Legalism

Law, Morals, and Political Trials

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INTRODUCTION

Law and Ideology

What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules. Like all moral attitudes that are both strongly felt and widely shared it expresses itself not only in personal behavior but also in philosophical thought, in political ideologies, and in social institutions. As an historical phenomenon, it is, moreover, not something that can be understood simply by defining it. Such a morality must be seen in its various concrete manifestations, in its diverse applications, and in the many degrees of intensity with which men in different places and conditions have abided by it. It is, in short, a complex of human qualities, not a quantity to be measured and labeled.

Legalism, so understood, is thus often an inarticulate, but nonetheless consistently followed, individual code of conduct. It is also a very common social ethos, though by no means the only one, in Western countries. To a great extent it has provided the standards of organization and the operative ideals for a vast number of social groups, from governmental institutions to private clubs. Its most nearly complete expression is in the great legal systems of the European world. Lastly, it has also served as the political ideology of those who cherish

these systems of law and, above all, those who are directly involved in their maintenance—the legal profession, both bench and bar. The court of law and the trial according to law are the social paradigms, the perfection, the very epitome, of legalistic morality. They are, however, far from being its only expressions. Indeed, they are inconceivable without the convictions, mores, and ideologies that must permeate any society which wishes to maintain them. Yet the spirit of legalism is not now, and never has been, the only morality among men even in generally legalistic societies. The full implications of this moral and political diversity, though its existence is commonly acknowledged and often regretted, has rarely been thoroughly investigated. This is by no means surprising, since almost all those who have devoted themselves to the study of legalistic morality and institutions have been their zealous partisans and promoters, anxious to secure their moral empire.

Even though it is no sign of disaffection for legalism to treat it as but one morality among others, such a view has not been congenial to any of the traditional theories of law. These have been devised almost exclusively by lawyers and philosophers who agree in nothing but in taking the prevalence of legalism and of law for granted, as something to be simply defined and analyzed. The consequences for legal theory have not been altogether fortunate. The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law completely from the social context within which it exists. Law is endowed with its own discrete, integral history, its own "science," and its own values, which are all treated as a single "block" sealed off from general social history, from general social theory, from politics, and from morality. The habits of mind appropriate, within narrow limits, to the procedures of law courts in the most stable legal systems have been expanded to provide legal theory and

ideology with an entire system of thought and values. This procedure has served its own ends very well: it aims at preserving law from irrelevant considerations, but it has ended by fencing legal thinking off from all contact with the rest of historical thought and experience.

As an alternative to this unsatisfactory situation, it is suggested here that one ought not to think of law as a discrete entity that is "there," but rather to regard it as part of a social continuum. At one end of the scale of legalistic values and institutions stand its most highly articulate and refined expressions, the courts of law and the rules they follow; at the other end is the personal morality of all those men and women who think of goodness as obedience to the rules that properly define their duties and rights. Within this scale there is a vast area of social beliefs and institutions, both more and less rigid and explicit, which in varying degrees depend upon the legalistic ethos. This would provide an approach suitable to law as an historical phenomenon, and would replace the sterile game of defining law, morals, and politics in order to separate them as concepts both "pure" and empty, divorced from each other and from their common historical past and contemporary setting.

The object here, then, is not only to understand legalism, but also to suggest other ways of thinking about law. Accordingly the first part of this book is devoted to an argument with both analytical positivism and natural law theory and, especially, their respective ways of distinguishing law from morality. The second part, equally critical in tone, deals with legalism as a political ideology which comes into conflict with other policies, particularly in the course of political trials, both international and domestic. Throughout there is an effort to explain and judge legalism as an ideological manifestation. Now the very word "ideology" is apt to create misunderstandings as soon as it is uttered. Unhappily there is no nice, safe

substitute available. Since nothing is to be gained, moreover, by arguments about the real meaning of this unfortunate word, one can do no more than offer a simple statement about its significance in various contexts. Thus it is important to explain, firstly, the meaning of the term "ideology" as it is used here; secondly, the author's own ideological commitments; and lastly, the purposes that this critical analysis of the ideological preferences of others is meant to serve.

The term "ideology" is not intended tó mean anything very complicated. It refers simply to political preferences, some very simple and direct, others more comprehensive. There have, of course, been ideologies that have claimed to be far more, to provide an explanation of the entire past, a program for the present, and a blueprint for the future. These might well be called grand or total ideologies in contrast to the more modest formulas that are the subject of this book. In no case is there any effort to use the word "ideology" as one of simple opprobrium. On the contrary, it may well be doubted whether political theory, of which legal theory is a part, can be written without some sort of ideological impetus. Nor is there any reason to feel that the expression of personal preferences is an undesirable flaw. It must seem so only to those who equate objectivity with remoteness from their own experiences and especially from those they share with their contemporaries. However, if one thinks of ideology as merely a matter of emotional reactions, both negative and positive, to direct social experiences and to the views of others, it is clear that ideology is as inevitable as it is necessary in giving any thinking person a sense of direction. To be sure, ideological responses are often difficult to recognize in oneself, as they insensibly come to condition one's interests, one's methods of study, one's conceptual devices, and even one's vocabulary. However, if we did not think of ideology as a gross form of irrationality, we would be less anxious to repress it and our self-awareness would be

correspondingly greater. Political theory might well benefit from it, for one of its tasks is to articulate and examine the half-expressed political views that the various groups in any given society at any time come to hold. Ideology, thus conceived, is eminently a matter of attitudes common to groups of people. It is the sort of preference that arises in the course of common social experiences. In the present case, legalism as a political ideology finds its strongest adherents in a professional group, the lawyers. It is also probable that the notion of objectivity as, above all, a matter of de-ideologizing social theory is an ideological reaction among academic intellectuals, appalled by the fanaticism engendered by the grand ideologies. One can hardly blame them. For an historian it is enough to observe that such political preferences are held by a number of people, with some degree of consistency and continuity, to know that ideology is prevalent. No more is needed.

