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Changing Legal Order

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THE CHANGING LEGAL ORDER.[1]

IT MUST, I suppose, be considered a dull age which does not have its loyal chronicler who arises to affirm that it is the greatest and most important age in the history of the world. There have been many great periods. Some of them doubtless antedate historic times. Many of these ages doubtless were unconscious of their own importance. Picture to yourself the time when primitive man first learned to make and control a fire. How it differentiated him from all other animals! Not even yet, so far as I am aware, does even the most advanced non-human animal build a fire. Picture to yourself the time when man first learned to utter and understand other sounds than those few notes of call and warning which exhaust the repertory of the beasts. Think of the time when men first learned to use written symbols, and were thus enabled to leave upon the sands of time some less perishable evidence of their existence than their whitening bones. Which of the great epochs of the past was the greatest and most eventful—the most potent in its influence upon man and his development, it is not easy to decide.

Recall for a moment the age of Pericles, the most brilliant period in the history of "the most gifted race the world has ever known." Or, measured not so much by the greatness of the times as by the greatness of the event, the birth of Christ and the later development of Christianity. Or that period of the revival of learning which is called the Renaissance. Or the hundred years which witnessed the discovery of America, the invention of printing, and the beginnings of the Reformation. Or that brief period which witnessed, in America, the Declaration of Independence, the Revolutionary War, and the adoption of the Federal Constitution, and, in France, the beginning and the end of the French Revolution. Or that period, within the personal experience of many of you, which witnessed the

[1] An address delivered before the Michigan State Bar Association at its annual meeting in 1916.

destruction of slavery in the United States, the defeat of Disunion, the process of Reconstruction, and the beginnings, at least, of the great expansion of the operations and influence of the Federal Government. Or that wonderful period, not yet ended, which has seen that marvelous growth of discovery and invention which has revolutionized our industry and profoundly changed the conditions and possibilities of our daily life.

Notwithstanding all these great periods however—and the list is only a sample of what might be given—we hear it constantly asserted that the present is the greatest period in the history of the world. As compared with some of the periods which I have mentioned, this is said to be not so much a period of new conquests and discoveries in the physical world, although these indeed are very great, as it is a time of new ideas, of new principles, of new ideals. It is another new birth; another Renaissance. Old things, it is said, have been cast aside and all things have become new. It is the time of the new thought, the new freedom, the new morality, the new justice, the new art, the new literature, the new poetry, and the new woman.

While doubtless it is true that not all things are really so new as they are said to be, and while I think it is neither wise nor necessary to take all of these new movements too seriously, no one can deny that in these days we see and hear many strange things which seem to me more or less characteristic of the times and therefore proper subjects for comment. In the field of the new art we have heard of the "Cubists," and the "Futurists," and the "Post-Impressionists,"—whatever these words may mean,—and we have seen an alleged picture which looked, it was said, like "an explosion in a shingle mill," but which was really, we were told, the picture of "a nude descending a staircase." Whether it was a nude man, or a nude woman, or a nude "fake," few were able to decide.

In the new literature, we have had what appears to many to be merely a gross and often obscene realism, whose only purpose seemed to be to parade in public what the old ideas of propriety and decency, if they could not prevent, at least determined to make as little conspicuous as possible.

Upon the stage, an alleged determination "to lay bare the realities of life," has found expression in an apparent endeavor, under the pretence of "cheering up the tired business man," to lay bare the bodies of the performers to the point at which a chaste and sensitive police force would feel bound to interfere.

In the new poetry, beauty of subject, elevation of mood, felicity of diction, and the swaying song of rhythm, have often seemed to

be of no concern, if only the lines could be made of unequal length, and stick out like the ends of a pile of unassorted slats.

In the field of the new morality, the chief stress seems to be laid, as by some strange freak it appears always to have been laid, upon showing how the old rules of marriage and constancy and fidelity are incompatible with the leading of those lives of purity and serenity which an all-wise Providence evidently intended human beings of opposite sexes to lead.

In the field of the new freedom, we have gone from moving pictures upon the "White Slave Traffic," to the edifying sight, within the last few weeks, of prominent ladies in New York hiring a hall in order that they might distribute, to women and young girls, leaflets which purported to detail how birth control could be secured without the troublesome necessity of exercising any self-control.

In the case of the new woman—but here modesty seems to require that I should draw that veil of secrecy which the women themselves seem determined to throw off. I shall therefore leave the new woman to make her own disclosures.

In the midst of this all pervading newness, it was, I suppose, scarcely reasonable to expect that law and lawyers, and courts and constitutions and government should escape unchallenged. At any rate, those of you who will recall the discussions and denunciations of the last half dozen years, beginning shortly before the last Presidential campaign, will abundantly realize that they have not escaped.

The Constitution, instead of being, as many a perfervid orator has so confidently assured us, the "Palladium of our freedom" and the "bulwark of our liberties," is really, we are told, only an impediment in the way of Progress.

