law literature which had considerable influence on the later developments. We can mention here only two characteristic examples. One of the most active of those who led the frontal attack on the American tradition of a “government of law and not of men” was Professor Charles G. Haines, who not only represented the traditional ideal as an illusion⁷⁷ but seriously pleaded that “the American people should establish governments on a theory of trust in men in public affairs.”⁷⁸ To realize how completely this is in conflict with the whole conception underlying the American Constitution, one need merely remember Thomas Jefferson’s statement that “free government is founded in jealousy, not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind those we are obliged to trust with power . . . our Constitution has accordingly fixed the limits to which, and no further, our confidence may go. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”⁷⁹

Perhaps even more characteristic of the intellectual tendencies of the time is a work by the late justice Jerome Frank, called *Law and the Modern Mind*, which, when it first appeared in 1930, enjoyed a success which for the reader of today is not quite easy to understand. It constitutes a violent attack on the whole ideal of the certainty of the law, which the author ridicules as the product of “a childish need for an authoritative father.”⁸⁰ Basing itself on psychoanalytic theory, the work supplied just the kind of justification for a contempt for the traditional ideals that a generation unwilling to accept any limitation on collective action wanted. It was the young men brought up on such ideas who became the ready instruments of the paternalistic policies of the New Deal.

Toward the end of the 1930s there was increasing uneasiness over these developments, which led to the appointment of a committee of investigation, the U.S. Attorney General’s Committee on Administrative Procedure, whose task was similar to that of the British committee of ten years earlier. But this, too, even more than the British committee, tended in its Majority Report⁸¹ to

⁷⁷ Charles Grove Haines, *A Government of Laws or a Government of Men: Judicial or Legislative Supremacy* (Berkeley: University of California Press, 1929), p. 37.

⁷⁸ *Ibid.*, p. 18.

⁷⁹ Thomas Jefferson, “Draft of the Kentucky Resolution of 1789,” in Ethelbert Dudley Warfield, *The Kentucky Resolutions of 1798* (2nd ed.; New York: Putman, 1894), pp. 157–58.

⁸⁰ Jerome Frank, *Law and the Modern Mind* (New York: Brentano’s, 1930), p. 21. More than a quarter of a century after the publication of this book, Thurman Wesley Arnold, in the *University of Chicago Law Review* [“Judge Jerome Frank,” 24 (1957): 635], could say of it that “more than any other it cleared the way for a new set of conceptions and ideals with respect to the relationship of the citizen to his government.”

⁸¹ Dean Acheson, chairman, *Administrative Procedure in Government Agencies: Final Report of the Committee on Administrative Procedure* (Washington, DC: Government Printing Office, 1941). [The

represent what was happening as both inevitable and harmless. The general tenor of the report is best described in the words of Dean Roscoe Pound: “Even if quite unintended, the majority are moving in the line of administrative absolutism which is a phase of the rising absolutism throughout the world. Ideas of the disappearance of law, of a society in which there will be no law, or only one law, namely that there are no laws but only administrative orders; doctrines that there are no such things as rights and that laws are only threats of exercise of state force, rules and principles being nothing but superstition and pious wish, a teaching that separation of powers is an outmoded eighteenth century fashion of thought, that the common law doctrine of the supremacy of law had been outgrown, and expounding of a public law which is to be a ‘subordinating law,’ subordinating the interests of the individual to those of the public official and allowing the latter to identify one side of a controversy with the public interest and so give it a greater value and ignore the others: and finally a theory that law is whatever is done officially and so whatever is done officially is law and beyond criticism by lawyers—such is the setting in which the proposals of the majority must be seen.”⁸²

7. Fortunately, there are clear signs in many countries of a reaction against these developments of the last two generations. They are perhaps most conspicuous in the countries that have gone through the experience of totalitarian regimes and have learned the dangers of relaxing the limits on the powers of the state. Even among those socialists who not long ago had nothing but ridicule for the traditional safeguards of individual liberty, a much more respectful attitude can be observed. Few men have so frankly expressed this change of view as the distinguished dean of socialist legal philosophers, the late Gustav Radbruch, who in one of his last works said: “Though democ-