By now it must be fairly evident that this book is not to be a contribution to the literature of de-ideologizing. It is not an exercise in the art of impersonally recording the views of other writers. It is therefore necessary to state the ideological contribution that the author is about to make to the debate. It is, at its simplest, a defense of social diversity, inspired by that barebones liberalism which, having abandoned the theory of progress and every specific scheme of economics, is committed only to the belief that tolerance is a primary virtue and that a diversity of opinions and habits is not only to be endured but to be cherished and encouraged. The assumption throughout is that social diversity *is* the prevailing condition of modern nation-states and that it *ought* to be promoted. Pluralism is thus treated as a social actuality that no contemporary political theory can ignore without losing its relevance, and also as something that any liberal should rejoice in and seek to promote, because it is in diversity alone that freedom can be realized. A free society is not one in which people are merely

allowed to make effective social choices among a variety of alternatives, but one in which they are encouraged to do so. The range and the number of choices available and the mutual tolerance among those who choose conflicting paths are what determine the degree of freedom that the members of any modern society can be said to enjoy. If one must be a hero, a saint, or at least enormously courageous and self-confident in order to pursue a manner of life or to express views other than those agreeable to the powers that be, both governmental and social, one cannot be said to live in a free society. These views are at least as old as John Stuart Mill, and hardly novel. No one today can claim, nor did Mill assume a hundred years ago, that everyone frantically yearns for personal liberty or regards tolerance as a virtue or finds the self-control it demands easy. It cannot even be said, as he did, that freedom is needed for "progress." What is evident, however, is that diversity and the burdens of freedom must be endured and encouraged to avoid the kinds of misery that organized repression now brings. This is a type of liberalism quite common among members of permanent social minority groups, and it surely reflects both the apprehensions and the positive experiences which their situation creates.

Obviously no one who writes in defense of an ideology is in any position to complain about others who do the same thing. That is certainly not the aim here. Not the mere presence of ideology but the reasons for and consequences of pretended immunity to ideology will be considered at length and, perhaps, with an undue lack of charity. There are three quite distinct ideological aspects of contemporary legal thinking to be taken into account. First of all, there is the manner in which ideology has conditioned the entire structure of thought among Austin's heirs, the analytical positivists. Secondly, there is a critical evaluation of the ideology implicitly and explicitly attached to theories of natural law. Lastly,

legalism in general, especially in its pervasive influence upon all legal thinking, must be established in its place as one ideology competing with other political preferences.

In the case of analytical positivism it undeniably is a criticism to show that political preferences have contrived to inspire and condition its whole development and inner character, often with unfortunate results—because this theory regards its ideological neutrality as the very core of its position. Imperviousness to ideology is regarded as the foremost condition of legal "science"; indeed, the latter is defined by its immunity to ideological contamination. Moreover, the image of law that analytical positivism has devised consists of sets of rules carefully divorced from ideology. Its whole theory of the separation of law from morals is designed to achieve this end. This is also what leads it to an excessive formalism. For only thus can the neutrality of law as a concept and of legal science as an intellectual discipline be maintained. However, it will be shown that these efforts are themselves conditioned by ideology and that the failure to recognize this has made analytical positivism a far less persuasive theory than it might otherwise have been. This is not meant to be one of those jobs of debunking that try to expose the "real," and presumably unworthy, hidden tendencies of ideas with which one disagrees. Since the ideological inspiration of analytical positivism is liberalism and a skeptical view of ethics, it is obviously quite congenial to its present unmasker. It is not the aims of ideology, but the results of treating political preferences as the logical necessities of any valid theory of law, that are highly questionable.

To charge natural law with being an ideology would, on the other hand, be ridiculous. Natural law theorists not only recognize that they are presenting a set of moral preferences, however flexible, but insist that this must be part of any legal theory. Here it is not the presence but the specific content and

character of ideology which, from a liberal point of view, is disheartening. The argument to be developed is that natural law theories set a premium on moral agreement and social cohesion and that these ends are not compatible in practice with freedom in a diversified society nor agreeable ideologically to those who wish to promote diversity and tolerance.