The law, instead of being, as we have so often told ourselves, an instrument designed and framed, however imperfectly, to work out justice among men, is really, we are now told, only the expression of class consciousness, and a device by which the dominant classes in the community have endeavored to obtain and retain a "stranglehold" upon their less powerful, though more numerous, and therefore, much more meritorious, fellow-citizens.

Courts, instead of being, as we learned in the old definition, places where justice is judicially administered, are, we are assured, only rigid institutions in which a decayed or decadent formalism is allowed to triumph over that "living law" which alone is competent to determine the affairs of living men.

Judges, instead of being, as we have blindly supposed, something in the nature of high priests of justice, are really, it is said, only a group of old gentlemen, usually benevolent, and often well-inten-

tioned, but always conservative and narrow-minded, who are striving to settle the problems of the twentieth century with the obsolete and elsewhere forgotten philosophy of the eighteenth century.

The lawyer, instead of being, in the language of Cicero, one wh must be "skilled in the laws and in the usages current among private citizens and in giving opinions and bringing actions and guiding his clients aright," is always, we are now assured, a sort of human harpy who lives off the frailties and misfortunes of his fellows, who delights in stirring up strife, who is skilled in making the worse appear the better reason, and who is always ready to espouse any side of any cause and to sell his time and his talents to the highest bidder. In the classic accusation, to "prostitute his talents" is always the expression used, and the picture is not deemed to be complete unless this highest bidder is some "soulless corporation" engaged in some "nefarious scheme to evade or circumvent the law."

With reference to the law, the criticisms have been both many and loud. They chiefly concern themselves with four main subjects, namely:—

First, with that portion of the public or constitutional law which seeks to put limitations upon legislative power.

Second, with those portions of the private law which regulate what may be rather loosely called the "social relations and activities."

Third, with the administration of the law, especially in criminal cases, and actions between those who are sometimes termed "the rich" on the one side, and "the poor" on the other.

Fourth, with the matter of the extension of Federal as opposed to State control.

So far as the ideas underlying these complaints are capable of being expressed in a phrase, they have taken the form of such demands as "Direct Control by the People," "Peoples' Power," "More Democracy," "Direct Action," Social Control," "Social and Industrial Justice," and the like.

With regard to the importance and value of our constitutional system, a curious and interesting change of opinion is manifested in many quarters. It has, as each one here well knows, been regarded as one of the especial merits of our form of government, that we did not live under a system of direct and uncontrolled exercise of the popular will, but under a constitutional government, in which not only were the various departments of government carefully defined and limited by express written charters, but also one in which the fundamental rights of citizens were enumerated and protected by express constitutional limitations designed to secure those rights against the oppressive or arbitrary exercise of the powers of govern-

ment. Not only were such "bills of rights," as they were called, made a prominent part of our State constitutions, but, as is well known, when the Federal Constitution was submitted to the people for adoption, the absence of an express bill of rights in that document was made the occasion of stubborn opposition, and its adoption was only secured in the end by an explicit understanding that the defect should be immediately rectified. In pursuance of this demand, the first ten amendments were proposed and adopted immediately after the adoption of the Constitution itself. The Civil War brought about still further limitations of the same sort, incorporated in the Fourteenth Amendment. These provisions have often been regarded as the crowning glory of our constitutional system.

In recent years, however, these same limitations have occasionally been found to stand in the way of certain actions which some people have very much desired to take, and a loud cry has gone up, directed sometimes at the limitations themselves, sometimes at the judges who enforced them, and sometimes at the manner in which they were interpreted and applied.

Many people have inveighed against them because they were "the product of a by-gone age," or because they were "outworn," or "antiquated," or the work of "a lot of political fossils."

"Why," said a prominent lady to me some time ago, "should we, in this age, be governed by the political ideas of our great-grandfathers? We do not lead their lives, wear their clothes, think their thoughts, subscribe to their religious beliefs, travel in their vehicles, —we do not live in their world. Why, then, should we be hampered in this age by their notions of rights and laws, and liberties? Why should not every generation live its own life under such conditions as it sees fit to impose, rather than under conditions imposed by generations long since dead?"

Such a view doubtless seems to present a certain amount of plausibility, but it is also subject to certain limitations. The fact, of course, is that we cannot cut ourselves off entirely from our past however much we try. Both physically and mentally, we are today very largely what the past has made us. We do not, it is true, propel ourselves by the same sort of machinery which our forefathers employed, nor do we move at the same rate, but we still think with the same sort of brains, feel with the same sort of nerves, respond to the same sort of emotions, yield to the same sort of influences, digest with the same sort of organs, and replenish the earth very much in the same old way. Science, it is true, has held out promises of chemical offspring but, so far as I am aware, the promises have not yet been realized.