Federal Administrative Procedure Act of 1946 was an outgrowth of the Final Report of the Attorney General’s committee on Administrative Procedure in Government Agencies, which was established in response to the immense number of administrative agencies created under the New Deal. The issues that the committee confronted were extremely contentious. So much of private conduct had been made subject to administrative regulation since 1934 and there were so few checks on the arbitrary power of administrators that many feared that the United States was on the verge of being reconstructed into a centrally planned state. To assuage them, Roosevelt requested his attorney general, Frank Murray, to strike a committee. The FAPA of 1946, which had authority over both independent agencies and those falling within the executive branch, governed the way regulations could be proposed and enacted and provided for judicial review of its decisions.—Ed.]

⁸² Roscoe Pound, “Administrative Procedure Legislation for the ‘Minority Report,’” *American Bar Association Journal*, 27 (1941): 678. On the present situation see Bernard Schwartz, “Administrative Justice and Its Place in the Legal Order,” *New York University Law Review*, 30 (1955): 1390–1417; and Walter Gellhorn, *Individual Freedom and Governmental Restraints* (Baton Rouge: Louisiana State University Press, 1956), esp. the remark on pp. 18–19, that “some of the former upholders of the administrative process [including the author] now feel that what were mainly imaginary dangers have become real—and frightening.”

racy is certainly a praiseworthy value, the *Rechtsstaat* is like the daily bread, the water we drink and the air we breathe; and the greatest merit of democracy is that it alone is adapted to preserve the *Rechtsstaat*.⁸³ That democracy does not in fact necessarily or invariably do so is only too clear from Radbruch's description of developments in Germany. It would probably be truer to say that democracy will not exist long unless it preserves the rule of law.

The advance of the principle of judicial review since the war and the revival of the interest in the theories of natural law in Germany are other symptoms of the same tendencies.⁸⁴ In other Continental countries similar movements are under way. In France, G. Ripert has made a significant contribution with his study of *The Decline of Law*, in which he rightly concludes that "above all, we must put the blame on the jurists. It was they who for half a century undermined the conception of individual rights without being aware that they thereby delivered these rights to the omnipotence of the political state. Some of them wished to prove themselves progressive, while others believed that they were rediscovering traditional doctrine which the liberal individualism of the nineteenth century had obliterated. Scholars often show

⁸³ Gustav Radbruch, *Rechtsphilosophie* (4th ed.; Stuttgart: K. F. Koehler, 1950), p. 357. [The English quotation appears in the original German as: "Demokratie ist gewiß ein preisenswertes Gut, *Rechtsstaat* aber ist wie das tägliche Brot, wie Wasser zum Trinken und wie Luft zum Atmen, und das Beste an der Demokratie gerade dieses, daß nur sie geeignet ist, den *Rechtsstaat* zu sichern." (p. 357)—Ed.] See also the significant comments in this work on the role which legal positivism has played in destroying the belief in the *Rechtsstaat*, esp. p. 335: "Dieses Auffassung vom Gesetz und seiner Geltung (wir nennen sie die positivistische Lehre) hat die Juristen wie das Volk wehrlos gemacht gegen noch so willkürliche, noch so grausame, noch so verbrecherische Gesetze. Sie setzt letzten Endes das Recht der Macht gleich, nur wo die Macht ist, ist das Recht"; and p. 352: "Der Positivismus hat in der Tat mit seiner Überzeugung 'Gesetz ist Gesetz' den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts. Dabei ist der Positivismus gar nicht in der Lage, aus eigener Kraft die Geltung von Gesetzen zu begründen. Er glaubt die Geltung eines Gesetzes schon damit erwiesen zu haben, daß es die Macht besessen hat, sich durchzusetzen." ["This understanding of the law and of its merits (which we call positivist theory) has made legal theorists as well as the great mass of people defenseless against laws that are arbitrary, cruel, and criminal. Ultimately this view equates law with power; that is, only where power resides is there law" (p. 335). "In fact, positivism, with its claim that 'all law is law' has rendered the German legal profession defenseless against arbitrary and criminal laws. At the same time, it is impossible for positivism on its own to justify the validity of a law. For it believes that a law's validity has been proved by the power to assert itself" (p. 352).—Ed.] It is thus not too much of an exaggeration when Emil Brunner, *Justice and the Social Order* (New York: Harper, 1945), p. 7, maintains that "the totalitarian state is simply and solely legal positivism in political practice."