Lastly, there is legalism itself. To say that it is an ideology is to criticize only those of its traditional adherents who, in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values. In itself this would hardly be a new accusation, nor a very important one. What does matter is again the intellectual consequences of this denial, and the attendant belief that law is not only separate from political life but that it is a mode of social action superior to mere politics. This is what will later be discussed as "the policy of justice," for legalism as an ideology does express itself in policies, in institutional structures, and in intellectual attitudes. As a social ethos which gives rise to the political climate in which judicial and other legal institutions flourish, legalism is beyond reproach. It is the rigidity of legalistic categories of thought, especially in appraising the relationships of law to the political environment within which it functions, that is so deleterious. This is the source of the artificiality of almost all legal theories and is what prevents its exponents from recognizing both the strengths and weaknesses of law and legal procedures in a complex social world.

Legalism as an ideology is the common element in all the various and conflicting modes of legal thinking that are to be discussed here. It is what gives legal thinking its distinctive flavor on a vast variety of social occasions, in all kinds of discourse, and among men who may differ in every other ideological respect. Legalism is, above all, the operative outlook of the legal profession, both bench and bar. Moreover,

most legal theory, whether it be analytical positivism or natural law thinking, depends on categories of thought derived from this shared professional outlook. The tendency to think of law as "there" as a discrete entity, discernibly different from morals and politics, has its deepest roots in the legal profession's views of its own functions, and forms the very basis of most of our judicial institutions and procedures. That lawyers have particularly pronounced intellectual habits peculiar to them has often been noticed, especially by historians and other students of society whose views differ sharply from those of the legal profession. As one English lawyer has put it, "A lawyer is *bound* by certain habits of belief . . . by which lawyers, however dissimilar otherwise, are more closely linked than they are separated. . . A man who has had legal training is never quite the same again . . . is never able to look at institutions or administrative practices or even social or political policies, free from his legal habits or beliefs. It is not easy for a lawyer to become a political scientist. It is very difficult for him to become a sociologist or a historian. . . He is interested in relationships, in rights in something and against somebody, in relation to others. . . This is what is meant by the legalistic approach. . . [A lawyer] will fight to the death to defend legal rights against persuasive arguments based on expediency or the public interest or the social good. . . He distrusts them. . . He believes, as part of his mental habits, that they are dangerous and too easily used as cloaks for arbitrary action." [1]

These remarkable observations come from an academic lawyer, forced perhaps by the demands of scholarly objectivity and daily contacts with non-lawyerly teachers to look at his profession from the outside. Another academic lawyer has noted in a similar vein that "it is possible for the commercial lawyer and the economist, for the family lawyer and the sociologist to regard one area of social activity from standpoints so far apart that contact becomes infrequent and indeed

almost fortuitous."[2] A practicing lawyer might not rest with noting the difference between himself and others; he would insist that his was simply the right and true view. That is the meaning of legalism as an ideology.

The dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counter-claims under established rules, and the belief that the rules are "there"—these combine to make up legalism as a social outlook. When it becomes self-conscious, when it challenges other views, it is a full-blown ideology. Since lawyers are engaged in their daily lives with political or social conflicts of some kind, they are bound to run up against perspectives radically different from their own. As law serves ideally to promote the security of established expectations, so legalism with its concentration on specific cases and rules is, essentially, conservative. It is not, however, a matter of "masking" a specific class and economic interest. Not only do lawyerly interests often differ from those of other conservative social groups, businessmen's, for example, but legalism is no mask for anything. It is an openly, intrinsically, and quite specifically conservative view, because law is itself a conservatizing ideal and institution. In its epitome, the judicial ethos, it becomes clear that this is the conservatism of consensus. It relies on what appears already to have been established and accepted. When constitutional and social changes have become inevitable and settled, the judiciary adapts itself to the new order. The "switch in time" from 1937 onward, after all, involved the whole federal bench eventually, not just one Supreme Court justice. For the judiciary to remain uncontroversial is the mark of neutral impartiality. Adjustment is therefore its natural policy, whenever possible.

The limits to such adaptation are to be found not in judicial attitudes but in society itself, when no consensus prevails to

allow the judiciary to appear neutral. When a consensus does emerge, as it rarely does, adjustment is easier. The ease with which the English judiciary not only accommodated itself to socialist legislation, but even bent backward to facilitate its enforcement, shows how the belief in statute law as "there" can help an immensely conservative set of lawyers to adapt itself to political *force majeur*.[3] Yet in 1911 Winston Churchill had said in Parliament that it was impossible for trade unionists to expect fairness or understanding of the nature of social conflicts from the judiciary. Even before turning to Marxism, Harold Laski assumed that no amount of personal impartiality could save the English judiciary from its upper-class outlook.[4] That English barristers have not as a group been drawn to the cause of socialism remains true. It is not likely that the judiciary is now composed of ardent Labour sympathizers. Far from it. However, men live up to the expectations that their own ideology imposes upon them and to the demands of public office. Faced with the consensus that supported the reforming legislation of the first years after the war, the judiciary demonstrated its neutrality by adapting to the new order as it had supported the old.

Aloofness from politics and impartiality depend upon avoidance of conflict with other, more powerful political agents. The politics of judicial legislation is exposed as such only when there is conflict. As long as there is no opposition to them, decisions seem to be not choices but accepted necessities. There is no reason to suspect the "legal caste" of using the "thereness" of law as a cover in order to exercise political power irresponsibly.[5] Ideology is rarely so rational or so purposefully designed a Machiavellian scheme. Neither natural law nor positivism is "there" to hide anything. They are not contrived to protect the judiciary or the bar. They are ideas that correspond, each in its way, to the professional experiences and necessities of bench and bar, and that help to

maintain their identity, their social place, and their sense of purpose. However, both natural law theories and analytical positivism allow judges to believe that there always is a rule somewhere for them to follow. The consensus of society or of its wise men, a statute (however broadly interpreted), a precedent (however twisted in meaning), all are somehow present to serve as rationalizations to which a judge must resort if his decisions are to meet the demands that a legalistic conscience and his office make upon him.