It is not true, though some people speak as though it were, that everything held or thought in the eighteenth century is, therefore, necessarily false. Nor is everything thought or held in the twentieth century therefore necessarily true. When one hears so frequently in these days, the curt dismissal of views once held with the mere dictum that "that is only eighteenth century philosophy," he is tempted to ask whether the philosophy, or art, or literature of the Greeks, is obsolete merely because it is old. Is Christianity false because we did not discover it? Are Shakespeare and Milton already in the rubbish heap? Are all the inventions and discoveries of the past which we have thought so glorious, to be repudiated simply because they did not happen in our time? Mind you, I am not contending that everything is true merely because it is old. The past had its limitations and made its errors, but the future will truthfully say the same thing concerning this remarkable age. Will the time ever come, I wonder,—or return if it was ever here,—when things can be discussed upon their merits, and not merely upon their age? Will it always suffice to dispose of an argument to simply point to the date when its proponent was born?

It is, of course, true that we could dispense with written constitutions; other peoples have done it. We need not have constitutional limitations upon governmental power;—other peoples have gotten along without them. It may be that it would be a wise thing to let each generation have a free hand to do as it pleases. The responsibility might have a sobering influence, and the experience might lead to valuable discoveries. All that seems to me to be quite arguable. I, personally, still believe in the wisdom and value of written constitutions, and in effective limitations upon hasty and improvident action, but I am open to conviction. All that I ask is that those who think differently will try to convince us, and not merely spend their efforts in denouncing us.

I feel very sure that we have sometimes made our constitutions too rigid and too difficult to alter. Many people thought that this was true of the Federal Constitution, but the ease with which the Sixteenth and Seventeenth Amendments were adopted a year or two ago shows that people were wrong about that, and that amendments to the Federal Constitution can be made quite easily enough, when once there is a crystalized general demand for the change.

The contention is made that, even if we are to have constitutional restraints upon legislative action, they should be self-operative only, —that is, that they should be addressed to the legislative body only, and that courts should have no power to declare statutes unconstitutional. Very great vehemence has been expended upon this, and,

although the doctrine of judicial control has been established among us for more than a century, during which time constitutions have been amended or adopted many times without altering the rule, judges have been, and are now, roundly denounced as usurpers of power and enemies of the public will. All sorts of measures have recently been proposed, from that of express constitutional declarations that the courts shall not have the power, or only by a certain majority, down, through a popular recall of decisions, to a popular recall of the unfortunate judge who has thwarted the public will.

Now, it must be conceded that a judicial power to declare statutes unconstitutional is not a necessary incident to a system of constitutional limitations. Other nations have dispensed with it, and we could do it. Personally, I favor the power under present conditions, and I think that in our history it has, on the whole, worked well rather than ill. Administered under the best conditions, it will at times disappoint the expectations or desires of some; but that is true of every matter which may become the subject of judicial determination. But if it is an undesirable power, let us openly appeal to the established method of changing it by constitutional amendment, if the requisite majority is in favor of the change. Personally, I doubt the existence of any such a majority, but I am quite ready to abide by the result if the majority exists. What I do object to is the criticism of judges for exercising the power while it is still an established part of our system, even though wrongly introduced; and I particularly object to the claim so often put forward that judges in exercising the power shall be very careful not to thwart the popular will. I freely confess that my picture of the ideal judge does not represent him as having one ear always on the ground to catch the more or less uncertain rumbling of public opinion.

Neither does it accord with my notion of the judicial function in these cases, that courts should be constantly altering the interpretation of constitutional provisions to keep pace with the changing aspect of alleged public opinion. Already, in my judgment, we are coming to put meanings into well-known constitutional provisions which it is quite certain that their framers never intended, and which, as it seems to me, just as certainly could never have been adopted if the meaning now imputed to them had been then ascribed to them. If we do not now approve them, let us come out openly and change them, and not fritter them away by specious and casuistical interpretation.

Merely to call attention, as one writer has recently done, to the large number of statutes which have been declared unconstitutional, does not seem to me to be very significant. If the power is to be

exercised at all, the real question is, not how many statutes have been held unconstitutional, but how many have been so declared which ought not to have been.

In this connection, also, we must not ignore the fact that legislators often shirk their duty and vote for statutes which they believe to be unconstitutional, simply because they have not the back-bone to resist the pressure of those who advocate the statutes, and all the time relying upon the court to do what they as legislators ought to have done themselves.

Every one familiar with the course of legislation has frequently seen this done, and by legislators who openly avowed it. It is an easy way to get credit as promoters of the popular will, and at the same time to put the blame for their own neglect of duty upon the courts.

Another point at which there is loud demand for change is in the direction of what is sometimes called "Direct Action," "People's Power," "Direct Popular Control," and the like.

It is, of course, true that our whole system of government is founded upon the theory of popular participation and control; but what those who are dissatisfied with the actual conditions are demanding is, not only a larger measure of control, but also a more immediate and direct participation by the people in the actual workings of government. Their demand practically involves a pretty complete abandonment of representative government, and the substitution therefor of direct popular action. The methods proposed are the initiative and referendum, the direct primary, the recall, the popular election of United States senators, and the like.