⁸⁴ See Gottfried Dietze, "America and Europe: Decline and Emergence of Judicial Review," *Virginia Law Review*, 44 (1958): 1233–72, and, concerning the revival of natural law, Helmut Coing, *Grundzüge der Rechtsphilosophie* (Berlin: Walter de Gruyter, 1950); Heinrich Mitteis, *Über das Naturrecht* (Berlin: Akademie-Verlag, 1948); Klaus Ritter, *Zwischen Naturrecht und Rechtspositivismus: Eine erkenntnistheoretische Auseinandersetzung mit den neueren Versuchen zur Wiederherstellung einer Rechtsmetaphysik* (Witten-Ruhr: Luther-Verlag, 1956).

a certain single-mindedness which prevents them from seeing the practical conclusions which others will draw from their disinterested doctrines.”⁸⁵

There has been no lack of similar warning voices⁸⁶ in Great Britain, and the first outcome of the increasing apprehension has been a renewed tendency in recent legislation to restore the courts of law as the final authority in administrative disputes. Encouraging signs are also to be found in a recent report of a committee of inquiry into procedure for appeals to other than ordinary courts.⁸⁷ In it the committee not only made important suggestions for eliminating the numerous anomalies and defects of the existing system but also admirably reaffirmed the basic distinction between “what is judicial, its antithesis being what is administrative, and the notion of what is according to the rule of law, its antithesis being what is arbitrary.” It then went on to state: “The rule of law stands for the view that decisions should be made by known principles or laws. In general such decisions will be predictable, and the citizen will know where he is.”⁸⁸ But there still remains in Britain a “considerable field of administration in which no special tribunal or enquiry is provided”⁸⁹ (which problem was outside the terms of reference of the committee) and where the conditions remain as unsatisfactory as ever and the citizen in effect is still at the mercy of an arbitrary administrative decision. If the process of erosion of the rule of law is to be halted, there seems to be urgent need for some in-

⁸⁵ Georges Ripert, *Le Déclin du droit* (Paris: Pichon and Durand-Auzias, 1949), p. 192. [The French reads: “Il nous faut tout d’abord faire le procès des juristes. Ce sont eux qui depuis un demi-siècle ont affaibli la notion de droit individuel sans avoir conscience qu’ils livraient ainsi ces droits à toute puissance de l’État politique. Les uns étaient désireux de se classer parmi les hommes de progrès. Les autres croyaient retrouver une doctrine traditionnelle étouffée par l’individualisme libéral du XIX^e siècle. Les hommes de science ont souvent une certaine candeur qui ne leur permet pas d’apercevoir les conséquences pratiques que d’autres tireront de leurs doctrines désintéressées.”—Ed.] Cf. also Paul Roubier, *Théorie générale du droit: histoire des doctrines juridiques et philosophie des valeurs sociales* (Paris: Recueil Sirey, 1946); Louis Auguste Paul Rougier, *La France à la recherche d’une constitution* (Paris: Recueil Sirey, 1952).

⁸⁶ See Sir Carleton Kemp Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in England* (London, 1945); George Williams Keeton, *The Passing of Parliament* (London: E. Benn, 1952); Charles John Hamson, *Executive Discretion and Judicial Control: An Aspect of the Conseil d’État* (London: Stevens, 1954); Cyril John Radcliffe, Viscount Radcliffe of Werneth, *Law and the Democratic State: Being the Presidential Address of the Right Hon. Lord Radcliffe, President of the Holdsworth Club of the Faculty of Law in the University of Birmingham, 1954–1955* [Holdsworth lecture] (Birmingham: Holdsworth Club of the University of Birmingham, 1955); and Geoffrey Marshall, “The Recent Development of English Administrative Law,” *Il Politico*, 24 (December 1959): 637–45.

