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DUTY, SELECTION AND FREEDOM

by MASON L. BOHRER*

INTRODUCTION

Coincidence of treatment, experimentation in altering human behavior, deprivation of other than basic food, clothing and shelter, and reward in the form of better than basic food, clothing and shelter in return for the performance of work frequently consisting of maintaining the facilities of the institution to which incompetents or mentally retarded persons have been involuntarily committed, has resulted in an attempt by one court to establish standards of care under the due process clause of the fourteenth amendment of the United States Constitution¹ as the right of any such incompetent or person.

The play, *Marat/Sade*, set in the asylum of Charenton, shows that deprivation of order reinforced by terror, when rewarded by superimposed order, subverts freedom mired in the inertia of mundane human needs and wants.² According to Hume, such human needs and wants are at the root of justice:

But 'tis evident, that the only cause, why the extensive generosity of man, and the perfect abundance of every thing, wou'd destroy the very idea of justice, is because they render it useless; and that, on the other hand, his confin'd benevolence, and his necessitous condition, give rise to that virtue, only by making it requisite to the publick interest, and to that of every individual.³

The subordination of freedom to such needs and wants is postulated by Hobbes:

The finall Cause, End, or Designe of men, (who naturally love Liberty, and Dominion over others,) in the introduction of that restraint upon themselves, (in which we see them live in Commonwealths,) is the foresight of their own preservation, and of a more contented live thereby; that is to say, of getting themselves out from that miserable condition of Warre, which is necessarily consequent . . . to the naturall Passions of men, when there is no visible Power to keep them in awe, and tye them by feare of

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¹ Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (M.D. 1971); 344 F. Supp. 373, 387 (M.D. Ala. 1972). D. B. Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81 (1973). Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973). F. N. Flaschner, *The Role of the Court as Mental Health Laws Change*, 62 ILL. B.J. 128 (1973).

² P. WEISS, *THE PERSECUTION AND ASSASSINATION OF JEAN-PAUL MARAT AS PERFORMED BY THE INMATES OF THE ASYLUM OF CHARENTON UNDER THE DIRECTION OF THE MARQUIS DE SADE* (1972).

³ D. HUME, *A TREATISE ON HUMAN NATURE*, Bk. III, Pt. II, § II.

punishment to the performance of their Covenants, and observation of those Lawes of Nature⁴

A contemporary psychologist, Mr. B. F. Skinner, has proclaimed that punishment is unnecessary if it is supplanted by a process of operant conditioning involving deprivation, manipulation of the environment (discriminative stimulus), response, and positive reinforcement.⁵ But his objective is like that of Hobbes, preservation which he deems inconsistent with freedom:

If it is always the individual who behaves, it is nevertheless the group which has the more powerful effect. By joining a group the individual increases his power to achieve reinforcement^[6] The simple fact is that a culture which *for any reason* induces its members to work for its survival, or for the survival of some of its practices, is more likely to survive. Survival is the only value according to which a culture is eventually to be judged, and any practice that furthers survival has survival value by definition^[7]. . . . But if it continues to take freedom or dignity, rather than its own survival, as its principal value, then it is possible that some other culture will make a greater contribution to the future. ^[8] . . . The main thing is, we encourage our people to view every habit and custom with an eye to possible improvement. A constantly experimental attitude toward everything — that's all we need. Solutions to problems of every sort follow almost miraculously.⁹

But Mr. Skinner may be in error when he complains that "Greek theories of human behavior led nowhere"¹⁰ for the very rudiments of his ideas may be found in the following words written by a Greek in about 200 A.D.:

We say, then, that the aim of the Sceptic is 'tranquillity of soul' in those things which pertain to the opinion, and moderation in the things that life imposes For he who is of the opinion that anything is either good or bad by nature is always troubled, and when he does not possess those things that seem to him good he thinks that he is tortured by the things which are by nature bad, and pursues those that he thinks to be good. Having acquired them, however, he falls into greater perturbation, because he is excited beyond reason and without measure from fear of a change, and he does everything in his power to retain the things that seem to him good. But he who is undecided, on the contrary, regarding things that are good and bad by nature, neither seeks nor avoids

⁴ T. HOBBS, *LEVIATHAN*, Pt. II, ch. XVII.

