

## LAW, CAPITALISM, AND THE FUTURE

### A. DEFINING THE ENTREPRENEUR: WEBER'S PROTESTANT ETHIC REFINED

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EDITOR'S NOTE: *Departing from the usual style of a law review article, the following manuscript not only invites but requires extensive participation by the reader in analyzing the function of the law in relation to capitalism. The author adopts an unorthodox technique and weaves together seemingly unrelated ideas. For example, by interjecting a lengthy quote from a 1964 Supreme Court decision, the author bids the reader to determine whether the law can serve "as a successful control device" in the face of the increasing internationalization of capitalism. Moreover, the web of ideas that the author spins does not suggest facile distinctions or conclusions. From the confusing and complex bombardment of ideas, analogies, and theories, the reader hopefully will discover perceptions worthy of the challenge.*

#### I

#### *The Inadequacies of Weber's Ideal Type*

##### (i)

History is the story of what happened, and the most instructive explanations — those most deserving of the historical title — are the ones that most satisfactorily account for the presence of the phenomenon whose behavior is being described. Historical explanations are therefore judged both in terms of how well they explain given instances of a phenomenon and how many such instances they explain.

Why Weber's explanation of entrepreneurship was so satisfactory is a question for the social and intellectual histories of the times during which it has been accepted. This article offers an explanation for the generally accepted proposition that Weber's theory explains remarkably few of the known instances of entrepreneurship. This defect in Weber's theory was caused both by the methodological inadequacies of the technique of the ideal type, which focuses on logical extremes as opposed to concrete cases, and by a disproportionate stress on rationality as a crucial component of the economic phenomenon of capitalism.

Weber, a German sociologist writing in the nineteenth century, was concerned with the relationship between the Protestant ethic and capitalist spirit.

The following excerpts from his work provide the nucleus for that part of his theory that is relevant to this article.

## (ii)

If any inner relationship between certain expressions of the old Protestant spirit and modern capitalistic culture is to be found, we must attempt to find it, for better or worse, not in its alleged more or less materialistic or at least anti-ascetic joy of living, but in its purely religious characteristics. Montesquieu says (*Esprit de Lois*, Book XX, chap. 7) of the English that they "had progressed the farthest of all peoples of the world in three important things: in piety, in commerce, and in freedom." Is it not possible that their commercial superiority and their adaptation to free political institutions are connected in some way with that record of piety which Montesquieu ascribes to them?<sup>1</sup>

The decisive point was . . . the conception of the state of religious grace, common to all the denominations, as a status which marks off its possessor from the degradation of the flesh, from the world.

[T]hough the means by which it was attained differed for different doctrines, it could not be guaranteed by any magical sacraments, by relief in the confession, nor by individual good works. That was only possible by proof of a specific type of conduct unmistakably different from the way of life of the natural man. From that followed for the individual an incentive methodically to supervise his own state of grace in his own conduct, and thus to penetrate it with asceticism. But . . . this ascetic conduct meant a rational planning of the whole of one's life in accordance with God's will. And this asceticism was no longer an opus supererogationis, but something which could be required of everyone who would be certain of salvation. The religious life of the saints, as distinguished from the natural life, was — the most important point — no longer lived outside the world in monastic communities, but within the world and its institutions. This rationalization of conduct within this world, but for the sake of the world beyond, was the consequence of the concept of calling of ascetic Protestantism.<sup>2</sup>

We can of course only proceed by presenting these religious ideas in the artificial simplicity of ideal types, as they could at best but seldom be found in history. For just because of the impossibility of drawing sharp boundaries in historical reality we can only hope to understand their specific importance from an investigation of them in their most consistent and logical forms.<sup>3</sup>

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1. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 45 (T. Parsons transl. 1946) [hereinafter cited as WEBER].

2. *Id.* at 153-54 (footnote omitted).

3. *Id.* at 98. "[T]he types of moral conduct in which we are interested may be found in a similar manner among the adherents of the most various denominations . . . We shall see that similar ethical maxims may be correlated with very different dogmatic foundations. Also the important literary tools for the saving of souls, above all the casuistic compendia of the various denominations, influenced each other in the course of time; one finds great similarities in them, in spite of very great differences in actual conduct.

"It would almost seem as though we had best completely ignore both the dogmatic foundations and the ethical theory and confine our attention to the moral practice so far as it can be determined. That, however, is not true. The various different dogmatic roots

The rationalization of the world, the elimination of magic as a means to salvation, the Catholics had not carried nearly so far as the Puritans (and before them the Jews) had done. To the Catholic the absolution of his Church was a compensation for his own imperfection. The priest was a magician who performed the miracle of transubstantiation, and who held the key to eternal life in his hand. One could turn to him in grief and penitence. He dispensed atonement, hope of grace, certainty of forgiveness, and thereby granted release from that tremendous tension to which the Calvinist was doomed by an inexorable fate, admitting of no mitigation. For him such friendly and human comforts did not exist. He could not hope to atone for hours of weakness or of thoughtlessness by increased good will at other times, as the Catholic or even the Lutheran could. The God of Calvinism demanded of his believers not single good works, but a life of good works combined into a unified system. There was no place for the very human Catholic cycle of sin, repentance, atonement, release, followed by renewed sin. Nor was there any balance of merit for a life as a whole which could be adjusted by temporal punishments or the Churches' means of grace.<sup>4</sup>

The combination of faith in absolutely valid norms with absolute determinism and the complete transcendentality of God was in its way a product of great genius. At the same time it was, in principle, very much more modern than the milder doctrine, making greater concessions to the feelings which subjected God to the moral law. Above all, we shall see again and again how fundamental is the idea of proof for our problem. Since its practical significance as a psychological basis for rational morality could be studied in such purity in the doctrine of predestination, it was best to start there with the doctrine in its most consistent form.<sup>5</sup>

. . . .

That great historic process in the development of religions, the elimination of magic from the world which had begun with the old Hebrew prophets and, in conjunction with Hellenistic scientific thought, had repudiated all magical means to salvation as superstition and sin, came here to its logical conclusion. . . .

Combined with the harsh doctrines of the absolute transcendentality of God and the corruption of everything pertaining to the flesh, this inner isolation of the individual contains, on the one hand, the reason for the entirely negative attitude of Puritanism to all the sensuous and emotional elements in culture and in religion, because they are of no use toward salvation and promote sentimental illusions and idolatrous superstitions. Thus it provides a basis for a fundamental antagonism to sensuous culture of all kinds. On the other hand, it forms one of the roots of that disillusioned and pessimistically inclined individualism which can even to-day be identified in the national characters and the institutions of the peoples with a Puritan past, in

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of ascetic morality did no doubt die out after terrible struggles. But the original connection with those dogmas has left behind important traces in the later undogmatic ethics; moreover, only the knowledge of the original body of ideas can help us to understand the connection of that morality with the idea of the after-life which absolutely dominated the most spiritual men of that time. Without its power, overshadowing everything else, no moral awakening which seriously influenced practical life came into being in that period." *Id.* at 96-97.

4. *Id.* at 117 (footnotes omitted).

5. *Id.* at 126.

such a striking contrast to the quite different spectacles through which the enlightenment later looked upon men.<sup>6</sup>

We may imagine [the] routine [of the continental textile industry] somewhat as follows: The peasants came with their cloth, often (in the case of linen) principally or entirely made from raw material which the peasant himself had produced, to the town in which the putter-out lived, and after a careful, often official, appraisal of the quality, received the customary price for it. The putter-out's customers, for markets any appreciable distance away, were middlemen, who also came to him, generally not yet following samples, but seeking traditional qualities, and bought from his warehouse, or long before delivery, placed orders which were probably in turn passed on to the peasants. Personal canvassing of customers took place, if at all, only at long intervals. Otherwise correspondence sufficed, though the sending of samples slowly gained ground. The number of business hours was very moderate, perhaps five to six a day, sometimes considerably less: in the rush season, where there was one, more. Earnings were moderate; enough to lead a respectable life and in good times to put away a little. On the whole, relations among competitors were relatively good, with a large degree of agreement on the fundamentals of business. A long daily visit to the tavern, with often plenty to drink, and a congenial circle of friends, made life comfortable and leisurely.

The form of organization was in every respect capitalistic; the entrepreneur's activity was of a purely business character; the use of capital, turned over in the business, was indispensable; and finally, the objective of the economic process, the book-keeping, was rational. But it was traditionalistic business, if one considers the spirit which animated the entrepreneur: the traditional manner of life, the traditional rate of profit, the traditional amount of work, the traditional manner of regulating the relationships with labour, and the essentially traditional circle of customers and the manner of attracting new ones. All these dominated the conduct of the business, were at the basis, one may say, of the ethos of this group of business men.

Now at some time this leisureliness was suddenly destroyed, and often entirely without any essential change in the form of organization, such as the transition to a unified factory, to mechanical weaving, etc. What happened was, on the contrary, often no more than this: some young man from one of the putting-out families went out into the country, carefully chose weavers for his employ, greatly increased the rigour of his supervision of their work, and thus turned them from peasants into labourers. On the other hand, he would begin to change his marketing methods by so far as possible going directly to the final consumer, would take the details into his own hands, would personally solicit customers, visiting them every year, and above all would adapt the quality of the product directly to their needs and wishes. At the same time he began to introduce the principle of low prices and large turnover. There was repeated what everywhere and always is the result of such a process of rationalization: those who would not follow suit had to go out of business. The idyllic state collapsed under the pressure of a bitter competitive struggle, respectable fortunes were made, and not lent out at interest, but always reinvested in the business. The old leisurely and comfortable attitude toward life gave way to a hard frugality in which some participated and came to the top, because they did not wish to consume but to earn, while

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6. *Id.* at 105-06 (footnotes omitted).

others who wished to keep on with the old ways were forced to curtail their consumption.

And, what is most important in this connection, it was not generally in such cases a stream of new money invested in the industry which brought about this revolution — in several cases known to me the whole revolutionary process was set in motion with a few thousands of capital borrowed from relations — but the new spirit, the spirit of modern capitalism, had set to work. The question of the motive forces in the expansion of modern capitalism is not in the first instance a question of the origin of the capital sums which were available for capitalistic uses, but, above all, of the development of the spirit of capitalism. Where it appears and is able to work itself out, it produces its own capital and monetary supplies as the means to its ends, but the reverse is not true. Its entry on the scene was not generally peaceful. A flood of mistrust, sometimes of hatred, above all of moral indignation, regularly opposed itself to the first innovator. Often — I know of several cases of this sort — regular legends of mysterious shady spots in his previous life have been produced. It is very easy not to recognize that only an unusually strong character could save an entrepreneur of this new type from the loss of his temperate self-control and from both moral and economic shipwreck. Furthermore, along with clarity of vision and ability to act, it is only by virtue of very definite and highly developed ethical qualities that it has been possible for him to command the absolutely indispensable confidence of his customers and workmen. Nothing else could have given him the strength to overcome the innumerable obstacles, above all the infinitely more intensive work which is demanded of the modern entrepreneur. But these are ethical qualities of quite a different sort from those adapted to the traditionalism of the past.<sup>7</sup>

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One feels at once that this powerful expression of the Puritan's serious attention to this world, his acceptance of his life in the world as a task, could not possibly have come from the pen of a medieval writer. . . . It is now our task to replace this vague feeling by a somewhat more precise logical formulation, and to investigate the fundamental basis of these differences. The appeal to national character, is generally a mere confession of ignorance. . . .<sup>8</sup>

It might thus seem that the development of the spirit of capitalism is best understood as part of the development of rationalism as a

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7. *Id.* at 66-69 (footnotes omitted). "As he became increasingly involved in the affairs of the world, [Luther] came to value work in the world more highly. But in the concrete calling an individual pursued he saw more and more a special command of God to fulfill these particular duties which the Divine Will had imposed upon him. And after the conflict with the Fanatics and the peasant disturbances, the objective historical order of things in which the individual has been placed by God becomes for Luther more and more a direct manifestation of divine will. The stronger and stronger emphasis on the providential element, even in, particular events of life, led more and more to a traditionalistic interpretation based on the idea of Providence. The individual should remain once and for all in the station and calling in which God had placed him, and should restrain his worldly activity within the limits imposed by his established station in life. While his economic traditionalism was originally the result of Pauline indifference, it later became that of a more and more intense belief in divine providence which identified absolute obedience to God's will, with absolute acceptance of things as they were. Starting from this background, it was impossible for Luther to establish a new or in any way fundamental connection between worldly activity and religious principles." *Id.* at 84-85 (footnotes omitted).

8. *Id.* at 88.

whole, and could be deduced from the fundamental position of rationalism on the basic problems of life. In the process Protestantism would only have to be considered in so far as it had formed a stage prior to the development of a purely rationalistic philosophy. But any serious attempt to carry this thesis through makes it evident that such a simple way of putting the question will not work. . . . [I]f under practical rationalism is understood the type of attitude which sees and judges the world consciously in terms of the worldly interests of the individual ego, then this view of life was and is the special peculiarity of the peoples of the liberum arbitrium, such as the Italians and the French are in very flesh and blood.<sup>9</sup>

(iii)

What this article proposes is that a more useful definition of the entrepreneur than that embodied in Weber's theory would focus on the opposition to what Weber designates as traditionalism.<sup>10</sup> Thus, if society is defined as the group recognized as rightfully occupying any area, peer as an acknowledged member of the group, and convention as a rule applicable to peer group behavior, the entrepreneur is an individual who breaks social conventions within acceptable limits. To illustrate the fact that this definition of entrepreneurship is technically applicable to all areas of human endeavor, the following description of Christopher Columbus is offered as one that exemplifies the spirit of entrepreneurship.