That it is within the power of the people, by constitutional amendment,—in some cases, perhaps, without it,—to bring about these changes, cannot be denied. That all of these changes would be wise, however,—that they would accomplish the results sought, that they would be improvements upon existing conditions, is another matter.

Upon the fundamental principle of popular government, I believe there cannot well be two opinions. To that, I believe we are as irrevocably pledged and committed as to any idea in a world of change. If we cannot govern ourselves, who will do it for us?

It is chiefly upon the question of *method* that the controversy wages. We have been doing it largely upon the representative principle—through delegates and agents and representative groups and bodies. It is now proposed that, pretty largely, the people shall take the power back into their own hands and exercise it directly. Can it advantageously be done? Will it be an improvement over existing methods?

On the whole, I believe that our system of representative government has worked reasonably well. Abuses of power, betrayals of trust, perversions of purpose, have of course occurred, and, I suppose, are more or less likely to continue. But what does direct popular action promise in this respect? In the first place, it must be conceded that we have no precedents for it upon so great a scale. Popular assemblies there have been, and in some cases they have worked satisfactorily, where the numbers were relatively small, the issues relatively simple, and there was solidarity and unity of interest. The New England town meeting of early days may furnish an example. But where in the history of the world have a hundred millions of people, of diverse nationalities, creeds, and political experiences, scattered over a great area, ever governed themselves by direct action?

There has been some experience abroad with the initiative and referendum, as in Switzerland, and we have had and are having some experience with similar measures in certain of our States, as for example, in Oregon. That experience has thus far been too brief to be very conclusive, but certainly the reports which we get of the operation of these measures in Oregon—an agricultural and grazing State with a smaller population than the city of Detroit—do not indicate that they are a panacea for our political ills, even after we have made all allowances for the newness and imperfect development of the machinery.

Are we likely, does it seem, to get better United States senators, as a rule, under popular election than we got under the old method?

Did your presidential primary here in Michigan express the peoples' choice?

Is there even likely to be less of abuse and corruption under the new methods than under the old? We are constantly assured—perhaps it is only a demagogue who tells us so—that the people are wise and just and honest and incorruptible, and that if we can only "get back to the people" all will go well with us.

Now, I suppose it is true that there can be no more wisdom and justice and honesty in the state than exists among the people; but does it follow from this that their direct political or governmental action, when they are influenced by their interests, their sympathies, their prejudices, yes, even by their passions, will always be wise and just and honest?

If anybody thinks so, he has more faith in human nature than I have, and he draws different lessons from the teachings of history than I am able to draw.

The conviction of Socrates, the rejection of Aristides because people were tired of hearing him called "the just," the crucifixion of Jesus, the persecution of the heretics, the bloody horrors of the French Revolution, the prosecutions for witchcraft, the toleration of human slavery in this country within my own life time, the frequent and horrible lynchings of the present day, to say nothing of such recent vagaries as "fiat money," and the "free and unlimited coinage of silver" at the Heaven-ordained ratio of sixteen to one, are simply a few of the almost countless instances which serve to show that the people, or, what is the same thing for this purpose, the dominant portion of the people, may be as unreasoning, arbitrary, cruel, tyrannical and unjust as any representative or group of representatives chosen from them could possibly be.

This, however, is not a cry of despair. It is not fair to expect a people to be more wise and just and honest than they are; but neither, on the other hand, is it reasonable to expect that we can extract a greater measure of wisdom and justice and honesty from them than they possess merely by changing the machinery for extracting it. Neither is it to deny that one piece of machinery may be better than another. It is only to warn us against what is, I think, one of our besetting sins, namely, the belief that machinery alone can save us.

It is frequently asserted that if there are evils in democracy, it is because we do not have enough of democracy. I do not need to go so far as to say, with Paul Elmer More, in his recent book on "Aristocracy and Justice," that "this is a lie and we know it to be a lie." My cure for the evils of democracy, if I were to attempt to state one,—which I by no means consider myself competent to do—would be to say as he does, that it is not *more* democracy which we need but a *better* democracy, or, perhaps, more aristocracy, using that expression as meaning the endeavor to cultivate and develop the highest wisdom and justice and honesty which can, from time to time, be produced among us, and then to see that, as far as possible, these qualities are brought into the service of the people.

A third common ground of complaint is found in the form and content of our private law. To some, the so-called judge-made law is an abomination, and they would have all law declared in statutory form by the legislature. A brief and simple code, which he who runs may read, and apply without the necessity of paying a lawyer to tell him what the law is or what it means, is their ideal. Time will not permit me to discuss it, but I may at least in passing speak for it a word of abstract praise. It is, indeed, a beautiful ideal.