If many lawyers, in America especially, do recognize that the courts do legislate and make basic social choices, this is less true and even less accepted in other countries. Even in the United States, moreover, the public at large and important sections of the bar do not perceive their functions thus. The courts are expected to interpret the law, not to alter it. Professional ideology and public expectations, in fact, do mold the conduct of the judiciary and its perception of its role. To seek rules, or at least a public consensus that can serve in place of a rule, must be the judge's constant preoccupation, and it affects his choices in ways that are unknown to less constrained political agents. To avoid the appearance of arbitrariness is a deep inner necessity for him. The trouble is that the possibility of aloofness does not depend on the judge's behavior alone, but also on the public responses to it. In England, given the acceptance of Parliamentary sovereignty, the judiciary is not exposed to controversy as extensive as that in America. Here both the nature of the issues placed before the courts and the greater scope of choice available put the judiciary inevitably into the very midst of the great political battles of the nation. Elective state judiciaries, moreover, are bound to remain subject to public scrutiny, which the English judiciary is spared.

In any case, no basic social decision, whether made by court or legislature, can ever meet with unanimous approval in a heterogeneous society. Without consensus the appearance of

neutrality evaporates. Every offended party characteristically responds to a decision by accusing the judges of "legislating." It is not the law, which is clearly far from self-evident, but the judge, who is at fault, and an erring judge is a legislating judge, since the losing party begins its case by presenting its version of the true law. The result is that, as denunciations of "lawmaking" multiply, the legalistic ethos is reinforced and the likelihood of judges satisfying it becomes increasingly rare. As long as substantial interests and expectations are disappointed by judicial decisions, there can be no realization of legalistic hopes for a neutral judicial process. Law exists to satisfy legally argued expectations, and the loser is sure to feel that the judge, not the law, has arbitrarily deprived him of "his own." The easiest resort, under such circumstances, is for judges to escape into formalism when they can. For American judges this is frequently not possible. In England it is. As for analytical legal theory, it is more than anything an effort to enhance the formalism that is already a built-in feature of legal discourse. Modern legal theory would be incomprehensible if it were forgotten that its creators are themselves lawyers and that professional habits of mind exercise a real influence upon them as they strive to extract the formal essence of law from the confusion of its historical reality.

Another instance of professional attitudes may be seen in the way in which such a citadel of conservative lawyerdom as the American Bar Association addresses itself to social issues. Matters are taken up one by one, in isolation from the social context and without discussion of the basic issue. Precisely because the A.B.A. regards itself as the official spokesman of the bar it must present its views in a formal manner that gives the appearance of being supra-political and almost without concrete content. It is the independence of the judiciary, the separation of powers, the preservation of fundamental rights, or just fairness, the policy of justice—never the specific social

interests or purposes of policies—that is discussed. This formalism makes for adaptability in the long run, but it also represents a rooted conservatism. When it comes to changes that affect the judicial establishment directly, moreover, conservatism becomes immobility. An A.B.A.-sponsored survey of the American legal profession concluded that when it came to reforming procedure, for instance, lawyers were unreasonably obstinate.[6] Observers of the English bar have reached the same conclusion. The English barrister tends to regard the common law as an inheritance to be preserved and technically perfected without being in any way altered. The changes that the bar wants, if any, are not those that the public is interested in.[7] It is, moreover, doubtful that change of any kind is to its liking. "The lawyers could no doubt reform their education and training, reform the practice and processes of the law, even reform the law itself, if they felt like it. But probably they will not feel like it." [8] On the contrary, the more the bar concentrates on formal perfection of established rules and procedures, the more removed it may become from the social ends that law serves. The judiciary, happily, is forced by the institutional demands of its office to keep moving.

The antiquity of legalism as an ideology is, in fact, one of the wonders of history. It is itself the expression of the continuity of the legal profession and its basic tasks. Whereas science has rendered the practice of modern medicine quite unlike the pre-nineteenth-century profession of the same name, the heirs of Coke resemble him closely in vocabulary, outlook, and concerns. De Tocqueville's description of the legalistic ethos is as accurate today as it was when it was written. Order and formality being the marks of the legal mind, he wrote, it is natural for lawyers to support the established social order. As long as they are not deprived of the authority which they regard as their due they will rally to the regime in power. The radical village lawyer of the French Revolution was an

aberration that the aristocracy foolishly brought upon itself. In the normal course of events conservatism is inseparable from legalism. "If they prize freedom much, they generally value legality still more: they are less afraid of tyranny, than of arbitrary power." [9] One might add that, if they fear tyranny, it is because it tends to be arbitrary, not because it is repressive. The fear of the arbitrary, however, is what gives legalism its political use. That is why it is not a conservatism without content. To the extent that change means uncertainty, the hatred of the arbitrary is inevitably conservative, but it is a conservatism that has a specific direction which distinguishes it from other conservatisms, especially on those occasions when the independence and professional standing of the bench and bar are directly involved; for they, and they alone, stand to protect "justice" against the arbitrariness and "expedience" of politics.