Most sensible people admitted that a voyage west to China could be made, and a few said it should be done, but nobody cared to try, until that young Genoese Cristoforo Colombo began pestering people to finance his project.

Exactly when and how he got the idea we do not know. It may have been put to him, as we suggest, by a shipmaster impatient of the dangers and disappointments of the Guinea trade. It may have come to him in a rush of religious emotion at Mass, when he heard Psalm 19, "The Heavens declare the Glory of God;" for a Genoa compatriot remarked that Christopher fulfilled the prophecy of the fourth verse, "And their words unto the ends of the world." He may have heard that prophecy of Seneca in the *Medea*, "A time will come when the chains of the Ocean will fall apart, and a vast continent be revealed; when a pilot will discover new worlds and Thule no longer be the ultimate." That prophecy, too, was fulfilled by him, as his son Ferdinand duly noted in his copy of Seneca. We do not know how Columbus came by the idea of sailing west to reach the East, but once he had it, that was the truth for him; he was the sort of man in whom action is the complement of a dream. He knew the truth, but he could not rest until it was proved, until the word became flesh. And, let us admit, his combination of creative imagination with obstinate assurance, his impatience with all who were slow to be convinced and contempt for those who withstood him, made Columbus a fool in the eyes of some men and a bore to most. Like the pioneers of aviation, he was considered a little touched in the head: one who would fly in the face of God. And the worst of it was that he had to persuade stupid people in high places that his

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9. *Id.* at 76-77.

10. See text accompanying note 7 *supra*.

Enterprise of the Indies, as he called it, was plausible, because he wanted money, men and equipment to carry it out.<sup>11</sup>

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 It is probable that Columbus [on his return from his first journey] could have had anything he wanted — a title, castle in Spain, a pension for life and an endowment — and it would have been well for him had he then taken profits and retired with honor, leaving to others the responsibility of colonizing. But he was not that kind of man, and if he had been, he would not have discovered America. He must see that the islands he discovered were settled, the gold trade put on a proper footing and the natives converted; he must make contact with the Grand Khan, or some Oriental potentate greater than Guacanagari. The rights already granted to him, incident to his offices of Admiral and Viceroy, promised (in his eyes) to be far more lucrative than any estate in Spain could possibly be. More than that, he was in good health, full of energy, in the prime of life (aged forty-one), and he regarded the work that God had appointed him to do as just begun.<sup>12</sup>

(iv)

The original Protestant vision was of a society of religiously enlightened laymen who were no longer burdened by traditional religious superstition and tyranny. That vision was still bright in major consolidation tracts of the 1530s and 1540s. . . . It can certainly be argued that Protestant catechisms and church ordinances, where fully enforced, tended finally to secure religious freedom by ending it. Nonetheless, these same consolidation tracts of the Reformation challenge influential modern assessments of the Protestant movement. Even in these tracts the new work ethic does not appear as an answer to religious anxiety, and still less as a sanction of compulsive labor and thrift. If such traits are Protestant, as scholarship in the tradition of Max Weber has argued, then they are born of a still later Protestantism. The work ethic of first generation Protestants remained what it was at the Reformation's inception: an insistence that people, especially the clergy and the powerful institutions they represented, be useful

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11. S. MORISON, CHRISTOPHER COLUMBUS, MARINER 14-15 (1955).

12. *Id.* at 63-64. "[Columbus'] share of the gold obtained on the Fourth Voyage was considerable . . . [b]ut Columbus felt that he had been defrauded, and monotonously besought his son to obtain confirmation of what he called his . . . 'thirds.' . . . The 'third' was really a preposterous claim. Columbus' grant of the new office of Admiral of the Ocean Sea stated that it carried 'pre-eminences and prerogatives . . . in the same manner as . . . the Grand Admiral of Castile.' Having ascertained that the Grand Admiral collected a thirty-three and one-third per cent tax on overseas trade within his jurisdiction — between Spain and the Canary Islands — Columbus claimed it as his due for the entire inward and outward trade of the Indies. Obviously, if that had been admitted, there would have been little profit left in American trade for anyone else, and he and his descendants would have become wealthier than the King of Spain or any other prince. As it was, even by collecting a mere two per cent of the gold, he was a rich man according to the standards of the day, and left substantial amounts to his sons.

"It should be said that Columbus never intended to keep all this money. Even on his deathbed he was planning to accumulate a fund to finance a new crusade, and so provided in his last will and testament. It was always on his mind that the profits of his 'Other World' might be used to recover the Holy Sepulchre from the infidel. And he was much more hurt over the slights to his dignity and honor than by the denial of what he deemed to be his property rights." *Id.* at 145-46.

servants within and not burdens upon their communities. That aim was the point of the struggle . . . and . . . the inspiration behind the new social ethic extrapolated from the priesthood of all believers.<sup>13</sup>

## II

### *The Functional Advantages of Legal Case Studies*

#### (i)

A basis for historical explanation can be ascertained through reference to a legal opinion deciding a concrete legal controversy, as well as through reference to an ideal type, such as that found in Weber's theory. The advantages possessed by the legal opinion over the ideal type in providing a basis for historical explanation can be summarized in terms of the factors of complexity and time. The ideal type may either overlook or weigh disproportionately one of the myriad of factors that constitute the phenomenon it is intended to describe.<sup>14</sup> The nature and proportionate weight of those factors may also vary over time.<sup>15</sup> The technique the common law has evolved

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13. S. OZMENT, *THE REFORMATION IN THE CITIES: THE APPEAL OF PROTESTANTISM TO SIXTEENTH-CENTURY GERMANY AND SWITZERLAND* 164 (1975).

14. "We have continually to deal with aspects of the Reformation which must appear to the truly religious consciousness as incidental and even superficial. For we are merely attempting to clarify the part which religious forces have played in forming the developing web of our specifically worldly modern culture, in the complex interaction of innumerable different historical factors." WEBER at 90.

15. "[Weber's] pluralistic agnosticism, manifested in his refusal to pledge allegiance to any exclusive viewpoint lest it do injustice to the unique individuality of historical entities and the perpetual shift of cultural horizons, was laudable in intention. It seemed to be pointing the way to the functionalization of research and interpretation in the social sciences. Actually, however, Weber's isolative treatment led to inevitable distortions. His method entailed the breakdown of any complex phenomenon into its components and then, choosing each one seriatim as a constant, tracing its effects on the other variables. At the end of the process, he indicated there would have to be a return to assess the varying force of each component in the actual historical composite and to determine how closely the empirical phenomena approached the ideal types he had formulated. This he had planned to do for his problem of the relationship between the Protestant ethic and the spirit of capitalism, but he must have felt the infinite and impossible nature of the task. Moreover, his approach offers no method for determining the interrelation of factors, the degree of influence pertaining to each, or their temporal variations, thereby leaving room for the play of personal evaluation in the choice and characterization of the particular historical atoms.

"For the historian concerned with determining the causes of a particular historical datum, the problem of timing, historical phenomena and tracing temporal variations is one of the crucial difficulties arising out of the impossibility, inherent in Weber's method, of determining the degree of influence to be assigned to the various factors involved. The ideal-type method neglects the time coefficient, or at any rate impairs the possibility of establishing time sequences, because it involves a telescoping of data. Granted, for instance, that Weber's interpretation of Calvinist theology is correct and that it was the type that would result in activism, dynamism, industry, and so on, the question still remains whether these influences did not begin to exert a significant effect only after capitalism had already reached a dominant position." Fishoff, *The Protestant Ethic and the Spirit of Capitalism: The History of a Controversy*, in *THE PROTESTANT ETHIC AND MODERNIZATION: A COMPARATIVE VIEW* 79-80 (S. Eisenstadt ed. 1968).

to deal with these possibilities is that of precedent: what a given opinion means, beyond the specific decision it embodies, is a consequence of whether and how it is cited. The questions, in other words, are whether the precedent will survive over time, in that it continues to be cited, and the extent to which the nature and form of the citations indicate adaptation of the precedent to changing social and economic conditions.

The remainder of this section attempts to analyze an opinion by Benjamin N. Cardozo. That opinion, *Meinhard v. Salmon*,<sup>16</sup> is striking in that Cardozo's holding exhibits the identical defect as Weber's ideal type. Both Cardozo's theory and Weber's ideal type identify morality—the internalized standards that characterize capitalistic society—with the calm and objective rationality of the numbers whose increasing magnitude socially defined the successful capitalist;<sup>17</sup> thus, both place a disproportionate emphasis on the possession and manipulation of capital as opposed to other skills and attributes required by a capitalistic society.

## (ii)

Salmon, while in course of treaty with [a] lessor as to the execution of the lease, was in course of treaty with Meinhard . . . for the necessary funds.<sup>18</sup>

When the lease was near its end, Elbridge T. Gerry had become the owner of the reversion . . . owned much other property in the neighborhood . . . had a plan to lease the entire tract . . . destroy the buildings then existing and put up another in their place. . . . Submitted such a project to several capitalists and dealers . . . was unable to carry it through with any of them . . . approached . . . Salmon . . . [and entered] a new lease [with] the Midpoint Realty Company, which is owned and controlled by Salmon, a lease covering the whole tract, and involving a huge outlay.<sup>19</sup>

The lease between Gerry and the Midpoint Realty Company was signed . . . on January 25, 1922 . . . Meinhard was not informed. . . . The first that he knew of it was in February when . . . [he] made demand . . . that the lease be held in trust as an asset of the venture.<sup>20</sup>

16. 249 N.Y. 458, 164 N.E. 545 (1928).

17. "[T]he capitalistic adventurer has existed everywhere. With the exception of trade and credit and banking transactions, [his] activities were predominantly of an irrational and speculative character, or directed to acquisition by force, above all the acquisition of booty, whether directly in war or in the form of continuous fiscal booty by exploitation of subjects.

"But in modern times the Occident has developed, in addition to this, a very different form of capitalism which has appeared nowhere else: the rational capitalistic organization of (formally) free labour.

"Now the peculiar modern Western form of capitalism has been, at first sight, strongly influenced by the development of technical possibilities. Its rationality is to-day essentially dependent on the calculability of the most important technical factors. But this means fundamentally that it is dependent on the peculiarities of modern science, especially the natural sciences based on mathematics and exact and rational experiment." WEBER at 20, 21, 24.

18. *Meinhard v. Salmon*, 249 N.Y. 461, 462, 164 N.E. 545, 546 (1928).

19. *Id.*

20. *Id.*

The legal premise on which Cardozo's holding in favor of Meinhard was based characterized the agreement between Salmon and Meinhard involving the original lease as:

[A] joint venture with terms embodied in a writing.<sup>21</sup>

The two were coadventurers, subject to fiduciary duties akin to those of partners.<sup>22</sup>

We have no thought to hold that Salmon was guilty of a conscious purpose to defraud. Very likely he assumed in all good faith that with the approaching end of the venture he might . . . take the extension for himself.<sup>23</sup> He had given to the enterprise time and labor as well as money. He had made it a success. Meinhard, who had given money, but neither time nor labor,<sup>24</sup> had already been richly paid.<sup>25</sup>

The opinion notes that:

There might seem to be something grasping in [Meinhard's] insistence

21. *Id.* "Q. Did you read the contract?"

"A. Just about . . . Mr. Salmon said to me that he felt that we ought to have some paper in case either one of us died, that the other one would not be embarrassed, and he suggested drawing up a paper, which he had the man which I think he had this office with, Mr. Everett, draw up, simply as a memorandum that if anything happened to either one of us, stating if we both lived it should not be the contract at all, and that was the history of that paper which I signed. . . ." Record at 274 (M. Meinhard on cross-examination).

22. 249 N.Y. at 462, 164 N.E. at 546. Contrast this with the dissenting opinion: "There was no general partnership, merely a joint venture for a limited object, to and at a fixed time. The new lease, covering additional property, containing many new and unusual terms and conditions, with a possible duration of eighty years, was more nearly the purchase of the reversion than the ordinary renewal with which the authorities are concerned." *Id.* at 473, 164 N.E. at 550 (Andrews, J. dissenting).

23. "What Mr. Salmon obtained was not a graft springing from the [original] lease but something distinct and different . . . I think . . . that in the absence of some fraudulent or unfair act the secret purchase of the reversion even by one partner is rightful. Substantially this is such a purchase. Because of the mere label of a transaction we do not place it on one side of the line or the other. Here is involved the possession of a large and most valuable unit of property for eighty years, the destruction of all existing structures and the erection of a new and expensive building covering the whole. No fraud, no deceit, no calculated secrecy is found. Simply that the arrangement was made without the knowledge of Mr. Meinhard. I think this not enough." *Id.* at 467-68, 164 N.E. at 548.

24. *Id.*

MORTON H. MEINHARD & CO.

66 to 72 Leonard St.