⁵ B. F. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* 64, 107, 110, 125, 205, 233 (Free Press Paperback 1965 ed.). Copyright © 1953. Reprinted by permission of the MacMillan Co. [hereinafter cited as *SCIENCE AND HUMAN BEHAVIOR*].

⁶ *SCIENCE AND HUMAN BEHAVIOR* 312, 327.

⁷ B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 130 (Bantam-Vintage ed. 1972). Copyright © 1971 by Alfred A. Knopf, Inc. Reprinted by permission of Random House Inc. [hereinafter cited as *BEYOND FREEDOM AND DIGNITY*].

⁸ *BEYOND FREEDOM AND DIGNITY* 173.

⁹ B. F. SKINNER, *WALDEN TWO* 29, 30; see also 267 (MacMillan Paperback ed. 1962). Copyright © 1948. Reprinted by permission of the MacMillan Co. [hereinafter cited as *WALDEN TWO*].

¹⁰ *BEYOND FREEDOM AND DIGNITY* 4.

anything eagerly, and is therefore in a state of 'tranquility of soul.' . . . The Sceptic, however, escapes more easily, as he rejects the opinion that anything is in itself bad by nature. Therefore we say that the aim of the Sceptic is 'imperturbability' in matters of opinion, and moderation of feeling in those things that are inevitable. Some notable Sceptics have added also suspension of judgment in investigation Since therefore the choice and the avoidance of things depends on the pleasure and displeasure which they give, and the pleasure and displeasure have their seat in perception and ideas, when some choose the things that others avoid, it is logical for us to conclude that they are not acted upon similarly by the same things, for otherwise they would have chosen or avoided alike.¹¹

In *Wyatt v. Stickney*, the court's consideration of a violation of due process in treatment of incompetents and mentally retarded persons is shown to be relevant to all natural persons not only by the play, *Marat/Sade*, but also by Mr. Skinner who says:

These problems are in essence soluble, however, and it should be possible to design a world in which behavior likely to be punished seldom or never occurs. We try to design such a world for those who cannot solve the problem of punishment for themselves, such as babies, retardates, or psychotics, and if it could be done for everyone, much time and energy would be saved.¹²

The purpose of this paper is to examine the primacy or totality of the value of survival and the means, including operant conditioning, of such survival.

HYPOTHESIS*

Limitations of perception inherent in the organism generate a compensating stimulus in the nature of curiosity, modified by deprivation or satiation, causing a response by the organism, the recurrence of which is a function of a reinforcer or reinforcers, conditioned or general without direct biological advantage. Such recurrence of response results in an element of the repertoire of the organism through a process of discrimination. Thus, a discriminative stimulus will result in such a recurrence until

¹¹ S. EMPIRICUS, OUTLINES OF PYRRHONISM, Bk. I, ch. XII and XIV. *The Second Trope*. See also BEYOND FREEDOM AND DIGNITY at 102 where it is stated:

Men do not work to maximize pleasure and minimize pain, as the hedonists have insisted; they work to produce pleasant things and to avoid painful things. Epicurus was not quite right: pleasure is not the ultimate good, pain the ultimate evil; the only good things are positive reinforcers, and the only bad things are negative reinforcers. See also SCIENCE AND HUMAN BEHAVIOR 273-74:

There are great individual differences in the extent to which private seeing is used As in conditioned seeing, such differences may be traced either to differences in the extent to which private seeing has been established or to differences in the ability to describe the resulting self-stimulation or use it as a basis for further behavior In solving a chess problem

On experimentation or investigation, see note 9 *supra*.

¹² BEYOND FREEDOM AND DIGNITY 62.