Almost a hundred years after de Tocqueville wrote, Max Weber could still present a picture of the ideology of the legal profession that was virtually unaltered. Lawyers remained as wedded to formal justice as ever and so to all the interests that relied on permanence and predictability in social procedures. Weber felt that this was even more true of the bureaucratized Continental lawyers than of those in common-law countries. And one can readily see how bureaucratic formalism would reinforce legalistic conservatism to a degree unknown in the Anglo-American legal systems where the free legal profession is less insulated from the shifts and turns of everyday politics. The liberalizing effect of involuntary politicization on the American higher bench, doomed to interpret and adapt its constitution, is evident enough. It is historical phenomena such as these, moreover, that make it so necessary to think of legalism as a matter of degree, rather than as either "there" or "not there," as lawyers think of law. Weber certainly thought of it dynamically, and he was far from complacent in his views

of the intensification and rigidity of the legalism that he saw about him. If, as he argued, it was worse on the Continent than in England, his general remarks still are far from inapplicable to Anglo-American lawyerdom.

What he and de Tocqueville saw was that a legal caste, once it had established the "rule of law" securely against threats from absolutist arbitrariness, was bound to prefer order to liberty. What de Tocqueville called aristocratic habits of thought, Weber believed (rightly) to be more a matter of "internal professional ideology." The importance of the inner dynamic of legal reasoning and the professional preferences of lawyers tend to separate them from other social groups. Capitalist entrepreneurs have their own interest in stability and calculability, but the excessive formalities of lawyers' law are uncongenial to them. The conflict between jurists and psychiatrists is another example of tension engendered by incompatible professional views. As Weber was quick to note, these are not class struggles but acute differences between groups which belong to the same economic stratum in society. Looking at German lawyerdom mainly, he thought that its self-absorption, the extreme formalism of the legalistic spirit, would make it inevitably hostile not only to all radical social reform but to democracy in general.[10] Since democracy was a radical ideal in Imperial Germany, he was quite right. However, as de Tocqueville noted, democracy is not necessarily incompatible with legalism. Law in America, then as now, is a profession open to talent, the poor boy's classical road to middle-class eminence. One might add that political democracy in America has been so conservative, in general, as to give the legalistic consciousness relatively little cause for complaint. Only occasionally, in the fear of radical state legislation and the Progressive movement for popular recall of the judiciary in the decades before the First World War, have legalism and democratic ideology clashed directly. Nevertheless, the main

thrust of legalistic ideology is toward orderliness, and formalism can readily reinforce an inherent preference for authority. The ease with which German lawyers accepted "Adolf Légalité's" pretensions to legitimacy, the support they gave Nazism until its radical anti-legalistic tendencies revealed themselves (and even after), more than justify de Tocqueville's and Weber's suspicions. It cannot be repeated often enough that procedurally "correct" repression is perfectly compatible with legalism. That is the cost of conservative adaptability.

If traditionalism tends to favor liberal constitutionalism in America and England, as it did not in Germany, other aspects of legalism transcend the historic differences which Weber stressed so much and which certainly are very important. The differences in the respective attitudes of American lawyers, psychiatrists, and businessmen are still much as he described them. If the American corporation lawyer, the "house lawyer," comes to identify himself completely with the "organization" for which he works, there are lawyers who are wary of the informality of businessmen. There are, moreover, plenty of businessmen who find "lawyer's law," and expenses, unwelcome—and not only crude robber barons like Ryan and Whitney at that.[11] The resort to arbitration under chamber of commerce auspices, from which lawyers were at first explicitly excluded, represented a significant preference for direct negotiations over formalism and, worse, litigation.[12] On another level, businessmen do not want regulatory governmental agencies to become too courtlike, but prefer to maintain direct access to them in order to bargain with officials. The official program of the A.B.A., on the other hand, calls for judicialization. In this the lawyers, true to their ideology and habits, express their traditional distaste for the politics of negotiation, expediency, and arbitrariness. It is the popular acceptance of this legalism in America that surely contributes its share to the general cynicism toward politics as inevitably "dirty." The

belief that negotiations aiming at peaceful settlements represent defeats for justice, for the politics of legalism, has led the official American bar to take at least one stand that separates it noticeably from most other conservative groups. From the first it has lent its support to international law, and especially to the International Court of Justice, on the ground that adjudication alone can prevent war and establish the reign of justice. Here, as in domestic politics, disputes between states are treated in isolation, apart from world politics in general. Here, too, the adjudicative process is held up as the model for government, the substitute for politics. So devoted a business lawyer as Joseph Choate headed the American delegation to the Second Hague Conference, and the "World Peace Through World Law" movement has today the ardent support of the A.B.A.[13] This in itself would suffice to demonstrate the existence of a professional ideology among lawyers.