New York, Feb. 18, 1905

Mr. Walter J. Solomon

500 Fifth Ave., City

My dear Walter:

Your letter of the 16th inst. received and carefully noted and in reference to the write off would say that same might be a technical term used in the real estate business, and such being the case, it is quite beyond my comprehension.

Record at 1614 (Plaintiff's Exhibit 33).

25. 249 N.Y. at 467-68, 164 N.E. at 548.

upon more. . . .<sup>26</sup> [S]uch recriminations . . . are not without their force if conduct is to be judged by the common standards of competitors.<sup>27</sup>

The basis for the holding, however, is that:

The heavier weight of duty rested . . . upon Salmon. He was a coadventurer with Meinhard, but he was manager as well.<sup>28</sup>

A managing coadventurer appropriating the benefit of . . . a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking to say the least, in reasonable candor, if the partner were to surprise him in the act of signing [a] new instrument. Conduct subject to that reproach does not receive from equity a healing benediction.<sup>29</sup>

Cardozo's test for determining the breach of a fiduciary duty consists of ascertaining fairness of the expectation of reproach if the fiduciary is surprised in the act of signing the operative document. The anachronistic nature of the test resides less in its phraseology in terms of the legal category of partnership than in its easy avoidance by the corporate organizations whose activities courts attempt to supervise precisely in terms of the legal concept of fiduciary duties. The fact that *Salmon v. Meinhard* continues to be cited for the proposition that corporate activities are subject to fiduciary principles thus indicates one advantage possessed by case studies as opposed to ideal types.

### III

#### *Romney and the Rambler: A Case Study in Entrepreneurship*

##### (i)

In the field of its highest development in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which often actually give it the character of sport.<sup>30</sup>

The text leaves unclear why Weber in effect characterizes business in the

26. *Id.* at 468, 164 N.E. at 548.

27. "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exception . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." *Id.* at 463-64, 164 N.E. at 546.

28. *Id.* at 468, 164 N.E. at 548. See also note 24 *supra*.

29. 249 N.Y. at 468, 164 N.E. at 548.

30. WEBER at 182 (footnote omitted).

United States as lacking traits derived from Puritan origins rather than accepts United States capitalism as a phenomenon that requires revision of his thesis concerning the relationship between the Protestant ethic and the spirit of capitalism.<sup>31</sup> The quoted passage is footnoted as follows:

115. "Couldn't the old man be satisfied with his \$75,000 a year and rest? No! The frontage of the store must be widened to 400 feet. Why? That beats everything, he says. In the evening when his wife and daughter read together, he wants to go to bed. Sundays he looks at the clock every five minutes to see when the day will be over — what a futile life!" In these terms the son-in-law (who had emigrated from Germany) of the leading dry-goods man of an Ohio city expressed his judgment of the latter, a judgment which would undoubtedly have seemed simply incomprehensible to the old man. A symptom of German lack of energy.<sup>32</sup>

To understand the characteristics of the American capitalist, a case study of three entrepreneurs, George Romney, Louis Wolfson, and Joseph Smith is an appropriate beginning.

(ii)

George Wilcken Romney, who became president of American Motors in the mid-1950s was early distinguished as "the Creator of the Compact." In his "Dinosaur in the Driveway" speech, made only four months after taking command of American Motors, Romney criticized his competitors for creating "gas guzzling monsters" — a message that Romney delivered to vast segments of the American public.<sup>33</sup>

At least part of [Romney's] effectiveness came from his air of religious earnestness, which in turn derived directly from his background. A devout Mormon (he still neither smokes, drinks nor swears, and he pays his tithe regularly to the church), at age 19, he was sent to do missionary work in Britain. There, for two years he sought Mormon converts by earnest door-to-door solicitation and public meetings. This sober background was, however, soon melded with more worldly experience as a U.S. senator's secretary (to Massachusetts Democrat David I. Walsh),

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31. See generally A. MITZMAN, *THE IRON CAGE: AN HISTORICAL INTERPRETATION OF MAX WEBER* (1970). "There was a great difference which was very striking to contemporaries between the moral standards of the courts of Reformed and of Lutheran princes, the latter often being degraded by drunkenness and vulgarity. Moreover, the helplessness of the Lutheran clergy, with their emphasis on faith alone, against the ascetic Baptist movement, is well known. The typical German quality often called good nature (*Gemütlichkeit*) or naturalness contrasts strongly, even in the facial expressions of people, with the effects of that thorough destruction of the spontaneity of the status naturalis in the Anglo-American atmosphere, which Germans are accustomed to judge unfavorably as narrowness, unfreeness, and inner constraint. But the differences of conduct, which are very striking, have clearly originated in the lesser degree of ascetic penetration of life in Lutheranism as distinguished from Calvinism." WEBER at 127 (footnote omitted). See also text accompanying note 8 *supra*.

32. WEBER at 283. See note 31 *supra*.

33. FORBES, Aug. 1, 1961, at 15 (footnote omitted). In 1958, for instance, Romney traveled 70,000 miles "carrying the compact gospel to any group that would listen." *Id.*

a Washington lobbyist (for Alcoa) and a trade association head (of the Automobile Manufacturers Association).

This lively mixture of political, business and missionary experience was to serve Romney well. For just such a combination of politicking, proselytizing and business was needed to save American Motors and hasten the success of the compact car. . . .

From 1954 through 1957, the first four years after the merger (the company's fiscal year ends Sept. 30), American lost nearly \$50 million. And more ominous, working capital sank from \$82.6 million at the end of fiscal 1954 to little more than half that figure three years later, despite the most heroic measures of prevention.

American Motors turned the corner in the first quarter of its 1958 fiscal (ended Dec. 1957), when it chalked up a \$4.9 million profit vs. a \$3-million loss in the same quarter the year before; and after that it was Nelly-bar-the-door. For, partly as a result of Romney's relentless hammering at the compact car theme, and even more because of a public reaction against the even higher-powered, higher-finned, more chrome-splashed creations that continued to issue forth from the Big Three, the Rambler suddenly began to move.<sup>34</sup>

On May 9, 1959, at the University of Michigan School of Business Administration, George Romney concluded the Second Annual Business Leadership Lecture as follows:

Our economic system is still based on vesting ultimate power in the hands of consumers. They make the decisions that result in economic success, economic failure or economic mediocrity. Thus, our economic system, like our political system, is of the people, by the people and for the people. Consumers have been the chief beneficiaries of our economic activity, and they are the bosses of that activity. Consequently, since the system is fundamentally aimed at consumer benefit and direction, I believe we should describe it as a system of "consumerism" rather than "capitalism." The continuation of "consumerism" is in jeopardy as a result of excessive concentration of union and employer power. However, this is a bigger story than the one you asked me to discuss.

The American system is still basically consumeristic in that its productive effort is directed at meeting the needs and desires of the consumer, and in that the consumer in general exercises control over industrial activity by his decisions in the marketplace. Both the owners and workers in any enterprise depend for their profits, salaries and wages on the favorable decisions of free customers. Thus the system is fundamentally aimed at consumer benefit, and since all of us are consumers, the direction of the system is ultimately vested in the greatest good for the greatest number as determined by all of us.

The case history of Rambler is a story of consumerism. I believe Rambler success at once proves the need and advantage of vigorous competition between an adequate number of competitors in the automobile business, and of the need for primary recognition of the consumer's role, and, that, finally, it will focus further attention on the new status of the consumer, as a human being, as a citizen, as a force, instead of as a mass statistic.<sup>35</sup>

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34. *Id.*

35. Address by George W. Romney, Second Annual Business Leadership Lecture, May 9, 1959, 11 MICH. BUS. REV. 7 (1959).

## (iii)

From pre- and post-merger losses, AMC had in the mid-fifties a carry-forward loss of \$47 million. The tax benefits to be derived from such a situation attracted the investment in AMC of Louis Wolfson, who in early 1957 became AMC's largest single shareholder. Both Wolfson and Romney were reported to have been interested in using the available tax credits to facilitate the organization of a group of appliance companies under Kelvinator.<sup>36</sup>

[Romney] met Wolfson [who headed a business empire which included Merritt-Chapman & Scott, Devoe and Raynalds, a chain of Florida theaters and other enterprises] for the first time on October 31, 1956, in Room 925 of the Ambassador Hotel (later Sheraton East) in New York. . . .

Wolfson explained he had bought more than 200,000 shares of American Motors stock with the idea that the company be at least partially liquidated.<sup>37</sup>

Wolfson questioned Romney sharply about the operating figures for the fiscal year just ended [and] . . . was especially interested in Kelvinator. Romney explained that while the company as a whole had an operating loss of more than \$30,000,000, Kelvinator had earned \$3,600,000 . . . [and] launched into an earnest explanation of his plans for American Motors.<sup>38</sup>

By the time the hour-and-a-half meeting ended, Romney and Wolfson were calling each other "Lou" and "George." They found they had something in common. Both had been school athletes, Wolfson an end on the University of Georgia football team. Both were abstemious, neither smoking nor drinking. Both were hard-working men of fierce energy.

Wolfson promised to support Romney as long as he was cooperative and emphasized that he wanted no information that Romney would not give to other stockholders.<sup>39</sup>

Louis Wolfson, the brisk 42-year-old Florida financier . . . is challenging dour 81-year-old Sewell Avery for control of the \$700 million mail order house of Montgomery Ward. . . .<sup>40</sup>

Wolfson never moves in to take over a company until he has conducted an intelligence operation involving months and sometimes years of quiet painstaking investigations.<sup>41</sup>

The investigators first study the company's overhead costs, profit figures, labor efficiency and the like against the average figures for the industry. If the figures are out of line poor management is indicated, and the Wolfsons begin to get interested. Production rate, product quality, sales methods, manufacturing equipment and physical plant are carefully studied. The Wolfson representatives even look for executives living beyond their means, because they believe that a man worried about his personal finances cannot devote adequate attention to his company.<sup>42</sup>

36. BUSINESS WEEK, Jan. 11, 1958, at 81-82.

37. T. MAHONEY, THE STORY OF GEORGE ROMNEY 29-30 (1960).

38. *Id.* at 30.

39. *Id.* at 31.

40. LIFE, Nov. 22, 1954, at 179.

41. *Id.* at 185.

42. *Id.*

Wolfson's talent for inspiring loyalty is one of the main facets of a basically very uncomplicated personality. . . . Said one [associate] recently, "I would without questioning do anything that Lou Wolfson asked me to do."

There is justification for such confidence. Wolfson is familiar with and can often recall down to the last dollar every significant figure in his dozens of companies' reports. He can cite Dow Jones averages on a second's notice. He has no constitutional need for sleep and probably does not average six hours a night, a fact that troubles colleagues not only for his welfare but for their own, since Wolfson expects them to keep pace with him.<sup>43</sup>

His devotion to business is untempered by any apparent need for relaxation, mental or physical. He has never smoked. He will sip a highball rather than embarrass a hostess, but he has said he cannot understand how anyone can enjoy the taste of liquor. He is no gambler, although he likes a congenial poker game with friends.<sup>44</sup>

Wolfson's reputation for cutting up surpluses into rich dividends may frighten some stockholders but should attract others not averse to seeing the Ward dividend rate increase while the stock itself goes up. Furthermore Wolfson is planning a two months' tour this winter to some 40 cities in which he plans to rent meeting rooms and explain his plans to Ward stockholders. His boyish sincerity and softspoken directness should make a formidable appeal.

To whatever Wolfson says in the next few months Wall Street will listen both intently and suspiciously. The U.S. financial community still has not made up its mind how to take Wolfson. Some of its more conservative members refuse to discuss him publicly. Wolfson is not merely a newcomer, he is a man of unconventional methods and motives. Wall Street's reserve is intensified by the fact that never before has so large and proper a body of stockholders as Montgomery Ward's been subjected to so open and direct an onslaught.

Wolfson has attempted to define his motives with his usual frankness: "I won't do anything for money for myself any more," he earnestly remarked a few weeks ago. "Once making money was high on my list of ambitions. I thank the Lord that now it is 'way down on the list. When we first talked about Montgomery Ward, even people in my own organization told me, 'It's too big. You're going in over your head.' I like a challenge like that. I've enjoyed proving to them it's not over our head.

"Here's another thing. We have about 20,000 stockholders in our companies now. If I can take in a company like Ward with 68,000 stockholders or so, and 70,000 employees—more than twice as many as we have in our present companies—and put those stockholders' money to work and show them how it is needed to create jobs, and if I can restore the initiative and confidence of the employees in the business that is their livelihood—well, if I can do that I will have gone a long way to awaken corporate management generally to its responsibilities and to reawaken confidence in American corporations. That's my real ambition."

Such evangelistic piety is not likely to make Wall Street grow misty-eyed. Wolfson will have to prove in much more tangible ways that he has become what Wall Street considers a responsible member of the business community. This he will probably try to do. And the more he tries, the more he will serve to keep lazy or inefficient manage-

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43. *Id.* at 191.

44. *Id.*

ments alert — and to that extent, at least, he will be contributing to the country's financial vigor.<sup>45</sup>

(iv)

It is true that Joseph Smith [an early Mormon leader in the United States] bucked cherished American traditions — the rigid separation of church and state, the sanctity of private property, and the inviolability of the marriage code. And it was his destruction of an opposition printing press that precipitated his lynching. But it is also true that he was purely a Yankee product and that a great deal that was good in American folklore and thinking found its way into his writings and into his church. The cornerstone of his metaphysics was that virile concept which pervaded the whole American spirit and which was indeed the noblest ideal of Jesus and Buddha, that man is capable of eternal progress toward perfection.