* Thanks to Janeen Weiss for help in elucidating the Hypothesis.

the reinforcer fails because of an ineffective schedule of reinforcement, and hence extinction of such response, or until the organism is reconditioned, or until the above noted compensating stimulus causes a novel response which is reinforced to the greater advantage of the organism than was obtained by the previous response. As such a process is repeated in a group, optimums of performance among individuals may be discovered in varying environments, so that biological, economic, social and political selection occurs. Such process sometimes inhibits or focuses the discovery of such optimums of performance unless each individual recognizes the advantage to himself of allowing each of the others in the group the opportunity to perform to the extent of his repertoire or his response generated by such compensating stimulus. There is thus behavior which alters the strength of other behavior and is reinforced because it does so. The recognition of such optimums is the foundation of duty and freedom, without which the organism will eventually decline, because the creativity in defining problems is more important to the advantage of the organism than the solution, however novel.

BRIEF HISTORY

According to Mr. Albert A. Ehrenzweig,

The purpose of all early law was the ruler's or the community's desire to replace self-help, feud, and revenge by authoritarian or communal action.¹³

The degree of control required varies inversely with the degree of social, economic and political disintegration. Thus, the term "seisin" has an etymological connection with the French "seisir" or "saisir," and the enforced beginnings of order after the sixth century and up to the twelfth century in Europe, and especially in England, indicate the submission of vassal and serf to the domination of a local chieftain of whatever rank who could grab and hold enough land and chattels to sustain communal life.¹⁴ The feudal concept of seisin became the sanctification of the status of protector and protected with duties imposed on high and low, and peace at the price of stratified, hierarchial

¹³ A. A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 243 (1971). Copyright © 1971 by A. W. SIJTHOFF'S UITGEVERSMMAATSCHAPPIJ N. V. Reprinted by permission of A. W. Sijthoff [hereinafter cited as EHRENZWEIG].

¹⁴ 1 G. M. TREVELYAN, *HISTORY OF ENGLAND* 62-192 (Doubleday-Anchor 1953) [hereinafter cited as TREVELYAN]. M. RADIN, *HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY* 393 *et seq.* (1936) [hereinafter cited as RADIN]; 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 56, 57, 60 *et seq.* (Lawyer's Literary Club 1959 ed.) [hereinafter cited as 1 POLLOCK AND MAITLAND]; 2 F. POLLOCK AND F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 29 *et seq.* (Lawyer's Literary Club 1959 ed.) [hereinafter cited as 2 POLLOCK AND MAITLAND]; H. MAINE, *ANCIENT LAW* 150 *et seq.* (Everyman ed. 1965) [hereinafter cited as MAINE].

power and submission.¹⁵ Occasionally, even such price was not enough for the lord-protector turned predator.¹⁶ In England, the Curia Regis was the central court that the king, as supreme feudal lord, held for his tenants in chief, and Henry II (1154-1189), whether as chief predator or defender of those preyed upon, initiated the following reforms:

- (a) He was the pioneer of the system of royal writs, which lies at the root of common law procedure.
- (b) He asserted the exclusive jurisdiction of the Curia Regis over all serious crime.
- (c) He established the principles of the 'King's Peace'; crime came to be regarded no longer as a wrong against an individual, but rather as a wrong against the State.
- (d) He hastened the demise of the older, and unsatisfactory, methods of trial, by developing the system of trial by jury.¹⁷

Apart from the partial rendering of identity of landholder and dominator in the person of the lord of the manor,¹⁸ the trial by jury, as initiated and later evolved in conjunction with the new writs, especially trespass, is a reasonably successful attempt at harnessing aggressiveness to maintain peace without the waste and lesser certainty of trial by compurgation, battle, and ordeal.¹⁹ Even Mr. Skinner admits:

The world isn't ready for simple pacifism or Christian humility, to cite two cases in point. Before you can safely train out the destructive and wasteful emotions, you must make sure they're no longer needed.²⁰

But Mr. Skinner adds:

We take no pleasure in the sophistical, the disputative, the dialectical.²¹

He relies upon operant conditioning to induce self-control and tolerance for frustration, and denies the responsibility of any man, except for his ability to recognize a community of interest both upon and after signing an agreement to abide by "the Walden Code." The agreement is a "constitutional guarantee of a share in the wealth and life of the community" in exchange for the agreement "to work according to our schedules and not to claim any share in the fruits of his labor. He may leave

¹⁵ 1 TREVELYAN 198 *et seq.*; RADIN 359-73; T. F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 357 *et seq.* (1954) [hereinafter cited as PLUCKNETT].