As to the complaints respecting the content of our law, I shall venture to detain you a little longer. The law is blamed both for

what it is and what it is not. The generic complaint most frequently made is that our law is "anti-social," that it is "individualistic" rather than "social," in its aims, and loud demands are made for the "socialization of the law." Now, in one sense, it is, of course, entirely untrue to say that our law is "anti-social." Law is, and always has been, a social instrument designed to secure their rights to men who are living in contact with their fellows; but this is probably not what the objectors mean. They doubtless mean that in the development of our judge-made law at any rate—which up to this time constitutes the larger part of it—the lawgiving organs have looked more directly at the individual involved than they have to society at large. Now, this is an important matter and it deserves to be looked at somewhat more closely.

It is, of course, quite true, as those who are familiar with the method by which our common or judge-made law has grown, well know, that this body of law is the development of or deduction from the rules or principles applied in the decision of actual controversies between particular individuals which have come before the courts for their determination. It is necessarily always *ex post facto* in its origin. It necessarily depends upon the existence of an actual controversy. Courts have always refused to decide merely fictitious or moot controversies. It necessarily and always involves the determination of the rights of some particular individual against some other particular individual. Courts have always refused to decide upon the rights of parties not in some way represented in the cause. Now while it has been true, I suppose, ever since this process of law making became a conscious one, that the rules which the courts have applied have been conceived of as general rules, applicable to all other controversies of the same sort, courts have never deemed it to be any part of their function to lay down general rules abstractly. And while, in determining what should be the rule to be applied in the particular controversy, courts have properly considered how such a rule would operate generally, it has always been, not merely for the purpose of promulgating the rule as general, but to find an appropriate general rule by which the particular controversy might properly be determined.

Moreover, in endeavoring to ascertain the rule to be applied, courts have always felt themselves constrained to look to the already established and prevalent ideas which were then dominant in the community, and in accordance with which the particular rights were presumptively acquired or the particular obligation presumptively incurred, and not to new, vague, and unformed notions of which the parties perhaps have never heard and in accordance with which they

have never dealt. Courts have never esteemed it to be either their right or their duty to attempt to be the first to promulgate new and untried theories; and especially have they never believed it to be any part of their function to attempt to establish a new social order, or to endeavor gratuitously to neutralize or "even-up" the disadvantages or disparities of rank or fortune under which the men, who were then before them, actually labored owing to the existing and established social order under which they lived.

In addition to all this, the doctrine of *stare decisis,* in accordance with which a rule once deliberately adopted was, in general, to be applied to future controversies of the same sort, has become established, upon the theory that the rule so declared had presumptively been deemed to be the rule under which the contract now in question was entered into, or the right of property was acquired or the course of conduct determined.

The result has been at once a certain inflexibility, as well as a considerable flexibility of rule. Courts have followed social opinion rather than attempted to be the leaders or the makers of it. Law *has,* in this sense, been "individualistic" rather than "social" in its development.

It may be that this course of procedure has all been wrong. For the time being, I pass no judgment upon that. Whether actually right or wrong, however, it is nevertheless true that this very characteristic has, for many generations, been deemed to be one of the chief merits of our law. It has given to our common law a cohesion, a practical fitness to the actual affairs of men, and a vitality under varying circumstances which have heretofore been deemed to merit praise rather than censure.

Granting what has already been said, however, it is, as has been stated, now declared that we must "socialize" our law. We hear much about "social justice," and demands are made for a "sociological jurisprudence."

These are very interesting ideas, and we must find out what they mean. Before we can go very far in the way of "socializing" our law, it would seem that we must agree upon some terms; that we should find the "social" principle; that we should have some common and reasonably definite "social" or "socialistic" or "sociological" ideal.

Take the last term first. What relation does a "sociological" jurisprudence bear to "sociology?"

For a considerable number of years, we have heard of the new "science of sociology" and almost all colleges and universities now have courses in "sociology" in their curricula and professors of

sociology upon their faculties. How comparatively recent all this is, is shown in a most interesting way in an article by Professor A. W. Small, in the last number of the American Journal of Sociology, on "Fifty Years of Sociology in the United States." It is most interesting to try to discover what the principle and ideals of this science are, but one of the most striking things about it,—and the most fundamental,—is the question whether there is or can be any such distinct and separate science at all. Many persons of more or less competence deny it altogether, and those who believe that there can be and is such a science, seem to be by no means agreed upon its principles and aims. · Personally, I make no pretensions to any ability to solve this problem—though I confess that I have an opinion upon it.

So with regard to a "socialistic" ideal. What is it? Do the advocates of it agree upon it? So far as I can discover, they do not. Many of the later socialists admit that their views have greatly changed. With many, "socialism" seems to have developed into "internationalism," and while there may be agreement as to the general impulse, the definite ideas seem still to be largely in the air. Within the last week, a leading Socialist has expressed the opinion that "the word 'socialism' may go the way of 'natural rights' and the 'greatest happiness principle,' and in our need we may find a new name for our hopes."