But Joseph's conception of perfection was by no means exclusively spiritual. His kingdom of God upon earth was saturated with the Yankee enthusiasm for earthly blessings. No one more ingeniously than he combined Jewish and Christian mysticism with the goal of perpetual prosperity. "Adam fell that men might be," he wrote, "and men are that they might have joy." And for Joseph Smith joy came, not from melancholy contemplation, but from planning bigger and better cities, building bigger and nobler temples, and creating for himself the nucleus of an American empire.

The source of his power lay not in his doctrine but in his person, and the rare quality of his genius was due not to his reason but to his imagination. He was a mythmaker of prodigious talent. And after a hundred years the myths he created are still an energizing force in the lives of a million followers. The moving power of Mormonism was a fable — one that few converts stopped to question for its meaning seemed profound and its inspiration was contagious.<sup>46</sup>

(v)

If what Weber designated "Protestant Ethic" may, in a historical sense more precisely be linked with American national character, the question presented is the way in which the emphasis on individualism characteristic of United States political ideology is compatible with the social function performed by what Weber defines as the essence of Protestant belief.<sup>47</sup> But

45. *Id.* at 194.

46. F. BRODIE, *NO MAN KNOWS MY HISTORY: THE LIFE OF JOSEPH SMITH VIII-IX* (1971). "Basically Joseph's was not a revivalist sect. Although he followed some of the revivalist patterns, he appealed as much to reason as to emotion, challenging his critics to examine the evidences of his divine authority — the Book of Mormon, the lost books of Moses and Enoch, the sworn statements of his witnesses, and numerous Bible-like revelations. The importance of this appeal cannot be overestimated, for it drew into the Mormon ranks many able men who had turned in disgust from the excesses of the local cults. The intellectual appeal of Mormonism, which eventually became its greatest weakness as the historical and 'scientific' aspects of Mormon dogma were cruelly disemboweled by twentieth-century scholarship, was in the beginning its greatest strength." *Id.* at 99. See also text accompanying note 6 *supra*.

47. "It seems at first a mystery how the undoubted superiority of Calvinism in social organization can be connected with this tendency to tear the individual away from the

man's individualism is countered by another opposing instinctual pattern, the desire to trust his fellow man. This conflict is explained by E. Weigert:

Before the child develops any thinking or verbal expression of his emotions he is able to trust, since he experiences without consciousness that his needs for survival, growth, and development fit into his parents' needs to give gratification and protection in mutually adaptive, tender cooperation. This trust, this confidence, which precedes all rational thought processes, seems to me to be the matrix or an early manifestation of religious experience. It grows with the growing individual and transcends the boundaries of the early environment; it embraces the universe of the broadening personality. This propensity to trust exists even when the parents are not trustworthy. In that case, trust is driven underground, hiding behind defenses; but the propensity to trust cannot be abolished in any human being.<sup>48</sup>

In moral and religious hypocrisy we recognize the vestiges of a yearning for peace and reconciliation with the ultimate power, the ground of existence revealed in destiny. But the approach to this ultimate authority is laden with the same excessive anxieties and distrust as the helpless child experiences in the relation to powerful parental authority which he does not dare to trust. The excessively anxious child tries to ward off nightmarish dangers by prayer or by other propitiating or atoning gestures. He tries to win the powers of goodness over onto his side in order to avoid desertion, punishment, and the accompanying excessive anxieties. He tries to fight off the black magic by a protective white magic. We recognize in the black magic the hated punishing parent; while the protective, comforting power represents the good, approving, and rewarding parent.<sup>49</sup>

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closed ties with which he is bound to this world. But, however strange it may seem, it follows from the peculiar form which the Christian brotherly love was forced to take under the pressure of the inner isolation of the individual through the Calvinistic faith. . . . Brotherly love, since it may only be practised for the glory of God and not in the service of the flesh, is expressed in the first place in the fulfilment of the daily tasks given by the *lex naturae*; and in the process this fulfilment assumes a peculiarly objective and impersonal character, that of service in the interest of the rational organization of our social environment." WEBER at 108-09 (footnotes omitted).

48. E. WEIGERT, *THE COURAGE TO LOVE* 7 (1970).

49. *Id.* at 18. "To a greater or lesser degree we are all easily deceived by our own deceitful manipulations of authority. Nothing is more difficult than to be honest with oneself. We are accustomed from childhood on to think in terms of good and bad, black and white. It is important for our sense of prestige and security that we be on the good side; therefore we try desperately to justify ourselves, sometimes by rationalizing argumentation. In such stubborn insistence on self-justification lie the roots of a paranoid development with its ideas of grandiosity and persecution. We all become identified with the role that we play. We really believe in our hypocritical goodness, our self-righteousness, even sometimes in our saintliness." *Id.* at 19.

. . . .

"I said before that on any level of human development the blocked resources of trust may spontaneously open up again. This is an experience totally beyond human efforts of the intellect or of the will; it is an experience which the religious person humbly accepts as the grace of God. Neither the psychoanalyst nor any other human being can produce this redeeming experience, but the analyst may be able to contribute to the removal of impediments of moral and religious self-deceit and hypocrisy, the outgrowth of an intolerant conscience, an intransigent superego. I do not consider deceit or hypocrisy primary needs; they are a defense, like the claim for despotic power, or lust," *Id.* at 20.

But the emotional experience of wholeness is never static; the synthetic function of the ego does not create a closed system. As long as a person lives, he remains — although in varying degrees — open to the future, open to the world as he sees it. The world of his experience, his world and his ego, lives in continuous interchange. He shapes his world, and in turn this world — his reality — shapes his ego. His impulses, his potentialities, aiming into the future, are shaped by processes of disintegration and reintegration, which Freud identified as Thanatos and Eros. Freud's reduction of integrative and disintegrative processes to basic instincts appears to some analysts, however, as an oversimplifying hypothesis. Even Melanie Klein, who uses the term "death instinct" amply, does not see in it a biological force but a subjective experience — the elementary fear of death, the prototype of all anxiety.<sup>50</sup>

. . . .

Man seems to be in conflict between his trend toward individuation and his need for solidarity with others. In human groups the motivation to eliminate a rival in the hierarchy is not left to an instinctive releaser automatism which dictates whether to kill or exercise mercy. Man uses foresight which mobilizes anxiety or guilt feelings, and he anticipates retaliation or punishment, which counteract and repress the murderous impulse from awareness.<sup>51</sup> . . . Why is man's reasoning power so relatively weak in taming the frustrated impulses? In the introduction to Goethe's *Faust*, Mephistopheles, the devil, bemoans the fate of man before God the Lord: "Man would live a little better, had you not given him the shine of heaven's light. He calls it reason (*Vernunft*) and he uses it only to be more brutish than any brute."<sup>52</sup>

## B. THE PROBLEM OF INTERNATIONAL CAPITALISM

### I.

#### *The Obligation of Law*

##### (i)

In terms of the relationship between entrepreneurial activity and man's "conflict between his trend toward individuation and his need for solidarity with others,"<sup>53</sup> it is probably crucial that both Romney and Wolfson perceived themselves as members of a minority, as "outsiders" in the world in

50. *Id.* at 54.

51. *Id.* at 86. "But the conflict between impulses and foresight continues undecided in the nonreporting parts of his brain (Freud's unconscious), threatening to return from exile and upset man's equilibrium by an outbreak of uncontrolled rage when his frustrated egocentric impulses overrun his need for group solidarity." *Id.*

52. *Id.* at 87. "Man's instincts are as innocent and free of guilt as the animal's instincts, as long as the needs which guarantee his survival are not frustrated. But man's capacity of foresight, his gift of imagination which anticipates the consequences of his behavior and actions, frequently lead him to overreactions in response to the danger signal of fear or anxiety. The human being is the only animal that is aware of his destiny to die, though he does not keep this knowledge in the focus of his awareness. Yet, in his imagination he may die a thousand deaths, and when this foresight triggers off unmanageable fears, his adaptational behavior may be thrown out of kilter." *Id.*

53. *Id.*

which they were operating. It is precisely this perception, in other words, that permitted them to treat the rules traditionally applicable to peer group behavior as artificial rather than binding conventions. The question raised by this analysis is the identity of the mechanism that defines the acceptable limits in terms of which such conventions can be broken. In the United States, as the analysis of *U.M.W. v. United States*<sup>54</sup> illustrates, this defining mechanism has been the law. This article then considers the possible changes, produced by the increasing internationalization of capitalism, in the character of that law.

In *U.M.W.* the United States had entered into an agreement concerning coal mines on May 29, 1946, with John L. Lewis, President of the United Mine Workers, to govern the terms and conditions of employment "for the period of Government possession." On October 21, 1946, Lewis requested the Secretary of the Interior to renegotiate the agreement. Secretary Krug responded that there was no contractual basis for renegotiations concerning the original Krug-Lewis agreement. The government, however, expressed willingness to discuss matters within the terms of the original agreement and requested Lewis to communicate his demands to the mine owners.

After some discussion with the government, during which the United States refused to alter the agreement to the extent that it affected terms and conditions of employment, Lewis wrote to Krug "terminating" the earlier agreement. Ignoring the President's requests to reconsider his decision, Lewis proceeded to circulate the letter among the mine workers for their "official information." The United States then sought declaratory and injunctive relief to the effect that Lewis had no power unilaterally to terminate the Krug-Lewis agreement.

The district court issued a temporary restraining order prohibiting the defendant union and John L. Lewis from encouraging mine workers to strike. Three days later, the mine workers walked out, idling the mines that furnished a major portion of the nation's coal.

Defendants filed a motion to dismiss the contempt charge, challenging the jurisdiction of the court and questioning whether the Norris-LaGuardia Act prohibited granting the government's request for the temporary restraining order. Overruling the motion, the court found defendants guilty of both civil and criminal contempt. On notice of defendants' appeal, the United States filed a petition for certiorari with the Supreme Court.

The Court granted certiorari, and while acknowledging that section 20 of the Clayton Act provided that "no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . ." to strike,<sup>55</sup> held that the term, "employer," did not include the United States.<sup>56</sup> Among the opinions<sup>57</sup> in this decision were the following:

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54. 330 U.S. 258 (1947).

55. 29 U.S.C. §52 (1970).

56. 330 U.S. at 275. "MR. JUSTICE JACKSON joins in this opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case." *Id.* at 307.

57. Among the opinions pertinent to this article are the following:

"MR. JUSTICE RUTLEDGE, dissenting.

"This case became a *cause celebre* the moment it began. No good purpose can be served by ignoring that obvious fact. But it cannot affect our judgment save only perhaps to steel us, if that were necessary, to the essential and accustomed behavior of judges. In all cases great or small this must be to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it. . . .

"MR. JUSTICE FRANKFURTER has shown conclusively, I think, that the policy of the Norris-LaGuardia Act, 47 Stat. 70, applies to this situation. The legislative history he marshals so accurately and cogently compels the conclusion that the War Labor Disputes Act of 1943, 57 Stat. 163, not only confirms the applicability of the earlier statute, but itself excludes resort to injunctive relief for enforcement of its own provisions in situations of this sort." *Id.* at 342-43 (footnotes omitted).

"MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

"For the reasons given in the Court's opinion, we agree that neither the Norris-LaGuardia Act nor the War Labor Disputes Act barred the Government from obtaining the injunction it sought in these proceedings. The 'labor disputes' with which Congress was concerned in the Norris-LaGuardia Act were those between private employers and their employees. As to all such 'labor disputes,' the Act drastically limited the jurisdiction of federal courts; it barred relief by injunction except under very narrow circumstances, whether injunction be sought by private employers, the Government or anyone else. But the attention of Congress was neither focused upon, nor did it purport to affect, 'labor disputes,' if such they can be called, between the Government and its own employees. There was never an intimation in the progress of the Act's passage that a labor dispute within the Act's meaning would arise because of claims against the Government asserted collectively by employees of the Interior, State, Justice, or any other Government department. Congress had never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense.

"We have no doubt that the miners became Government employees when the Government took over the mines. It assumed complete control over the mines and their operation. The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves. If we thought, as is here contended, that the Government's possession and operation of the mines were not genuine, but merely pretended, we should then say that the Norris-LaGuardia Act barred these proceedings. For anything less than full and complete Government operation for its own account would make this proceeding the equivalent of the Government's seeking an injunction for the benefit of the private employers. We think the Norris-LaGuardia Act prohibits that. But as we read the War Labor Disputes Act and the President's order taking over the mines against the background of circumstances which prompted both, we think, apparently contrary to the implications of the regulations, that the Government operates these mines for its own account as a matter of law; and those who work in them, during the period of complete Government control, are employees of the Government.

"Since the Norris-LaGuardia Act is inapplicable, we agree that the District Court had power in these proceedings to enter orders necessary to protect the Government against an invasion of the rights it asserted, pending adjudication of the controversy its complaint presented to the court. . . .

"We think it significant that the conduct which was prohibited by the restraining order for violation of which these defendants have been punished for contempt is also punishable under the War Labor Disputes Act. That Act provides a maximum punishment of \$5,000 fine and one year imprisonment for those who interfere with the operation of

MR. JUSTICE MURPHY, dissenting.