⁸⁷ Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals, Presented by the Lord High Chancellor to Parliament by Command of Her Majesty* [the Franks Report], chaired by Sir Oliver Franks, Baron Franks of Headington. Cmd. 218 (London: Her Majesty’s Stationery Office, 1957), p. 8, par. 37.

⁸⁸ *Ibid.*, p. 6, pars. 27, 29.

⁸⁹ *Ibid.*, p. 28, par. 120.

dependent court to which appeal lies in all such cases, as has been proposed from several quarters.⁹⁰

Finally, we might mention, as an effort on an international scale, the "Act of Athens" adopted in June, 1955, at a congress of the International Commission of Jurists, in which the importance of the rule of law is strongly reaffirmed.⁹¹

It can hardly be said, however, that the widespread desire to revive an old tradition is accompanied by a clear awareness of what this would involve⁹² or that people would be prepared to uphold the principles of this tradition even when they are obstacles in the most direct and obvious route to some desired aim. These principles which not long ago seemed commonplaces hardly worth restating and which perhaps even today will seem more obvi-

⁹⁰ See Inns of Court, Conservative and Unionist Society, *Rule of Law: A Study* (mentioned in note 59 above), and William Alexander Robson, *Justice and Administrative Law* (3rd ed.; London: Stevens, 1951). On similar recommendations of the Hoover Commission in the United States see the Symposium on the "Hoover Commission and Task Force Reports on Legal Services and Procedure," *New York University Law Review*, 30, no. 7 (1955): 1267-1417.

⁹¹ The International Commission of Jurists at The Hague (now at Geneva) convened at Athens in June 1955, and adopted a resolution which solemnly declared: "1. The State is subject to the law. 2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement. 3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence as judges. 4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is afforded a fair trial." (See the *Report of the International Congress of Jurists, Held June 13-20, 1955, at Athens* [The Hague: International Commission of Jurists, 1956], p. 9.) [These four "resolutions" do not, in fact, form part of the formal resolutions of the Congress but, rather, were adopted by the International Commission of Jurists as "fundamental principles of justice . . . essential to a lasting peace throughout the world."—Ed.]

Unfortunately, since then the International Commission of Jurists (in its "Declaration of Delhi" of January 10, 1959) decided to introduce a "new" and "dynamic" conception of the Rule of Law which included the establishment of "social, economic, educational and cultural conditions under which [the individual's] aspirations and dignity may be realized." However desirable these objectives might be, extending the notion of the Rule of Law to include these goals can only lead to making the term worthless and can only accelerate the repudiation of those constraints that the Rule of Law places on the actions of the state should these limitations stand in the way of pursuing certain social ends. Cf. "The Declaration of Delhi," *Newsletter of the International Commission of Jurists*, no. 6 (March-April 1959): 1.

⁹² It is no exaggeration when one student of jurisprudence (Julius Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control; A Study in Jurisprudence* [Cambridge, MA: Harvard University Press, 1950], p. 261) asserts that the restoration of the rule of law as here defined "would strictly require the reversal of legislative measures which all democratic legislatures seem to have found essential in the last half century." The fact that democratic legislatures have done this does not, of course, prove that it was wise or even that it was essential to resort to this kind of measure in order to achieve what they wanted to achieve, and still less that they ought not to reverse their decisions if they recognize that they produce unforeseen and undesirable consequences.

ous to the layman than to the contemporary lawyer have been so forgotten that a detailed account of both their history and their character seemed necessary. It is only on this basis that we can attempt in the next part to examine in more detail the different ways in which the various modern aspirations of economic and social policy can or cannot be achieved within the framework of a free society.