It also shows that lawyers are not indifferent to their public responsibilities, as has often been charged, but that they conceive of these in terms of their professional experiences and ideology. These give legalistic politics its identifying marks. It would be foolish to underestimate their prevalence or the depth of their roots in tradition, in the very structure of judicial institutions, and in the professional life of bench and bar. That is why one may well doubt the efficacy of the many schemes devised to reorient the thinking of lawyers by altering legal education in America. These proposals come mostly from academic lawyers who, like their medical-school counterparts, have a rather different view of their profession than do their client-oriented former students. Many academic lawyers would like to see a public-spirited political elite replace the private-law practicing lawyers whom they now teach. It is, to be sure, true that many lawyers do participate in politics. These men especially, but the profession as a whole, too, cannot, it is said, be prepared for their public duties by the case method or other

traditional ways of teaching lawyers. Men as far apart in their political preferences as the late Justice Vanderbilt and Professor Hurst agree that special training for public service must replace the old curriculum.[14]

That changes in the curriculum are the answer to all public deficiencies is, of course, in keeping with the great American tradition of painless reform. Everything from the study of Chaucer to the pursuit of "social science" has been proposed to this end. What has not been shown, however, is that changes in the content of courses alter the social behavior and attitudes of students once they enter upon their professional life. Given the very real demands for his services in our society, there is no reason why the young lawyer should not follow Lord Coke and make *meum* and *tuum* his favorite words, rather than the vocabulary of social science. Nor is there any reason to suppose that tinkering with the curriculum will, in the absence of significant social changes, alter traditional attitudes that are as firmly grounded as is legalism, not only among American lawyers but in popular opinion as well. The policy of justice, which despises arbitration, negotiations, bargaining, as mere "politics" arbitrary and expedient, will continue to appeal to lawyers. Adjudication of private *lites inter partes* will remain the model for public rectitude, the best way to solve all social conflicts, and "the law" will remain "there." Moreover, a great deal of analytical legal theory will continue to thrive on conceptions that have their roots in this nexus of beliefs. However formal the arguments and abstract the concepts, analytical jurisprudence reflects the same ideological climate as the legal profession as a whole, in spite of that minority of the legal profession in some American law schools which has long protested against formalism in jurisprudence, no less than against the ideological legalism of the bench and bar.

If one is to treat legal thinking in ideological terms, one must also look at its relationships to other ideologies. Indeed,

the complex relations between liberalism and legalism form one of the major themes of the present study. Some of the most obvious bearings of legalism upon both liberalism and conservatism are, of course, well known. "Freedom under law," "a government of law, not of men"—the limitation of private and public power through the vigorous application of general rules—is inseparable from liberalism. The conservative has no less reason to cherish that security of expectations, guaranteed by the impartial application of rules, which insures the enforcement of established rights and values. Vested interests are rights, too, depending upon enforceable rules. Such views are too well known to require much examination. They are indeed still prevalent. There are, however, other ideologies fundamentally hostile to legalism. Of these, Fascism and Nazism are the most obvious in their glorification of spontaneous violence as a fit replacement for the morality of rules. These are not, indeed, the only manifestations of that nihilism which simply wants revolution as a form of authentic self-expression, quite apart from any future ends that it might serve. There are also those extreme forms of anarchism and communalism that reject any ethics of rights and duties in favor of a common life based on mutual service, fellowship, and self-abnegation. These are but a few of the ideological competitors of legalism. They are also all integral parts of the moral history of the West. This is an important consideration, because it is as part of the current preoccupation with "*the* political tradition of the West" that law has now become a major item of ideological discourse. This development, and also that highly traditionalist liberalism which has made "the rule of law" the core of its program, would in themselves justify a study of law as an ideological manifestation. They must, at the very least, be mentioned in order to place legalism in the general ideological picture of the present age.

The conspicuous concentration on "*the* West" today is

clearly a response to the Cold War and to the political organization of ex-colonial, non-European societies which now challenge the European world. These events have made us all culturally self-conscious. The result is a search for an identity, for a positive and uniquely Western tradition. The core of that tradition, for those who have discovered it, is essentially legalism, the rule of law. It is not an entirely new notion. The contrast between European legal government and Oriental or "Turkish" despotism is as old as European political theory. There have occasionally been advocates of enlightened despotism who used the Eastern potentate as a model of rational government. However, the main object of these comparisons has been to fortify the rule of law by warning Europeans of the dangers and miseries that await all those who abandon it in favor of Eastern absolutism. Today the confrontation of East and West is not quite so simple, but its ideological core has hardly altered.

The most elaborate, erudite, and influential of modern efforts to expose the contrast between "the Occident" and the rest of the world has been that of Max Weber. It is clear that his object was not to analyze the non-European world, but to discover, by comparing it to Europe, the unique cultural traits of the West. The question he asked was not what are they like, but why are they different from us, and therefore what makes us what we are? To him it seemed that it was a matter of "rationality," by which he meant exactly what has here been called legalism. The predisposition to discover, construct, and follow rules was, in his view, the distinguishing mark of European culture. This alone accounted for those phenomena which appear "only in the Occident": Roman law, the legal profession, judicial institutions, capitalist economics, rational social ethics, and Puritanism in religion. In glaring contrast to these stand the patrimonial and kadi justice of China and Islam and the inner-worldly ethic of the Orient.[15]

The issue here is not whether this provides an adequate account of Asian history. The question is whether it is valid to extract a quintessence of "the West" by subtracting from its history all that it shares in various degrees with the rest of mankind. The result inevitably gives Europeans an unwarranted appearance of consistency and uniformity. The aim of this exercise, moreover, is not difficult to guess: as always it is a matter of defending the "essential" West against other ideological forces, revolutionary, national, and violent. The difficulty is that these too are Western.