An objective reading of the Norris-LaGuardia Act removes any doubts as to its meaning and as to its applicability to the facts of this case. Section 4 provides in clear unmistakable language that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute. . . ." That language, which is repeated in other sections of the Act, is sufficient by itself to dispose of this case without further ado. But when proper recognition is given to the background and purpose of the Act, it becomes apparent that the implications of today's decision cast a dark cloud over the future of labor relations in the United States.

Due recognition must be given to the circumstances that gave rise to this case. The Government was confronted with the necessity of preserving the economic health of the nation; dire distress would have eventuated here and abroad from a prolonged strike in the bituminous coal mines. It was imperative that some effective action be taken to break the stalemate. But those factors do not permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment. That can have tragic consequences even more serious and lasting than a temporary dislocation of the nation's economy resulting from a strike of the miners.<sup>58</sup>

MR. JUSTICE FRANKFURTER, concurring in the judgment.

The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court.

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mines taken over by the United States. Had the defendants been tried under that statute, their punishment would have been limited thereby and in their trial they would have enjoyed all the constitutional safeguards of the Bill of Rights. Whatever constitutional safeguards are required in a summary contempt proceeding, whether it be for criminal punishment, or for the imposition of coercive sanction, we must be ever mindful of the danger of permitting punishment by contempt to be imposed for conduct which is identical with an offense defined and made punishable by statute. . . .

"The situation of grave emergency facing the country when the District Court acted called for the strongest measures—measures designed to produce quick and unqualified obedience of the court's order. If the \$10,000 fine on defendant Lewis and the \$3,500,000 fine on the defendant union be treated as coercive fines, they would not necessarily be excessive. For they would then be payable only if the defendants continued to disobey the court's order. Defendants could then avoid payment by purging themselves. . . .

"We should modify the District Court's decrees by making the entire amount of the fines payable conditionally. On December 7, 1946, Mr. Lewis directed the mine workers to return to work until midnight, March 31, 1947. But, so far as we are aware, the notice which purported to terminate the contract has not been withdrawn. Thus, there has been, at most, only a partial compliance with the temporary injunction.

"Hence our judgment should provide that the defendants pay their respective fines only in the event that full and unconditional obedience to the temporary injunction, including withdrawal of the notice which purported to terminate the contract, is not had on or before a day certain." *Id.* at 328-30, 334-35 (footnotes omitted).

58. *Id.* at 335-36.

Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. "Civilization involves subjection of force to reason, and the agency of this subjection is law." The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into the question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

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The Government here invoked the aid of a court of equity in circumstances which certainly were not covered by the [Norris-LaGuardia] Act with inescapable clarity. Colloquially speaking, the Government was "running" the mines. But it was "running" them not as an employer, in the sense that the owners of the coal mines were the employers of the men the day before the Government seized the mines. Nor yet was the relation between the Government and the men like the relation of the Government to the civil service employees in the Department of the Interior. It would be naive or wilful to assert that the scope of the Norris-LaGuardia Act in a situation like that presented by this bill raised a question so frivolous that any judge should have summarily thrown the Government out of court without day. Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of the court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

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In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an

essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.

It only remains to state the basis of my disagreement with the Court's views on the bearing of the Norris-LaGuardia Act . . . and the War Labor Disputes Act. . . .<sup>59</sup>

## II

### *The Problem of Nationality*

#### (i)

The problems presented by the legal framework in terms of which Western governments attempt to regulate the movement and privileges of noncitizens reflect the more general phenomenon of the breakdown of the legal and political conception of nationality.

In most areas in the West the social, economic, and political institutions collectively known as the feudal system resulted in considerable modifications of the Roman conception of nationality, which was based solely on descent. Because feudal institutions were primarily based on landowning, place of birth replaced parentage as the indicia in terms of which the rights of citizenship—full participation in the community—were measured. Because of the relative immobility of large segments of the population, such rules probably did not often result in undue hardship. But the conception of nationality that they reflected persisted long after the institutions giving rise to that conception had disappeared.

Thus, a child born of British parents outside Great Britain was not regarded as a British citizen until 1708.<sup>60</sup> Similarly, laws prohibiting the ownership of land by foreigners, the necessity of which is apparent in a feudal system, were not relaxed in Great Britain until 1844, when leases up to a term of 21 years were permitted to foreigners. In 1870 these prohibitions were eliminated altogether.

The shift produced by feudal institutions in conceptions of nationality substituted territorial for individual indicia. Paralleling this development was the stress on the community in contemporary political and social theory. Johannes Althusius lived in an era when feudal institutions were already largely being replaced by national monarchies. But the Germanic states in terms of which his theory was presented symbolized the last significant

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59. *Id.* at 307-10, 312 (footnote omitted).

60. An Act for Naturalizing Foreign Protestants, 7 Anne c. 5 §3 (1708). See also 4 Geo. 2, c. 21 §1 (1731). In 1807, §9 of the Code Napoleon allowed a child born in France of foreign parentage to claim French citizenship one year after attaining his majority. Section 10, which represented a codification of earlier law, extended French citizenship to children born of French parents outside the territorial limits of France.

strongholds of particularism in Europe, and Althusius' theories contain, in many ways, the most mature and comprehensive development of conceptions that underlay the institutions of the earlier period.<sup>61</sup>

The key concept in the political thought of Althusius is a biological one, that of symbiosis. Though usually regarded as a contract theorist, Althusius' conception of human communities is firmly grounded in sociological and biological fact. There is, therefore, a distinctly Aristotelian flavor to the sense in which Althusius defines communities as "natural" entities.

Equally important, however, is the nature of the particular groupings that provided the basis for Althusius' theory. The state was not, in the 16th century, man's "natural" community, and Althusius assigned only very limited political functions to this political entity. As in the feudal system, the "natural" communities were those social and economic groupings based either on possession of land or on the various guilds that organized commerce and the professions. In terms of Althusius' theory, many economic matters were even assigned to the family unit for disposition.

Given this stress upon "natural" communities, it seemed necessary to postulate, as Althusius did, that a state is established, not by contract among individuals, but rather by contracts among subordinate communities.<sup>62</sup> In part, of course, this postulate reflects the fact that institutions, in many cases even political institutions, continued to exist outside the state, and retained sufficient power to challenge the state for the loyalty of the individual. More precisely, such a postulate represents an accurate assessment of a system in which the privileges that an individual sought to acquire by belonging to a community were at the disposal of many institutions other than the state. In modern terms, the "rights" of citizenship were fragmented and could be obtained only by belonging to a varied number of groupings, rather than by loyalty solely to a single national state.

Althusius' state was "natural" not only in the biological sense but also in the sense of being sanctioned by natural law. Thus, although the theory is entirely coherent and internally consistent solely on the basis of the biological metaphor, Althusius introduces a reference to Scripture to further justify the validity of the contract creating the state.

The following two centuries saw the final destruction of the legal and biological pillars on which Althusius had erected the edifice of his theory. With the increasing centralization of political power characteristic of the maturing monarchical states, the expanded opportunities for mobility due to improved transportation and communication facilities, and the rapid development of a commercial and partially industrial rather than agricultural economy, the system of organically linked functionally unique communities, on which Althusius had based his state, grew increasingly divergent from the "natural" reality. Neither could the religious sanctions embodied in

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61. See generally C.J. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE* 62-74 (1957); C. J. FRIEDRICH, *POLITICA METHADICE DIGESTA OF JOHANNES ALTHUSIUS* (1932); O. VON GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800* (2 vol. 1934); J. PARRY, *THE POLITICAL SCIENCE OF JOHANNES ALTHUSIUS* (unpub. Ph.D. dissertation, Yale, 1953).

62. See O. VON GIERKE, *THE DEVELOPMENT OF POLITICAL THEORY* 39 (1939).

Althusius' use of natural law long withstand the corrosive influence of rationalistic systems of natural law such as that developed by Grotius.<sup>63</sup>

The results of these developments became apparent in the theories of the period preceding the French Revolution and in the course of events during the Revolution itself. During the 18th century, nationalism and cosmopolitanism often developed contemporaneously, absent the catalyst of practical political efforts. Herder, for example, who regarded language as the definitive characteristic of a national culture and whose works propounded the importance of the values of cultural nationalism, nevertheless strongly advocated the value of cultural diversity, believing that the claims of competing national cultures could somehow be synthesized into a worldwide harmony. Other important political theorists, though not advocating cosmopolitanism, also strikingly misgauged the political implications of nationalism. Thus Rousseau, in the *Social Contract*, while apparently advocating an extreme form of nationalism, was in fact describing a *polis* rather than a nation-state. As is made amply clear by the painstaking accumulation of geographical and demographic data in that work, the nationalism described therein was not applicable to a nation-state such as France.

During the later stages of the French Revolution, however, a strain of nationalism emerged from the earlier amalgam of political beliefs. Thus, while accepting Herder's identification of culture with language, many of the Jacobins advocated the use of compulsory French instruction as a method of eliminating local cultures regarded by them as subversive and erecting in their place a single and uniform national culture, rather than following the precepts of Herder and supporting the development of local cultures as a means towards the development of cultural diversity.<sup>64</sup>

Furthermore, in the political sphere the revolutionaries concentrated on the creation of a unitary administrative state by means reminiscent of the attempts of 18th century enlightened despots to rationalize their governmental machinery. The law on local government, for example, passed on December 22, 1789, substituted purely administrative subdivisions for the existing regional government organizations,<sup>65</sup> and thus went far towards completing the work begun by the monarchy, which the Revolution had supplanted, in destroying traditional local institutions and the loyalties that they evoked. Measures such as these formed the background against which Burke accused the revolutionaries of destroying a system of civil rights rooted in law and tradition in the name of a set of disembodied abstractions represented by the secularized versions of natural rights.

Whether a system of civil rights rooted in law and tradition had existed in France prior to the Revolution, Burke himself represented a political and cultural tradition significantly different from that which was developing on the

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63. See generally A. P. D'ENTREVES, *NATURAL LAW* (1951).

64. "[F]ederalism and superstition speak low-Breton; emigration and the hatred of the Republic speak German; the counterrevolution speaks Italian, and fanaticism speaks Basque. Let us break these weapons of shame and terror." Speech of Barere to the Convention on January 27, 1794, reprinted in *MONITEUR*, XVII 775 (1794).

65. For the text of this law, see DUVERGIER, *et al.*, I *COLLECTION COMPLETE DES LOIS, DECRETS, ORDONNANCES, REGLEMENTS, AVIS DU CONSEIL D'ETAT* 63 (1934).

Continent. The contrasts between the Revolutions of 1688 and 1789 are significant on many levels other than that represented by a history of changes in governmental forms. In terms of Burk's thought, the fact that the British political and social structures proved capable of accommodating change within a stable framework was what ultimately made it possible for him to contrast the concrete reality of civil rights with the abstract chimerae propounded by theorists who proclaimed the natural rights of man. Similarly, insofar as Burke himself was a natural law theorist, he could take such a position precisely because he lived in a society in which positive law in fact served to guarantee a certain measure of individual rights.

More specifically, the British conception of nationality was molded by a variety of factors, many of which were unique to the island kingdom. The English experience of merging with the political entities of Wales and Scotland necessarily introduced an element of elasticity into the conception of British citizenship. If these constituent parts of the United Kingdom were in some sense conquered provinces, they were, in another sense, also equals. The common citizenship of England and Scotland today symbolizes the extent to which nationality perforce had become accepted as a means of reconciling significant cultural and social diversity with political stability.

Equally important, the rapidly developing overseas empire created a situation in which significant numbers of British nationals spent considerable portions of their lives outside the national territorial boundaries. Finally, a commitment to free trade doctrines resulted in the deprecation, in a practical sense, of the importance to be attached to the reality of the cartographic lines representing national boundaries. As Schumpeter notes in his study, *Imperialism*, when faced with international markets, capitalism as an economic system expands to meet the demand of these markets. What confines capitalistic economies within national boundaries is politics, not economics.<sup>66</sup> During the 19th century, however, a significant portion of the world economy was regulated by the London financial markets, and British international politics was to a remarkable degree devoted to the task of buttressing the position of economic hegemony won by the stability of sterling. As a result of this effective collaboration, the interests of London bankers were truly international, and the exclusive elements in concepts of nationality were, at least as a matter of economic reality, to that extent weakened.<sup>67</sup>

Whether or not Britain's predominant economic position during the 19th century made the commitment to a free trade position inevitable, the political fact is that such a commitment existed. Fully developed free-trade doctrines encompassed, often in the form of unspoken assumptions, a commitment to free trade in persons as well as goods. To some extent, the acceptance of free trade doctrines undoubtedly helped to make possible the massive immigration movements of the 19th century.<sup>68</sup> At the same time, however, the swelling tide of emigrants failed to produce changes in the legal conceptions of British nationality. In spite of the number of persons leaving

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66. See J. A. SCHUMPETER, *IMPERIALISM AND SOCIAL CLASSES* 64-98 (1955).