¹⁶ 1 TREVELYAN 200, 201; C. BRINTON, IDEAS & MEN — THE STORY OF WESTERN THOUGHT 201 (1957) [hereinafter cited as IDEAS & MEN].

¹⁷ H. G. HANBURY, ENGLISH COURTS OF LAW 34 *et seq.* (Oxford ed. 1945) [hereinafter cited as HANBURY]; PLUCKNETT 357 *et seq.*

¹⁸ TREVELYAN 172, 173, 212 *et seq.* *But see note 61 infra*; the jury may have existed in manorial courts before Henry II.

¹⁹ HANBURY 36 *et seq.*; PLUCKNETT 366 *et seq.* See also 1 POLLOCK AND MAITLAND 136-225, 527-688; 2 POLLOCK AND MAITLAND 611-32.

²⁰ WALDEN TWO 102.

²¹ *Id.* at 112.

at any time, and take with him the personal possessions he brought."²²

The adversary system has also been criticized by Mr. Ehrenzweig on similar grounds:

Tort law everywhere purports to respond primarily to the seemingly all-rational desire for compensation. But even that desire is in part based on the same irrational need for aggressive satisfaction as the seemingly all-rational wish to punish in order to deter or reform.²³

While both classical Roman and canon law adopted accusatory procedures, in the twelfth century Innocent III introduced the inquisition where the suspect's only protection was the requirement of full proof by the accordant testimony of two unexceptionable witnesses who saw the crime committed:

The judge proceeds *ex officio* either of his own mere motion, or on the suggestion of a promoter (*inquisitio cum promovente*); he collects testimony against the suspect, testimony which the suspect does not hear; it is put in writing. But even this weapon was too feeble for that warfare against heresy in which the church was by this time engaged. The work of suppressing this crime was committed to the friars, more especially to the Dominicans, and the procedure by way of inquisition soon assumed in their hands all its worst characteristics. Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction. This procedure, inquisitory and secret, gradually forced its way into the temporal courts; we may almost say that the common law of Western Europe adopted it. When in the eighteenth century French philosophers and jurists rebelled against it and looked about them for an accusatory, contradictory, public procedure, a procedure which knew no torture, they looked to ancient Rome and modern England.²⁴

The following is from The Declaration of the Rights of Man and of the Citizen, promulgated by the French National Assembly in 1789:

7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense.

9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

11. The free communication of ideas and opinions is one of the

²² *Id.* at 227, also 162, 163. See SCIENCE AND HUMAN BEHAVIOR 115, 116, 240, 341, 447; BEYOND FREEDOM AND DIGNITY 67 *et seq.*

²³ EHRENZWEIG 244-45.

²⁴ 2 POLLOCK AND MAITLAND 657-58; see also 656-61.

most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.²⁵

In spite of this Declaration, however, Montaigne was a prophet of the end of the French Revolution as portrayed in the play, *Marat/Sade* previously noted:

Such people as have been bred up to liberty, and subject to no other dominion but the authority of their own will, look upon all other form of government as monstrous and contrary to nature. Those who are inured to monarchy do the same; and what opportunity soever fortune presents them with to change, even then, when with the greatest difficulties they have disengaged themselves from one master, that was troublesome and grievous to them, they presently run, with the same difficulties, to create another; being unable to take into hatred subjection itself.²⁶

Whatever may be said of the similarities of Cromwell, Bonaparte and Stalin,²⁷ Cromwell refused the throne, and though he may have been guilty of abuses and attempts at conquest, never in seventeenth century Britain was there the Terror of eighteenth century France nor the enforced conformity of twentieth century Russia.²⁸