Because the threat to "the West" is external at present and so more obviously non-Western in character, the ideological defense of the Western tradition has become increasingly rigid. It is no longer just a matter of emphasizing that legalism has been far stronger in the West than elsewhere, which is certainly true. The ideology of "the West" now goes well beyond that, insisting as it does upon a single Western political tradition. It always comes down to a political tradition of freedom under law or the rule of law. The difficulty with this self-congratulatory view of the Western past is that it flies in the face of the most obvious facts of history. There is no *one* Western tradition. It is a tradition of traditions. Moreover, political freedom has been the exception, a rarity, in Europe's past, remote and recent. It is indeed the very diversity of traditions and conditions that makes European history so turbulent and various. To say that *a* political tradition, "freedom under law," ties all that together into a neat pattern is an ideological abuse of the past. It falsifies the past, and renders the present incomprehensible. What it expresses is the nostalgia of a liberalism that has ceased to look to the future and which seeks to maintain itself not as a hope but as an ancient possession, to be valued more for its familiarity and age than for its intrinsic merits.

Conservative liberalism also inspires that ideology of the

rule of law which has Professor Hayek as its most persuasive and consistent advocate.[16] This indeed is grand ideology, with its own theory of history, of psychology, of epistemology, of economics, and of politics. History is seen as a battle between the healthy instincts of society and the destructive power urges of the state. The battle is fought essentially in terms of intellectual conceptions, especially in terms of economic theories, for it is economic policy that is fundamental. Once the free market is tampered with, even by such a policy as professional licensing, the swift decline of society into absolutism and destruction is inevitable. The chief agents of this destructive urge in the modern world are the intellectuals who want to plan society, not grasping that this requires unobtainable total knowledge of society as a whole. Since their plans must fail, they end by becoming tyrants. The answer to these false political aspirations is the rule of law. The rule of law is the miracle of liberalism, government without coercion. By coercion, Professor Hayek does not mean any exercise of power, but only what occurs when one man issues a direct command to others to perform a specific action to serve his own ends. The chief source of such coercion is government, for it is seen, essentially, as a military agency. Coercion can, however, be eliminated if men are governed entirely by general rules which are applied impersonally and equally to all. These rules must, moreover, be accepted by those to whom they apply directly, as well as by others. Such general rules, indeed, have the character of a natural necessity and, as such, people adjust to them spontaneously. It is, of course, not obvious that men do accept natural necessity. The very existence of technology argues against such a notion. It is even more difficult to imagine what laws other than traffic rules can possibly have the character that is ascribed to genuine law here. Certainly no other examples are offered.

It is not clear at all that the contrast between direct com-

mands and general rules can be maintained. There are direct commands which are general: "Fasten your seat-belts," for example. There are general rules that are highly coercive: "No one may travel abroad," for instance. The difference is clearly not one of form at all, but of the ends served by both laws and commands. The purpose of this division is, in fact, to show that administrative action is not lawlike in character. Only general legislation providing for the barest needs of peace and order in society may truly be honored by the name of law. All else is not natural but coercive. Law, to be law, may merely articulate those standards that are already immanent in society, else it becomes destructive impositions. Although freedom is clearly the end of such a vision, it is also a deeply conservative one, for the natural is the prevalent. That is why law ought to have nothing to do with politics, with that dangerous realm of purposive social action. It exists, rather, to limit politics. To be sure, rules of law do exist to ensure the security of expectations, but here security and freedom, tradition and legality are totally identified. As such, this too, like the ideology of "the West," is a liberalism that clings to legalism because of its conservative implications.

These prevailing ideologies of law would suffice to justify a study of legal thought in ideological terms. There is, however, another consideration. There has been a great tendency toward formalism in philosophy in general, and in political theory especially, in recent years. Mostly it is a matter of reducing political thought to exercises in definition. Of course, playing with words has always been the favorite intramural sport of academicians, and bickering over definitions is far from being a new occupation for philosophers. Nevertheless, not even in the later middle ages were the learned more concerned with language, words, and definitions than they are today. This is so evident that one can hardly avoid wondering how and why it has come about. To anyone interested in con-

temporary social and intellectual history this general verbalism must be a subject of considerable interest in itself. Moreover, since this is now a feature of all forms of social theory, it might be profitable to look at some of the ideological pressures which have stimulated the passion for definitions and the disputes about them in at least one corner of our intellectual world. Legal theory offers the most promising starting point for such an inquiry, because it has traditionally been the battleground of wars of definition. Perhaps an examination of some legal ideas might serve to illuminate a few of the more fundamental issues of political theory.