The same thing is true about the ideals for more fully "socializing" society and the law. Is there, at the present time, any such general agreement about it as to make it the basis of legal or political reorganization? I ask you to think about it. What is the end or aim of society, or what is the goal of social progress?

I have asked many people that question in recent years. I have also asked many to tell me what one thing or group of things they would do, if they had the power to mould or reform society according to their ideals.

The striking, though perhaps not the surprising thing about it, is, that there is not simply *one* ideal, but hundreds. Most people reply, usually by way of metaphor, by telling what kind of a society they would like to see, and when pressed for definite projects they usually declare that they would do "something" to cure this alleged evil or that, but just what they would do they have never definitely determined. Many would "do something to equalize opportunity;" many would "do something to curb the power of wealth;" many would "do something to conserve our national resources;" many would "do something to put personal rights above property rights"—as if there was a difference between the two—, many would "do something to

bring about a more just distribution of the products of social activity," and the like.

Many have, if not a principle, at least a list or program of specific acts. They would establish the initiative and the referendum,—they would "pass laws" for workmen's compensation, minimum wages, mothers' pensions, old-age pensions, hours of labor, protection of children, improved housing, eugenic marriage, sterilization of criminals, easy divorce, income taxes, single taxes, inheritance taxes, government ownership, the abolition of private property in land, and so forth.

Some of these are doubtless worthy ideals; some of them seem to me undesirable; some of them not only undesirable but positively unjust. We already have some of these measures in many places, and many of them in a few places. Most of them are, as yet, only in the experimental state. Many of the actual measures are obviously still crude and tentative in form. The wisdom of many of them is far from demonstrated. I do not undertake, at this time, to criticise any of them. But the comments, for example, of Professor Taussig of Harvard, in the current number of the Quarterly Journal of Economics on the legislation fixing minimum wages for women, are very illuminating, as showing how, even after much gathering of data, the particular measures enacted may wholly fail of their purpose because they overlook actual economic conditions and the fundamental facts of life.

One of our characteristic American weaknesses besets us here, and is certain to lead to disappointment of our expectations, if it does not work injustice. This is our desire for haste, and our apparently incurable belief in the self-sufficiency of legislation. Does an evil exist? Yes, it does. Very well, then pass this law against it. Now, *that* is settled. What shall we take up next?

Even the advocates of such measures are themselves sometimes appalled at the rate at which legislation is enacted. In an editorial urging "social and industrial preparedness," one of our leading papers said the other day:

"In the last two years, 1914 and 1915, over five hundred laws have been passed by state legislatures on social problems of this nature. And in spite of all this activity the surface of the subject has scarcely been touched.

"Many of these laws were in the interests of the laboring people, the wage earners, but entirely opposed to the welfare of the country at large. Many are frankly experiments. Some of them are not enforcible because they were passed by an active and evangelistic majority without reference to facts."

If the editor who wrote those words could have looked back over our statute books for twenty years, or any other considerable period, he would have been still more impressed by the number of "dead-letter" laws—passed in haste, crude, ill-digested, unsupported by a coherent force of settled public opinion,—which have been wholly ineffective, which were often ignored as soon as they were passed, and which stand now only as silent warnings against hasty and ill-considered legislation.

Moreover, in form and content these measures are too often the product of irresponsible, inexperienced and immature persons. Men, and women too, whose experience, judgment and capacity are not sufficient to enable them to manage their own private affairs with success, have no hesitation in proclaiming how the business of the nation should be carried on. Fortunately, not many of them preach such arrant nonsense as that proclaimed recently, according to the public press, by an alleged prominent woman and reformer who urged that motherhood should by law be confined to the lower classes:

"Educated, cultured women should not be permitted to become mothers," she said. "Their heritage of nervous temperament, and physical development makes propagation of life by them more dangerous than to women of the lower classes."

Limiting reproduction to the lower classes, is certainly a brilliant method of perpetuating the educated and cultured classes!

Not the least of the difficulties which the many proposals to regulate our lives and conduct involve is the tremendous increase in the power and number of the new officers, boards and bureaus which must be employed to enforce them. They will require on the part of the people a high degree of capacity, good judgment, public spirit, and freedom from susceptibility to those corrupting influences of partisanship, ignorance, prejudice and graft which now so much hamper and impede the proper enforcement of the laws we already have. Are we likely to be able to secure this indispensable kind of a public service, either now or in the near future?

One of the advocates of these new regulative measures recently declared, "Of course, we take it for granted that the growth and increase in the capacity of the people for wise, intelligent and incorruptible administration of their public affairs will keep pace with the demand which these measures will make upon them."

Can anyone who is cognizant of existing conditions reasonably believe that any such assumption as this is really justified? The truth seems to me to be that when this condition of things is realized, the need of many of these regulative measures will *ipso facto* be

terminated. When we are able to administer them properly, we shall not need many of them at all.