There is the possibility that the harnessing of human aggression in the adversary proceedings of English law reinforced by Henry II in the twelfth century inhibited and focused the English revolution begun in 1640 as well as the one of 1688. Of course it must be said that the *peine forte et dure* was used in thirteenth century England to compel submission to trial by jury,²⁹ that modern "inquisitorial" procedure resembles that of

²⁵ M. VIORST, *THE GREAT DOCUMENTS OF WESTERN CIVILIZATION 187* (Bantam Books 1967) [hereinafter cited as VIORST]. Compare The Bill of Rights (1689) of England in PLUCKNETT 59, 60.

²⁶ M. DE MONTAIGNE, *ESSAYS*, Bk. 1, ch. XXII. Compare WALDEN Two 194:

Governments which use force are based upon bad principles of human engineering. Nor are they able to improve upon these principles, or discover their inadequacy, because they aren't able to accumulate any body of knowledge approaching a science. All that can ever be done by way of 'improvement' is to wrest power from one group and transfer it to another. It's never possible to plan and carry out experiments to investigate the better use of power or how to dispense with it altogether.

²⁷ C. BRINTON, *THE ANATOMY OF REVOLUTION* 207, 213, 214 (Vintage Books 1965) [hereinafter cited as *ANATOMY OF REVOLUTION*].

²⁸ *ANATOMY OF REVOLUTION* 205-36, especially 216-18, 224; but see 48: "John Lilburne, the Leveller, goes so far as to assert that the whole common law was a badge of slavery imposed upon the free people of England by the Norman Conquest." See also M. ASHLEY, *ENGLAND IN THE SEVENTEENTH CENTURY* 105-06 (Penguin Books 1966) where it is stated:

It is true that Cromwell's idea of 'liberty of conscience' was narrow by modern standards. It did not, for instance, apply to Roman Catholics or even to the Anglicans. But it embraced both the Quakers and the Jews so long as they did not defy civil authority. Those political and economic freedoms which came down to us with the spirit of nonconformity we owe in no small measure to the precepts of Oliver Cromwell.

²⁹ 2 POLLOCK AND MAITLAND 650 *et seq.*

the medieval inquisition only in the somewhat greater power of the judge than of English and American courts,³⁰ and that equity jurisdiction to try a case without a jury stems from ecclesiastical courts.³¹ But there is utility in the adversary proceeding. There is value in releasing and preserving human aggression for the redress of grievances. Submission induced by punishment or conditioning or genetic engineering reduces the flexibility of response and the ability to press on to the definition of problems to which varied responses may be required. As Mr. Skinner says, Mr. Darwin notes that the Fuegians seemed to make no effort to protect themselves from the cold.³² But evidence as to the effect of environment is equivocal according to Mr. Darwin:

The Fuegians were probably compelled by other conquering hordes to settle in their inhospitable country, and they may have become in consequence somewhat more degraded; but it would be difficult to prove that they have fallen much below the Botocudos, who inhabit the finest parts of Brazil.³³

The anti-trust treble damage action,³⁴ and recognized defenses, grounded in unjust enrichment, actions for recovery of personal property,³⁵ as well as recovery by principal from agent of profits from transaction initiated by principal,³⁶ are examples of legislative and judicial evaluation of society's dependence on aggressive counter-control for the maintenance of peace. None of these results need be "all or none" decisions, although they may be more definitive than the resolution of priorities among creditors.³⁷ Yet the resolution of priorities of creditors of an insolvent agent may require an indemnity action against his principal,³⁸ and contribution or indemnity among tortfeasors are definitive recognition of grey areas.³⁹ For if Zeus equally divided the time of Persephone between Hades and Demeter,⁴⁰

³⁰ EHRENZWEIG 262-69.