67. See E. H. CARR, *NATIONALISM AND AFTER* 14-16 (1945).

68. See generally J. ISAAC, *ECONOMICS OF MIGRATION* 19-22 (1947).

European shores every year, no European state in the early 19th century made provision for changes of nationality on the part of its citizens.<sup>69</sup> And Great Britain recognized the ability of British subjects to change their nationality only in 1870.<sup>70</sup>

In part, the law of nationality failed to respond to the needs of the emigrants because of the conflicting pressures generated by the Britons who left their homeland not as emigrants but as civil servants. The necessity for preserving a sense of nationality among the colonies of Britons who lived abroad was reflected in legal doctrines that created a concept of British nationality, which, if tenuous, also greatly stressed elements of permanence. "Once an Englishman, always an Englishman" became a maxim that was embodied in the positive law of British nationality.<sup>71</sup> Thus, neither circumstances of birth, marriage, nor residence served to produce denaturalization. As might be expected, the result of the British position of nationality was the development of legal rules in the countries to which Britons emigrated, in terms of which changes of nationality were recognized as the result of circumstances that would not have produced such a change under British law.<sup>72</sup>

The eventual acceptance of the possibility of legal changes of nationality, furthermore, was the result, not of a more complete understanding and acceptance of free trade doctrines, but rather of the development — both in theory and practice — of a view of emigration as an antidote to overpopulation and unemployment. Britain's rapid industrialization early exposed her to the vicissitudes of recurrent depressions. The economic difficulties caused by the disbandment of the armed forces after the Napoleonic wars, the popularity of the wage-fund theory, in which only a fixed amount of money in the economy is available for wages, and the disillusionment within the working class as a result of the collapse of the early trade union movement led by Robert Owen, all helped to make of emigration an acceptable solution to economic ills. Eventually, even labor organizations developed an emigration fund for the use of members. And the increasing acceptance of emigration gradually brought with it recognition of the possibility of changes in nationality.

The lateness of national unification in German history might be thought to have contributed to the preservation of local loyalties, and thus to a more tenuous and possibly fragmented form of loyalty to the nation-state than that characteristic of older states. The conception of federalism had already become important in Germany before the unification as a result of the federal constitution proposed by the Frankfurt Assembly in 1848. What is striking about the

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69. Note, 16 COLUM. L. REV. 502 (1916).

70. Expatriation, 33 & 34 Vict. c. 14, §6 (1870).

71. In terms of the more technical legal definition of domicil, for example, British courts continue to hold that the domicil of origin revives whenever an individual leaves a domicil of choice. See, e.g., *Bell v. Kennedy* [1868] L.R. 1 Sc. & Div. App. 307. And it is still a good deal easier to lose a domicil of choice than a domicil of origin under British law. *Winans v. A-G* [1904] A.C. 287; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588.

72. For the best known example in United States jurisprudence, see *In re Estate of Jones*, 192 Iowa 78, 182 N.W. 227 (1921).

two leading German constitutional theorists of the generation following the Assembly is the extent of their debt to American thought. George Waitz proposed a theory based on divided sovereignty, drawn from the models that he found in the *Federalist* and the works of de Tocqueville. With the publication of a critical article in 1872, Max von Seydel, a Bavarian, led an ultimately successful attack on Waitz' theories. Drawing heavily on Calhoun, von Seydel insisted that the conception of divided sovereignty was logically indefensible.<sup>73</sup> Although von Seydel, like Calhoun, posited sovereignty, by definition indivisible, in the constituent states, it is obvious that his arguments can also be used to justify the possession of an exclusive sovereignty on the part of the central government. The latter course was the one that tended to dominate later German thought.

The emphasis on the national government in Germany following unification is due to a variety of factors. The overwhelming influence of Prussia tended to make any federal organization largely illusory. This was especially true in the period following the triumphant conclusion of the Franco-Prussian War when Prussian prestige was at its height in Germany as a result of the unification, and Bismarck had succeeded in humbling the Liberals in the Prussian parliament. In part, too, a theory based on divided sovereignty proved unacceptable in Germany because of the prevalence of monarchical institutions. Such a theory seems peculiarly difficult to reconcile with an institutional framework in which ultimate authority inheres in a single monarch rather than in the people. The importance of this institutional framework becomes apparent once it is recalled that in Germany, as opposed to France, nationalism was associated with monarchy rather than democracy, as a result of the events leading to the unification.<sup>74</sup>

Theories of sovereignty do not by themselves, however, lead to exclusive national loyalties. As in England, the economic element in Germany's development following the unification played a decisive role in molding conceptions of the nature of German nationality. Aided by the war indemnity of five billion French francs between 1871 and 1873, Germany's industrialization was both rapid and comprehensive. But the European and world markets in which her products attempted to compete had already been divided into national enclaves to an extent that had not been thought possible when Britain first underwent industrialization. As a result, in 1878 Bismarck disavowed the policy of free trade and introduced tariffs both to protect Prussian grain producers from cheap Russian, United States, and Canadian wheat and to benefit the expanding iron industries. Created by "blood and iron," the German Empire was maintained by the alliance of "iron and grain." Equally important, this state intervention in the national economy created a precedent employed by Bismarck in his attempt to meet the political threat posed by the rapidly increasing power of the Socialist organizations. The social security measures promulgated during the later years of Bismarck's tenure in office represented an attempt to "nationalize" the demands of workers. The state,

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73. See R. EMERSON, STATE AND SOVEREIGNTY IN MODERN GERMANY 92-100 (1928) (German theories of federalism).

74. See generally L. KRIEGER, THE GERMAN IDEA OF FREEDOM 1-80 (1957).

in short, by becoming responsive to the demands of groups that had recently become socially and politically aware, ended by formulating solutions to social problems in terms of a framework of national dimensions. By acting to satisfy some of the basic demands of the socialists, Bismarck may have intended only to neutralize a potential political threat, albeit a serious one; in so doing, however, he succeeded also in establishing a precedent for the channeling of social demands into the governmental machinery of the state. Insofar as the state was responsive to such demands, it was expanding its control over the economy of the nation; consequently, decisions by the government increasingly served to mold the community that it ruled. Any pattern that the state succeeded in imposing, however, was necessarily limited to the territory over which it exercised jurisdiction, and the recipients of state bounty, having wrested concessions from the state, had no desire to share the fruits of their labor more widely than was necessary. As the state became more powerful, therefore, it also tended to become increasingly exclusive, in the sense both of a lack of institutions that could compete with it for the loyalty of individuals and of an increasing reluctance to extend the benefits of state membership to persons who were not nationals.<sup>75</sup>

It is against this background that the relevance of Hegelian political theories to the development of conceptions of nationality must be assessed. Although Hegel's works were published even before the meeting of the Frankfurt Assembly and were written as much in terms of a Prussian as a German state, the conception of the state as a moral force that infuses the mechanistic workings of civil society with valuative elements appears meaningful primarily in terms of an already industrialized society. The contrast with Althusius is obvious, for the Hegelian state has a monopoly on moral worth. Man as a moral being is a member, not of an organically linked set of constituent communities, but of a single nation-state.<sup>76</sup> Lesser communities, which in terms of Althusius' theory formed the constituent elements of the state — indeed, created the state by means of a contract among themselves — are subsumed, in Hegelian terms, under the head of civil society, subject to the amoral workings of purely mechanistic and nonvaluative laws. This moral value inherent in nationality is, moreover, an exclusive one. Just as the economic order imposed by states on their constituent societies is necessarily limited by territorial jurisdiction, so the moral values posited in Hegel's philosophy are embodied by finite entities in constant competition with one another. The monopoly of moral worth by a single political entity in Hegel's system carried with it, in this way, the destruction of the earlier conception of citizenship as a synthesis of the values of membership in a series of diverse groupings.

The contrast presented above between the development of British and German conceptions of nationality is, of course, an oversimplified one. Not only did the traditions of the Frankfurt Assembly continue to develop in

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75. See generally E. CARR, NATIONALISM AND AFTER 22-24 (1945).

76. "Mind is actual only as that which it knows itself to be, and the state, as the mind of a nation, is both the law permeating all relationships within the state and also at the same time the manners and consciousness of its citizens." G. F. HEGEL, PHILOSOPHY OF RIGHT 178-79 (T.M. Knox transl. 1953). For a discussion of Hegel's theory of the state, see E. CASSIRER, THE MYTH OF THE STATE 263-76 (1961).

competition with Hegelian conceptions in Germany, but Hegelian theories also significantly influenced political thought in Great Britain. The theories propounded by T.H. Green and the influence of the works of Coleridge on the thought of John Stuart Mill provide examples of this development. Significantly, especially in the case of Green, Hegelian elements were adopted precisely because they provided a means for analyzing the moral responsibility that the state was felt to bear in connection with problems created by the continuing process of industrialization. The earlier British development, based on individualist theories such as that of Locke, which had provided the conceptual underpinnings for free trade agitation and the Manchester school of economic liberalism, was proving insufficient even in the United Kingdom. And since the problems presented by maturing industrial societies increasingly faced the governments of other western states as well, the Hegelian model may serve as a tool for analyzing the development of conceptions of nationality outside Germany.

As indicated above, Hegelian models serve as a means of analyzing not only a German conception of the meaning of nationality, but the impact that growing industrialization had generally on conceptions of nationality. The state, forced in response to such demands to intervene in national economies, to arbitrate between competing moral and economic claims, inevitably expanded the range of its sphere of operation by expropriating the power to regulate the workings of other institutions and groups in the society. It also claimed for its decisions a superior morality in order to justify the imposition of such decisions on other groups.

The process of expanding the claims of the sovereign nation was carried to its logical extreme in 20th century Germany. The centralizing tendencies evident even in the Weimar constitution may in part have been due to a continuing conception of authority as located above rather than within the social framework. Thus, under the Weimar constitution, the central government obtained rigorous control of financial matters. As contrasted with the provision in the United States Constitution making the consent of a state mandatory in any attempt to deprive it even of its equal vote in the Senate, the Weimar government could itself dissolve the constituent states and transform Germany into a unitary state by constitutional amendment.<sup>77</sup>

With the coming to power of the National Socialists, the concentration of functions in the central government was carried to completion. Since the Nazi Party existed outside the state, power, in a sense, cannot be said to have been centered in the state itself, but the total direction that the Nazi Party exercised over the activities of German citizens was made possible by the near-monopoly on power that had been enjoyed by the governmental machinery to which it succeeded. In implementing this policy, the Nazi government discontinued the separate police force and postal system that had been maintained by the state of Bavaria under preceding regimes, and in 1934 state citizenship was abolished as part of the attempt to create a truly unitary German state.

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77. See WEIMAR CONSTITUTION art. 76 (1919).

Similarly, the Nazi regime demanded exclusive loyalty from Germans living abroad, even if such individuals had adopted the citizenship of the state in which they were living, and refused completely to accommodate the demands of other governments to control, at least partially, the activities of those of their nationals who resided in Germany. Thus, the Nazi government insisted that Nazi law be applied to German activity wherever it occurred and simultaneously refused to apply anything other than Nazi law to disputes arising within German borders, regardless of the nationalities of the parties involved.<sup>78</sup> Such ultimate claims over national territory and nationals living abroad, if made by more than one government, are, of course, irreconcilable, except for the unlikely contingency of a complete identity among the various systems of national law. The relevance of the Nazi example, however, lies in the fact that what occurred was only the carrying to extremes of policies that were already being followed by the governments of most industrialized states.

## (ii)

Even governments whose claims on nationals living abroad are not couched in terms as extreme as those characteristic of Nazi ideology are being forced to recognize the contradictions inherent in the conceptions of nationality in terms of which economic and social policies are being formulated. As states increasingly seek to control the activities of individuals, national borders come to be regarded as tools that can be utilized to evade such governmental controls. Increasingly, for example, commercial enterprises utilize the device of foreign incorporation in order to evade the regulatory activities of the governments in whose territory business is conducted.<sup>79</sup> Given the increasingly interdependent nature of the world economy, no national scheme of economic regulation can succeed without a significant measure of control over activities occurring outside national boundaries;<sup>80</sup> but the achievement of such control is predicated on the willingness to compromise to some extent the exclusiveness of sovereign claims over these activities.

This fact had led, during the 19th century, to the movement in the field of conflict of laws directed toward the ideal of all courts applying the laws of places where the activities in dispute occurred, rather than the laws of

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78. See E. RABEL, II *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 560 (1947). For commentary on Italian fascist attitudes toward Italians living abroad, see Wignore, *Domicile, Double Allegiance, and World Citizenship*, 21 *ILL. L. REV.* 761, 761-63 (1927).

79. See generally A. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 146-47 (1943), and two articles by Timberg, *International Combines and National Sovereigns*, 95 *U. PENN. L. REV.* 575 (1947); *Corporate Fictions: Logical, Social and International Implications*, 46 *COLUM. L. REV.* 533, 571-80 (1946).

80. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 442-43 (2d Cir. 1945) (cartel agreement was not signed by Alcoa); *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947, 955 (D. Mass. 1950) (cartel agreement did not cover United States markets); *United States v. General Electric Co.*, 82 F. Supp. 753, 887 (D.N.J. 1949) (same); Comment, *The Diamond Cartel*, 56 *YALE L.J.* 1404 (1947) (successful avoidance of prosecution by remaining outside United States territorial limits).

the territories in which the courts themselves were located.<sup>81</sup> It had long been held, for example, that courts would refuse to apply the penal laws of another sovereign state.<sup>82</sup> But this doctrine was rapidly eroded on the basis of a distinction between penal and remedial legislation,<sup>83</sup> which was said to depend on whether the statute in question punished an offense against public justice or provided a remedy for injury to private interests.<sup>84</sup> The theory was that laws providing a remedy for injury to private interests did not involve any governmental interests of either the foreign state or the state in which the court was located, and could therefore be applied by all courts to any disputes involving such transactions without the necessity for choosing between the policies of two sovereign governments. Both British and United States courts, for example, held that a statute imposing liability for all corporate debts on corporate officers who signed falsified certificates was not penal for conflict-of-law purposes and could therefore be applied by the courts of other sovereign states.<sup>85</sup>

Such a distinction might have been meaningful in terms of the laissez-faire philosophy of an age that could still clearly distinguish a limited area of public activity from the private sector of the economy. But with the continued growth of an industrialized economy came an expansion of governmental interference in the economy, ranging from nationalization through regulatory legislation to unofficial approval of cartelization. Much recent economic legislation, as a result, is neither wholly public nor private. Such legislation represents a declaration of the public interest in private transactions;<sup>86</sup> thus, it seems difficult to apply foreign law in a dispute involving such a transaction on the theory that no governmental interests are involved. On the contrary, because totalitarian governments insisted that their laws should be applied in all cases coming before courts located in their territory, some commentators suggested, with particular reference to the United States, that nontotalitarian nations should also totally refuse to apply foreign laws in any disputes coming before their courts, even in cases where the disputes in question involve

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81. See generally Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Law*, 42 COLUM. L. REV. 189 (1942); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796-817 (1955). Professor Rheinstein stresses the political aspects of this development and, more particularly, the development of a conception of *jus gentium*—whose origin he traces to Rome—regarded as valid over the whole of Europe.

82. See, e.g., *Richardson v. New York Central R.R.*, 98 Mass. 85 (1867) (wrongful death statute). For recent examples, see *Government of India v. Taylor* [1955] 1 All E.R. 292 (H.L.) (refusal to enforce political or revenue laws of a Commonwealth nation); *Trinidad Shipping & Trading Co. v. G.R. Alston & Co.* [1920] A.C. 888 (P.C.) (United States law making payment of rebates illegal no defense in an action on a contract made in Britain by British subjects). See generally Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932).

83. See, e.g., *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

84. See *Huntington v. Attrill*, 146 U.S. 657, 673-74 (1892). The British courts take a similar position. See G.C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 131-32 (5th ed. 1957).

85. *Huntington v. Attrill*, 146 U.S. 657, 677 (1892); *Huntington v. Attrill*, [1893] A.C. 150 (P.C.).

86. See generally Katzenbach, *Conflicts On An Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087-93 (1956).

transactions having taken place in foreign states.<sup>87</sup> The theory underlying this position is that, since all laws are public in the sense of representing governmental policies, courts, whatever the nature of the transaction involved in the dispute before them, must prefer the policies of the government in whose territory they sit and therefore apply the government's laws.

Whatever the surface plausibility of such a doctrine, it is clear that the interdependent nature of national economies makes its application impracticable. So long as persons and goods are mobile across national boundaries, a flat refusal of courts to apply anything other than their own national law to disputes before them must end in a welter of conflicting judgments whenever those laws differ. Furthermore, a refusal to apply foreign laws may very well result in the foreign state's refusal to enforce within its territory any judgments other than those rendered by its own courts. But the possibility that national legislation may be violated by foreign corporations or by means of transactions centered in other nations necessitates reliance on the willingness of other states to enforce judgments based on such violations within their territories. Even in terms of the efficacy of national legislative programs, a refusal to apply foreign laws in national courts is ultimately self-defeating.

The need for such inter-jurisdictional comity was explicitly recognized in the case of *United States v. Imperial Chemical Industries*.<sup>88</sup> The decree in that case required ICI, a British corporation, to divest itself of certain patents that it had obtained from DuPont. ICI, however, together with another British firm, had already created a corporation known as British Nylon Spinners (BNS), to which it had granted an exclusive license under the patents in question. British Nylon Spinners thereupon applied to the British courts for an injunction restraining ICI from complying with the United States decree and ordering it to execute the license, and the decree was granted.<sup>89</sup>

These contradictory judgments have been explained as the result of different findings of fact,<sup>90</sup> the United States district court having found that BNS was created in an attempt to circumvent the proposed decree,<sup>91</sup> while the British court found that BNS was not a party to the conspiracy.<sup>92</sup> The British court did not rely on this finding of fact but based its decision on the grounds that BNS had not been before the United States court and that the territorial principal had been violated by the United States decree since the contract for the license was a British contract made in Britain between two British corporations.<sup>93</sup>

Despite its reliance on the territorial principle, the British Court of Appeal stressed its desire to maintain comity with the United States judicial

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87. See Kronstein, *Crisis of 'Conflict of Laws'*, 37 GEO. L.J. 483 (1949); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940).

88. 105 F. Supp. 215, 229-31 (S.D.N.Y. 1952) (decree).

89. *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd.*, [1953] 1 Ch. 19 (C.A.), made permanent, [1955] 1 Ch. 37 (1954).

90. See W.L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 91-92 (1958).

91. 105 F. Supp. at 230-31.

92. [1955] 1 Ch. at 47.

93. *Id.* at 51-52.

system.<sup>94</sup> Similarly, the district court indicated that its decision conformed with a British public policy condemning monopolies.<sup>95</sup> But this view overlooks significant differences between British and United States antitrust legislation,<sup>96</sup> and, more importantly, it fails to recognize that the policy of the British patent laws is to foster domestic production at the expense of imports<sup>97</sup> and would thus be opposed to any attempt to subject holders of British patents to foreign competition. In fact, this British patent policy had been proved in the United States court.<sup>98</sup>

Rather than embarking on a dubious attempt to find conformity between conflicting policies, the United States court might have been better advised to recognize explicitly the existence of conflicting policies, stress the possibilities for evasion that have threatened to render United States regulatory legislation ineffective in the absence of extraterritorial enforcement, and indicate the factors that led it to regard the United States interest as the more important in the particular transaction involved. Had this been done, the British court would have been faced with the choice between comity and territoriality, and might therefore have found it more difficult to persist in its refusal<sup>99</sup> to accept the district court's finding as to the attempted evasion of United States legislation. Had the United States court's finding of fact been accepted, the Court of Appeal's injunction against compliance with the United States decree could have been justified only on the basis that the British interest outweighed that of the United States in the particular case. Faced with the necessity of making such a determination, it is at least arguable that the Court of Appeal would have decided the case differently.

The difficulty with any such decision, however, would be the damage it would inevitably entail to the paramount need for certainty in the law. It is the need for certainty, clarity, and clear and definite standards, the search for "logic" in the law, that made so satisfying the formulation that courts in applying conflict of laws principles were attempting to apply the law that governed the dispute at issue rather than the law of the territory in which the court sat.<sup>100</sup>

Such a formula is effective precisely insofar as it gives the appearance of controlling the future, of defining the ways in which the law will be applied without resort to such concepts as "the length of the Chancellor's foot." It is equitable concepts like the latter that have historically been invoked<sup>101</sup> to justify applications of formulas incapable of satisfactory

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94. *Id.* at 53. The United States court also recognized the need for comity. 105 F. Supp. at 229.

95. 105 F. Supp. at 229.

96. See Comment, *The British Monopolies Act of 1948: A Contrast With American Policy and Practice*, 59 YALE L.J. 899 (1950).

97. See BOOKER, *THE PROBLEM OF BRITAIN'S OVERSEAS TRADE* 171 (1948); *Recent Cases*, 66 HARV. L. REV. 924, 926 (1953).

98. 105 F. Supp. at 229-30.

99. [1955] 1 Ch. at 53-54.

100. See text accompanying note 81 *supra*.

101. See note 27 *supra*.

rationalization.<sup>102</sup> The effectiveness of such justifications, however, is ultimately rooted in a shared sense of governing norms — the expression of the human need for “solidarity”<sup>103</sup> — that may not be capable of being brought to bear on disputes concerning transactions that involve significantly disparate national communities.

### III

#### *Law, Capitalism, and the Future*

##### (i)

#### *United States v. Bass*<sup>104</sup>

.....  
 The prisoner was indicted under the eighth section of the act of congress, passed in 1790 (1 Gord. Dig. p. 62 [1 Stat. 113]), for that he, being a citizen of the United States, to wit, of Richmond, in the state of Virginia, on the 15th day of June, 1818, with force and arms, upon the high seas, to wit, off the Peak of Pico, out of the jurisdiction of any particular state, then being on board a certain schooner or vessel then belonging and appertaining to a certain citizen or citizens of the United States to the jurors unknown, did piratically and feloniously set upon, attack, board, break, and enter a certain merchant ship or vessel called the San Joao Baptista, a ship of certain persons to the jurors unknown, and did assault certain mariners, whose names are to the jurors unknown, and did put them in corporal fear and danger of their lives, and the said vessel, her tackle, apparel, and furniture, of the value of twenty thousand dollars, a quantity of sugar in boxes, of the value of twenty thousand dollars, and a quantity of coffee in bags, of the value of one thousand dollars, being on board said vessel, the goods and chattels of persons unknown, in the care and possession of said mariners, did piratically and feloniously steal, take, and carry away, against the peace, etc., and contrary to the form of the statute.

.....  
 LIVINGSTON, Circuit Justice, in the decision of the court, said, that he was aware that many abuses have existed and still do exist in relation to captures made of Spanish and Portuguese vessels, by color of authority emanating from the governments of the independent provinces in South America. With regard to the question whether an American citizen could enter into foreign service, and make captures of vessels belonging to a power at amity with the United States, it was sufficient to say that this has not been prohibited by any act of congress. And with regard to the question relative to the sufficiency of blank commissions, it was well known that Mr. Genet, while minister from the French republic to the government of the United States, pursued the same practice, to a considerable extent. Here the principal question is, whether this commission, so put on board this vessel by an agent of the Artegas government, is to be considered a nullity. In the opinion of the court, in a case of life or death, this commission is

102. See text accompanying note 4 *supra*.

103. See text accompanying notes 6, 51-52 *supra*.

104. 24 F. Cas. 1028 (No. 14,537 (C.C.D.N.Y. 1819)).

sufficient to exculpate the prisoner from the charge laid in the indictment.

The jury immediately acquitted the prisoner.<sup>105</sup>

(ii)

The danger represented by the increasing internationalization of capitalism can be expressed in terms of *United States v. Bass*, as the danger of a law so singularly logical and rational, so much a Weberian ideal type, that it can be applied by a judge without a jury. Whether such a law will be obeyed and will function as a successful control device is a question that can, perhaps, best be illustrated by a case decided by the Supreme Court of the United States concerning the application of the contempt power to the leader of a smaller territorial unit of government than that represented by the court rendering the decision.

*United States v. Barnett*<sup>106</sup>

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding in criminal contempt was commenced by the United States upon the specific order, sua sponte, of the Court of Appeals for the Fifth Circuit. Ross R. Barnett, Governor of the State of Mississippi at the time this action arose, and Paul B. Johnson, Jr., Lieutenant Governor, stand charged with willfully disobeying certain restraining orders issued, or directed to be entered, by that court. Governor Barnett and Lieutenant Governor Johnson moved to dismiss, demanded a trial by jury and filed motions to sever and to strike various charges. The Court of Appeals, being evenly divided on the question of right to jury trial, has certified the question to this Court under the authority of 28 U.S.C. §1254(3). 330 F.2d 369. We pass only on the jury issue and decide that the alleged contemners are not entitled to a jury as a matter of right.

The proceeding is the aftermath of the efforts of James Meredith, a Negro, to attend the University of Mississippi. Meredith sought admission in 1961 and, upon refusal, filed suit in the United States District Court for the Southern District of Mississippi. That court denied relief, but the Court of Appeals reversed and directed the District Court to grant the relief prayed for. *Meredith v. Fair*, 305 F.2d 343. The mandate was stayed by direction of a single judge of the Court of Appeals, whereupon, on July 27, the Court of Appeals set aside the stay, recalled the mandate, amended and reissued it, including its own injunctive order "enjoining and compelling" the Board of Trustees, officials of the University and all persons having knowledge of the decree to admit Meredith to the school. On the following day the Court of Appeals entered a separate and supplemental "injunctive order" directing the same parties to admit Meredith and to refrain from any act of discrimination relating to his admission or continued attendance. By its terms, this order was to remain in effect "until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of [Meredith]. . . ."

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105. *Id.* at 1028-29.

106. 376 U.S. 681 (1964).

After a series of further delays, the District Court entered its injunction on September 13, 1962, directing the members of the Board of Trustees and the officials of the University to register Meredith.

When it became apparent that the decrees might not be honored, the United States applied to the Court of Appeals on September 18 for permission to appear in the Court of Appeals in the case. This application was granted in the following terms: "IT IS ORDERED that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of Mississippi to accord each court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States." Meanwhile, the Mississippi Legislature had adopted an emergency measure in an attempt to prevent Meredith from attending the University, but on September 20, upon the Government's application, the enforcement of this Act was enjoined, along with two state court decrees barring Meredith's registration. On the same day Meredith was rebuffed in his efforts to gain admission. Both he and the United States filed motions in contempt in the District Court citing the Chancellor, the Registrar and the Dean of the College of Liberal Arts. After a hearing they were acquitted on the ground that the Board of Trustees had stripped them of all powers to act on Meredith's application and that such powers were in Governor Barnett, as agent of the Board.