Do not misunderstand me. I am not arguing against reform. I am not opposed to progress. Neither am I pessimistic about the future,—on the contrary, I am full of hope. But, I confess that I am not optimistic or "progressive" enough to be ready to espouse every proposal for new legislation as soon as it is made, and without trying to carefully consider, not only the abstract merits of the scheme, but also how it seems to me likely to work in view of the present, actual conditions which surround us. To that extent, I confess that I am a conservative. When it is said that we must have more "social control," I confess that I cannot help asking, "What kind of control?" "By what methods?" and "By whom?"

So when eager reformers insist that, if people will not see what is good for them and voluntarily accept it, it must be forced upon them, I cannot help stopping to think. It sounds so much like the old days when religious zealots were saying to their neighbors, you must accept our views or you will be hanged or burned, or, at the very least, be damned.

It is the characteristic of a certain type of protagonists that they always arrogate to themselves the application of all of the commendatory adjectives. They are always the "progressive," the "open-minded," the "forward-looking," men; while those who do not agree with them are always the "stand-patters," the "reactionaries," and the "old fogies." Fortunately, however, no one is, or has to be, a certain type merely because some one else sees fit to call him that. Children and small souls may settle differences by making faces and calling names, but full grown men do not argue in that way.

Whatever we may think about these new proposals, however, we seem destined to try many of them out. So far as they seem to give reasonable promise of improvement, I think we should give them a fair and impartial trial. It has been my observation that no new measure ever works as well as its most enthusiastic advocates believed it would; but, on the other hand, that many measures, if they work at all, often work better, in actual practice, than those who opposed them thought they would or could.

In the meantime, whatever changes are to be made in our law must doubtless be made by legislation. Even when the rule to be altered is one adopted by the courts, it cannot reasonably be expected that the courts will suddenly abandon settled rules and adopt an entirely different policy.

This fact raises an exceedingly important question, of great interest to every one, and especially so to the members of the legal

profession. That is, what can be done to secure careful, competent and well organized legislation?

The first thing, I suppose, is to endeavor to secure a higher type of legislators. However well-intentioned and public-spirited our average legislatures may be, no one, I think, will deny that they do not, as a rule, represent the highest type or even the highest average type of legislative ability in the State.

In the second place, we must improve our technique of legislative drafting. Consider what has been the evil for a hundred years or more, arising from carelessly-drawn, ambiguous, ungrammatical, inconsistent, self-contradictory, unintelligible statutes. The evil is not local; it exists everywhere. It is not confined to State legislatures, but is found in Congress as well. To take but a single instance: Think of the uncertainty, doubt and ambiguity found in that exceedingly important statute,—of a sort in which such evils are as harmful as they can be anywhere,—the present income-tax and revenue statute of the United States, which is a very jumble of confused and almost unintelligible provisions. Endless interpretations, constructions and administrative rulings have been required to make it workable.

Anybody deems himself competent to draft a statute, and proceeds to do so with little or no regard to already existing statutes, or inquiry as to how it fits in with the present scheme of legislative enactments. It is idle, however, to enlarge upon the situation: it is known to everyone.

Legislative reference bureaus have been established in some States, designed to give aid in collecting data, exhibiting the present state of the law, and in drafting proposed measures. But we need more than this. There must be careful attention given to the theory of legislation and to the science of draftmanship. If our law is to be reduced more and more to statutory form, this will be a vital necessity, and it will need to become as much a part of the curricula of our law schools as any other branch of our law. My colleague, Professor Freund, is rendering valuable service in making all of this more clear.

In the third place, as has often been pointed out, there is need of some officer or bureau whose constant and regular duty it shall be to supervise the whole matter of legislative activity. At the present time, it is the business of no one to discover and point out the need of new legislation, to ascertain where the law, whether legislative or judicial, is working badly and why, to expose defects, inconsistencies, contradictions, or omissions, and then to endeavor to have the difficulty corrected. It is all left to chance, accident, or the spasmodic

activities of individuals. The result is that private, self-interested, and often incompetent persons frequently undertake the task, and they often create more confusion than they cure. A legal supervisor or minister of justice, charged with this important duty, is needed in every State. Professor Pound, of Harvard, among others, has urged this with great force on various occasions.

A fourth point of proposed change which I must merely mention because there is not time for its adequate discussion, is the growing demand for greater legislative control on the part of the Federal government. If this is to be done, I urge that it be only in pursuance of a frank and open amendment of the constitution of the United States, so that we may know precisely what we are doing and agree upon the methods. The current tendency to accomplish such results by stretching and distorting the power of Congress to regulate commerce among the several States, seems to me to be most inappropriate and undesirable. If Congress is to attempt to regulate private industry within the States by declaring that goods not made in accordance with its standards as to the age and compensation of employes, or their hours of labor, or conditions of work shall not be admitted to interstate commerce, as is now so often proposed, we may soon witness the unedifying spectacle of attempts to regulate the lives and conduct of our citizens by declaring that persons who were not married or divorced, or housed, or fed, or clothed, or educated, in accordance with Federal regulations, shall not engage in interstate commerce, if not that only those whose purity of heart accords with a Federal standard shall be allowed to use interstate railways or send their letters by the Federal post.