There is nothing inherently odd or silly about the passion for clarity and precision which inspires classifications and definitions. What is curious is that there should be such endless disputes about the "true" meaning of words and phrases. Since these arguments tend to center on words which refer to subjects about which few of us are neutral, such as "law," "religion," "ideology," or "justice," it is of considerable practical importance to know exactly what friend and foe mean in using these explosive words. One might also assume that here the issues are basically ideological; they are semantic only in appearance. This can be seen in the effects created by that very fear of "bias" which is so widely shared among American social scientists and which tends to encourage exercises in definition and "methodology" as a means of "coming clean" about one's "values." For, however honest these efforts may be, they seem to be futile. Somehow the definitions and categories remain only covert or open expressions of ideological preferences and as such inevitably become subjects of bitter dispute. Nor, on the other hand, is there any reason to believe that the elucidation of "common usage" as a means of evading "right" definitions can succeed in bringing even limited agreement. To say that to insist upon "true" meanings is a species of verbal self-righteousness misses the point. We protest because words

arouse incompatible emotions in us. Until the unlikely event of our ceasing to be different from one another, even a complete analysis of how words in fact behave in our language will not diminish the tensions created by our responses to them. It is not the words but the feelings behind them that cause men to fight.

In fact, however paradoxical it may seem, the urge to define and the various forms of linguistic analysis which oppose such rigidity and finality in the use of words seem to have a common origin. Both arise from a general anxiety about our ability to communicate with each other at all, which is the legacy of the great ideological struggles of the recent past and the verbal warfare and distortions they induced. It is just because the Western world is no longer torn by the life-and-death political passions that raged in it before the Second World War that we have become both aware of the damage done to us by the systematic abuse of language and eager to de-ideologize and de-emotionalize our discourse. However, there is no cause for rejoicing yet. If both the desire for one clear set of definitions and the readiness to admit that "anything goes," as well as the various intermediate positions, show that the great ideological disputes are past and that in different ways we are prepared to settle for limited agreements, there is no evidence that we are succeeding. There is no end to the persuasive use of definitions and classifications and no end to arguments about them. All that has happened is that the issues have shrunk. There are no more great militant ideologies, but this has not produced any agreement. On the contrary, we are now deprived of the cloaks which clothed our temperamental and private differences in the garments of great causes. Now we stand psychologically quite naked before one another, our intellectual dispositions and social preferences openly displayed as expressions of habits and experiences rooted in our very characters, and, as such, probably quite beyond reconciliation. This applies most of all to those who by instinct are believers and those who by nature are skeptics. And it is between these two, the man who is drawn to faith and order and the man who doubts and debates, that most contemporary social, as well as purely philosophic, antagonisms arise. The entire debate about "facts" and "values," about "cognitive" and "non-cognitive" ethics and their political offshoots, is rooted in this conflict. For the questions are not, as the old ideological battles were, matters of concrete substance. The disagreements are not about what we should do, how we should act in specific situations, but about how we should feel and think about morals and politics, above all about how certain we should be, with what degree of conviction and self-assurance we should insist upon our preferences.

It must then seem that the end of the "age of ideology" has left only pettiness and triviality behind it. So the veterans of the 1930's tell us daily, and this too is the complaint of the various "commitment at any price" enthusiasts. For them the end of the great ideologies is the end of all genuine thought. In fact, however, two things are left: ideology in the simple sense of personal and group political preference, and those perennial questions of political philosophy that have concerned the reflective part of mankind since well before the French Revolution—since classical antiquity, in fact. What has gone is grand ideology, those inspiring "isms" that still shake the non-European world. These great social faiths were total world views, explaining the past, predicting the future, serving both as programs of collective action and as the primary ends of individual lives. However, political thinking did not begin with them, nor need it disappear now. While it is a vain tribute to academic vanity and pretended aloofness to say that political philosophy can be divorced from all preferences and all ideology, we are not doomed to a choice between grand ideology and intellectual extinction. We need not even stay

modestly within the limits of linguistic clarification. On the contrary, the most obvious task of political theory has always been the elucidation of common experience, the expression of what is inarticulately known to groups of people at any time. It is the re-examination of inherited ideas, their adaptation, and even their utter rejection. It is not a work of discovery, but one of illumination through discussion. We all carry with us a mixed bag of *idées reçus,* and in order to travel with it through an everchanging world we must shift it around occasionally—drop something here and add something there. Above all, we share a variety of common encounters and reactions, and to give these a coherent form, a clear voice, is the task of political theory.

PART I

Law and Morals

DEFINITIONS AND IDEOLOGIES

Philosophical controversies are rarely resolved, but some do fade away. There are a few, however, which have an extraordinary capacity for survival. Of these the argument between natural lawyers and legal positivists is a notable example. Modern legal theory amounts to little but a repetition of the assertions and counterassertions of these ancient opponents, neither one of whom really expects to convince the other. On the surface their differences appear to be a matter of irreconcilable definitions of the word "law." In fact, however, their durable antagonism involves not just words but fundamental social ideologies. The natural lawyer has generally been quite ready to recognize this. Indeed, the moral and political implications of legal positivism have been the main objects of his attack. The positivist's case, however, rests to a large extent upon denying any political commitment on his own part. This is not surprising, since the necessity of separating law, politics, and morals entirely from one another is, ostensibly, his main concern. While this enterprise is pictured as a disinterested pursuit of intellectual clarity as an end in itself, it has from the first been a counter-ideology, a theory whose life depends upon a negative assertion.