The United States then moved in the Court of Appeals for a show-cause order in contempt against the Board of Trustees, based on the order of that court dated July 28. An en banc hearing was held at which the Board indicated that it was ready to admit Meredith, and on September 24 the court entered an order requiring the Board to revoke its action appointing Governor Barnett to act as its agent. The Order also required the Registrar, Robert B. Ellis, to be available on September 25 to admit Meredith.

On the evening of September 24, the United States filed an ancillary action to the *Meredith v. Fair* litigation seeking a temporary restraining order against the State of Mississippi, Governor Barnett, the Attorney General of Mississippi, the Commissioner of Public Safety and various lesser officials. This application specifically alleged that the Governor had implemented the State's policy of massive resistance to the court's orders, by personal action, as well as by use of the State's various agencies, to frustrate and destroy the same; that the Governor's action would result in immediate and irreparable injury to the United States, consisting of impairment of the integrity of its judicial processes, obstruction of the administration of justice and deprivation of Meredith's declared rights under the Constitution and laws of the United States. On the basis of such allegations and at the specific instance of the United States as the sole moving party and on its own behalf, the Court of Appeals issued a temporary restraining order at 8:30 a.m. on the 25th against each of these parties restraining them from performing specific acts set out therein and from interfering with or obstructing by any means its order of July 28 and that of the District Court of September 13. Thereafter the United States filed a verified application showing that on the afternoon of the 25th Governor Barnett, "having

actual knowledge of . . . [the temporary restraining order], deliberately prevented James H. Meredith from entering the office of the Board of Trustees . . . at a time when James H. Meredith was seeking to appear before Robert B. Ellis in order to register . . . and that by such conduct Ross R. Barnett did wilfully interfere with and obstruct James H. Meredith in the enjoyment of his rights under this Court's order of July 28, 1962 . . . all in violation of the terms of the temporary restraining order entered by the Court this day." The court then entered a show-cause order in contempt against Governor Barnett requiring him to appear on September 28. On September 26, a similar order was issued against Lieutenant Governor Johnson requiring him to appear on September 29. On September 28, the Court of Appeals, en banc and after a hearing, found the Governor in civil contempt and directed that he be placed in the custody of the Attorney General and pay a fine of \$10,000 for each day of his recalcitrance, unless he purged himself by October 2. On the next day Lieutenant Governor Johnson was found in contempt by a panel of the court and a similar order was entered with a fine of \$5,000 a day.

On September 30, President Kennedy issued a proclamation commanding all persons engaged in the obstruction of the laws and the orders of the courts to "cease and desist therefrom and to disperse and retire peaceably forthwith." 76 Stat. 1506. The President also issued an Executive Order dispatching a force of United States Marshals and a detachment of the armed forces to enforce the court's orders. On September 30, Meredith, accompanied by the Marshals, was moved into a dormitory on the University campus and was registered the next day. Although rioting broke out, order was soon restored, with some casualties, and Meredith carried on his studies under continuous guard until his graduation.

On November 15, 1962, the Court of Appeals, sua sponte, appointed the Attorney General or his designated assistants to prosecute this criminal contempt proceeding against the Governor and Lieutenant Governor pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. On application of the Attorney General, the Court of Appeals issued a show-cause order in criminal contempt based on the Court of Appeals' temporary restraining order of September 25, its injunctive order of July 28, and the District Court's order of September 13. It is out of this proceeding that the certified question arises.

As we have said, the sole issue before us is whether the alleged contemners are entitled as a matter of right to a jury trial on the charges.

. . . .

Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial. This claim has been made and rejected here again and again. Only six years ago we held a full review of the issue in *Green v. United States*, 356 U.S. 165 (1958). We held there that "[t]he statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." At 183.<sup>107</sup>

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

. . . .

In *Green* the Court affirmed a three-year sentence imposed for

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107. *Id.* at 692.

criminal contempt. But now in note 12 of its opinion in the present case the Court has inserted an ambiguous statement which intimates that if a sentence of sufficient "severity" had already been imposed on these defendants, a majority of the Court would now overrule *Green* in part, by holding that if a criminal contempt charge is tried without allowing the defendant a jury trial, punishment is constitutionally limited to that customarily meted out for "petty offenses." ["Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses. . . ."]<sup>108</sup> I welcome this as a halting but hopeful step in the direction of ultimate judicial obedience to the doubly proclaimed constitutional command that all people charged with a crime, including those charged with criminal contempt, must be given a trial with all the safeguards of the Bill of Rights, including indictment by grand jury and trial by jury.<sup>109</sup>

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

In response to the certified question, I would answer that defendants have both a statutory and a constitutional right to have their case tried by a jury.<sup>110</sup>

#### IV

#### *The Length of the Chancellor's Foot*

We know him (God) to be a living being with every essential property and attribute of personality — that he thinks, wills, feels, that he is a moral being who demands righteousness and justice — but that in his love he is compassionate, merciful, and longsuffering. For us God is not an abstraction, he is not just an idea, a metaphysical principle, an impersonal force or power. He is not identical with the totality of the world, with the sum of all reality. He is not an "absolute" that in some way embraces the whole of reality in his being. Like us, he exists in a world of space and time. Like us, he has ends to be achieved, and he fashions a cosmic plan for realizing them. He is a concrete, living person, and though in our finite state we cannot fully comprehend him, we know that we are akin to him, for he is revealed to us in the divine personality of his Son Jesus Christ.<sup>111</sup>

The theological criticism most generally directed at Mormonism is that of anthropomorphism, the confusion of the human and the Divine. This criticism is based on a definition of God essential to Protestantism: it incorporates the distinction between the "spirits" of Catholicism<sup>112</sup> and Protestantism,<sup>113</sup> and it involves the fundamental nature of the distinction between the human and the Divine that was perhaps most clearly articulated for the lay audience by Paul Tillich.<sup>114</sup>

108. *Id.* at 695.

109. *Id.* at 724, 726-27.

110. *Id.* at 728.

111. H.B. BROWN, *IMPROVEMENT ERA* 458 (1967).

112. See text accompanying note 4 *supra*.

113. See text accompanying note 5 *supra*.

114. P. TILlich, *BIBLICAL RELIGION AND THE SEARCH FOR ULTIMATE REALITY* (1955).

The extent to which Protestantism was incapable of developing human institutions that were consonant with the divergence between the Catholic and Protestant perceptions of the Divine<sup>115</sup> is perhaps best symbolized by the formula for ending warfare between German Protestants and Catholics embodied in the Religious Peace of Augsburg of 1555, which provided that the individual's choice of religion was a matter to be determined by the religion professed by the monarch in whose territory one resided. What is politically important about this theological criticism of anthropomorphism is that it is rooted in the Mormon refusal to accept the fundamental significance of original sin,<sup>116</sup> a refusal to acknowledge the legitimacy of authority that is manifested in United States political ideology by a stress on individualism whose development was unencumbered by the need to reject the historical legacy of feudalism.<sup>117</sup>

The political form of this theological criticism is that, despite the Mormon stress on the social community as the area within which aspirations to divine perfection are realized,<sup>118</sup> the Mormon people have not in fact realized the ideal of a truly communitarian state or, in strictly Mormon terms, that the ideals of the United Order of Enoch have not in fact been realized. It is this form of the criticism that is met by "[t]he cornerstone of [Smith's] metaphysics, [the] concept which pervaded the whole American spirit . . . that man is capable of eternal progress toward perfection."<sup>119</sup> It is precisely the rejection

115. See note 7 *supra*.

116. "'Mormonism' claims an actual and literal relationship of parent and child between the Creator and man—not in the figurative sense in which the engine may be called the child of its builder; not the relationship of a thing mechanically made to the maker thereof; but the connection between father and offspring. In short it is bold enough to declare that man's spirit being the offspring of Deity, and man's body though of earthly components yet being in the very image and likeness of God, man even in his present degraded—aye, fallen condition—still possesses, if only in a latent state, inherited traits, tendencies and powers that tell of his more than royal descent; and that these may be developed so as to make him, even while mortal, in a measure Godlike." J.E. TALMAGE, ARTICLES OF FAITH 528 (4th ed. 1971). See also B. YOUNG, 3 JOURNAL OF DISCOURSES 93 (1856): "The Lord created you and me for the purpose of becoming Gods like Himself; when we have been proved in our present capacity and have been faithful with all things He puts into our possession. We are created, we are born for the express purpose of growing up from the low estate of manhood, to become Gods like unto our Father in heaven. That is the truth about it, just as it is. The Lord has organized mankind for the express purpose of increasing in that intelligence and truth, which is with God, until he is capable of creating worlds on worlds, and becoming Gods, even the sons of God."

117. See generally L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

118. "Religion has too often spent a large proportion of its effort on doings apart from the real business of life. One of man's problems is to establish a deep understanding of man's relationship to his fellow men. When that relationship is faulty, men are not living in the just, helpful, and cooperative fellowship which the Savior enjoined. On every hand we see an appalling human need awaiting the harness of religions power and zeal. One of mankind's most insistent needs is the interpretation of religion in terms of service. . . . Man's curious ability to keep divine relationships in one compartment of life and human relationships in another is wrong. They belong together. . . . Religious life should inspire practical goodness and daily usefulness. God dwells in the hearts of the human family as well as in temples." H.B. BROWN, VISION AND VALOR 48-50.

119. See text accompanying note 47 *supra*. See also J.E. TALMADGE, ARTICLES OF FAITH 529 (4th ed. 1971): "'Mormonism' claims that all nature, both on earth and in heaven,

of this concept of human perfectibility that, in theological terms, permits the charge of anthropomorphism to be lodged at the Mormon refusal to define the Divine as that which is not human, just as, in political terms, it is the acceptance of this concept that accounts for the Mormon refusal to define as truly communitarian only that which is lacking in existing United States society.

Insofar as both the theological and political non-Mormon visions of man's destination are thus defined in terms of what human society is not, it seems clear that, in a literary sense, insofar as human life is tragic or, in a philosophical sense, to the extent that human life is existential, the objections to Mormon theology are in fact objections to reality. More particularly in terms of the definition of the entrepreneur with which we have been concerned,<sup>120</sup> what seems crucial is that *Reynolds v. United States*<sup>121</sup> constituted Mormon society a self-conscious minority<sup>122</sup> in a "Christian"<sup>123</sup> nation and that what that minority teaches is that perfection, whether human<sup>124</sup> or

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operates on a plan of advancement; that the very Eternal Father is a progressive Being; that his perfection while so complete as to be incomprehensible by man, possesses this essential quality of true perfection—the capacity of eternal increase. That therefore, in the far future, beyond the horizon of eternities perchance, man may attain the status of a God. Yet this does not mean that he shall be then the equal to the Deity we worship, nor that he shall ever overtake those intelligences that are already beyond him in advancement; for to assert such would be to argue that there is no progression beyond a certain state of attainment, and that advancement is a characteristic of low organization and inferior purpose alone." See BRIGHAM YOUNG, I JOURNAL OF DISCOURSES 349 (1856): "All organized existence is in progress to an endless advancement in eternal perfections, or back to dissolution. . . . All things that have come within the bounds of man's knowledge—the things he naturally understands—teach him that there is no period, in all the eternities, where organized existence will become stationary, that it cannot advance in knowledge, wisdom, power and glory."

120. See text accompanying notes 10-11, 53-54 *supra*.

121. 98 U.S. 145 (1878) (Constitutional "free exercise of religion" clause not accepted as defense to a polygamy prosecution).

122. See note 120 *supra*.

123. "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

124. "We admit that God is the great source and fountain from whence proceeds all good; that He is perfect intelligence, and that His wisdom is alone sufficient to govern and regulate the mighty creations and worlds which shine and blaze with such magnificence and splendor over our heads, as though touched with His finger and moved by His Almighty word. And if so, it is done and regulated by law; for without law all must certainly fall into chaos. If, then, we admit that God is the source of all wisdom and understanding, we must admit that by His direct inspiration He has taught man that law is necessary in order to govern and regulate His own immediate interest and welfare: for this reason, that law is beneficial to promote peace and happiness among men. And as before remarked, God is the source from whence proceeds all good; and if man is benefitted by law, then certainly law is good; and if law is good, then law, or the

Divine,<sup>125</sup> is itself a function of law.

#### CONCLUSION

This article has not argued that Mormonism is the only possible religion, but that it embodies most precisely among Protestant beliefs the ideology Weber designated as the Protestant Ethic. Within United States society in general, the author has asserted that the social function necessitated by that belief is performed by the law. Whether the law can continue effectively to perform that function in a global as opposed to a national economy is the question left to the future.

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principle of it emanated from God; for God is the source of all good; consequently, then, he was the first Author of law, or the principle of it, to mankind." J. SMITH, 2 DOCUMENTARY HISTORY OF THE CHURCH 12-13 (2d ed. 1960).

125. "'Mormonism' has taught me that God holds Himself accountable to law even as He expects us to do. He has set us the example in obedience to law. . . ." J.E. TALMADGE, CONF. REPORT 96 (April 1930).