Finally, it may be asked, what should be the attitude of lawyers to these measures for social reform? Lawyers as a rule, are not good "reformers." Their training, their traditions, their experience, the very necessities of their profession tend to make them conservative. They spend their lives in defending and enforcing rights, in making binding arrangements for the future, in endeavoring to predict, and to advise their clients, as to what will happen or be held under given circumstances. Certainty, continuity, conformity to rule and precedent, are the foundations of their activities. It is popular, in many places, to deride their attitude of mind. They are too legalistic, it is said. "The real case we British have against our lawyers," said Mr. H. G. Wells, in a recent article, "is not that they are lawyers, but that they are such infernal lawyers."

Lawyers have had to oppose so many irregular, immature, ill-advised and really destructive measures and proceedings, that, in

the minds of a certain type of people, the lawyers are deemed to be the chief obstacle in the way of the furtherance of their schemes. "First, let us kill all the lawyers," is the cry of every Jack Cade.

There is, I suspect, a measure of foundation for these complaints, though it is a curious and interesting sight to note how soon these very fault-finders run to the lawyers for protection when the tide of affairs seems to be turning against themselves.

Nevertheless, the members of the legal profession are not, I think, likely to become, nor do I think it desirable that they should become, mere innovators and advocates of purely experimental and unseasoned schemes.

Such civilization as we have has been bought at too dear a price, such workable institutions as we have have been pounded out with too much labor upon the anvil of Time, to be surrendered before there is a reasonable prospect of getting something better in their place.

The eager advocates of hasty change speak as if they thought that the Millenium lies just over the brow of yonder hill.

I see no reason for such a belief. That any "golden age," wherein all men will be equally rich or wise or happy or contented, lies ahead of us, within any appreciable period of time, I see no reason to believe.

If, when you go home, you will look at the marginal annotation in your family bible, you will probably see that the time of the creation of the world and of man is set down for a specific date,—four thousand and four years before the Christian era.

Scientists, however, now assure us that the evidence which has been accumulating during recent years indicates that man, as man, has existed upon this earth for from five hundred thousand to a million years, while the earth itself has probably existed at least a hundred times as long. Compared with the probable age of man, the period of our actual historical knowledge of him seems almost insignificant. For probably five hundred thousand years, he has been marching before he comes in sight. As we look toward the future, a few steps at most are all that we can see. What man's destiny is, no one of us can tell. As we grow in knowledge of ourselves and of the world which lies about us, we can undoubtedly shape our destiny to some extent. But to what end? "Not enjoyment and not sorrow," sings the poet, "is our destined end or way; but to act that each tomorrow finds us farther than today." But farther from what? farther towards what? is still the question.

As we look at man from one standpoint, we are appalled at his weakness. A single blow may end him. As we look at him from

another standpoint, we are amazed at his powers. He can fell forests, bridge rivers, cross oceans, harness steam, compel the lightning to do his bidding, erect temples, ravish our eyes with pictures and our ears with music; he can dream dreams; he can form ideals of truth and justice and mercy and honor and love and fidelity and self-sacrifice. He can see a vision of a society in which, by coöperation and mutual helpfulness, these ideals may be realized in fact. That seems to me to be the destiny which lies before us. You and I will never see it fully realized. Perhaps no one ever will. It can not be reached in a hurry. It can not be created by mere legislation. It can not be imposed upon us from without. Only by the long, old, slow and tedious process which makes these ideals first blossom and ripen within ourselves can we bring them to external operation and perfection. In the meantime, we must have patience, hope and courage; we must keep an open mind; we must hold fast to that which is good, and fairly and in good faith try out those schemes which, in the light of our experience and our knowledge of human nature, bid fair to aid us. I have no doubt that some of them will be found to work.

We must, however, never lose sight of the fact that, notwithstanding all their dreams and longings, men do not really want any Utopias after all, and would doubtless spurn them as soon as they were achieved. As William James has said, "Everyone must at some time have wondered at that strange paradox of our moral nature, that, though the *pursuit* of outward good is the breath of its nostrils, the *attainment* of outward good would seem to be its suffocation and death. Why does the painting of any paradise or Utopia, in heaven or on earth, awaken such yawnings for nirvana and escape? The white-robed harp-playing heaven of our Sabbath-schools, and the ladylike tea-table elysium represented in Mr. Spencer's 'Data of Ethics,' as the final consummation of progress, are exactly on a par in this respect,—lubberlands, pure and simple, one and all."

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