³¹ 1 POLLOCK AND MAITLAND 151, 152, 170, 193 *et seq.*; 2 POLLOCK AND MAITLAND 232. See HANBURY 124 *et seq.*, especially 127; PLUCKNETT 279 *et seq.* See also C. H. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 118-22 (1958 ed.) on torture in sixteenth century England.

³² BEYOND FREEDOM AND DIGNITY 29; C. DARWIN, THE DESCENT OF MAN, ch. II at 444, ch. VII at 542 (Modern Lib. ed.) [hereinafter cited as DARWIN].

³³ DARWIN, ch. V at 509.

³⁴ 15 U.S.C. § 15.

³⁵ *E.g.*, *Wetherbee v. Green*, 22 Mich. 311 (1871).

³⁶ *E.g.*, *Robert Reis & Co. v. Volck*, 151 App. Div. 613, 136 N.Y.S. 367 (1912).

³⁷ EHRENZWEIG 280. See WALDEN TWO at 268: "There are seldom any issues which have to be decided in an all-or-none fashion." See also SKINNER, SCIENCE AND HUMAN BEHAVIOR at 62.

³⁸ *Evans, Coleman & Evans, Ltd. v. Pistorino*, 245 Mass. 94, 139 N.E. 848 (1923).

³⁹ But see EHRENZWEIG 248. Compare *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288 (1972) with *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

⁴⁰ EHRENZWEIG 280.

Solomon did not cut up the baby, but determined the identity of the mother.⁴¹

The adversary system is a flexible means of settling disputes, and Mr. Ehrenzweig's analysis does not seem to demonstrate that the "inquisitorial" system is any more successful in formulating adjustments or in arriving at truth, though perhaps it may be less definitive.⁴²

⁴¹ 1 KINGS 3:16. Mr. Ehrenzweig has criticized the "good faith" of U.C.C. § 1-201(19) at page 147 of his book under the heading "The mirage of 'justice'." See R. S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968), reprinted in part in R. E. SPEIDEL, R. S. SUMMERS, J. J. WHITE, *TEACHING MATERIALS ON COMMERCIAL TRANSACTIONS* 467 (1969 ed.) A likely inference is that U.C.C. § 1-102(3) ("obligations of good faith, diligence, reasonableness and care"), § 2-103(1)(b) ("Good faith" . . . of a merchant"), and § 2-302 ("Unconscionable Contract or Clause") and also § 2-719(3) would be likewise dismissed. Yet a consideration of "unconscionability" appears in a bankruptcy proceeding involving determination of a creditor's right to participate in assets of a bankrupt's estate. In re Elkins — Dell Mfg. Co. Inc., 253 F. Supp. 864 (E.D. Pa. 1966). See also C. M. Hewitt, *Good Faith or Unconscionability — Franchisee Remedies for Termination*, 29 BUS. LAW 227 (1973). Whether Mr. Ehrenzweig's rejection of such standards is because of his belief in the impossibility of objectivity expressed by him at 63, 64, 95 and 158 or because the "Justessee" (at 194) founded in "harmony rather than conquest" (at 205) has no place for such concepts, cannot be determined. If he recognizes "the animal's seemingly 'programmed' interplay of aggression and love," (at 205) then it is difficult to understand his rejection of the adversary system. See also Krahmer, *Some Problems of Consumer Class Actions*, 7 U. RICHMOND L. REV. 213 (1972) which indicates the little man is not entirely helpless under the adversary system, though Mr. Ehrenzweig suggests the contrary (at 272), and FED. R. CIV. P. 23. See *Carpenters' Union v. Citizens Committee*, 333 Ill. 225, 164 N.E. 393, 63 A.L.R. 177 (1928); ILL. REV. STAT. ch. 110, § 52.1; but see *Reardon v. Ford Motor Co.*, 7 Ill. App. 3d 338, 287 N.E.2d 519 (1972). Of course, the phrase "kill the umpire" is a figure of speech in the United States, while Henry IV not only stopped at Canossa, but later took Rome in 1084, a lesson which Innocent III, who established the "inquisitorial" system, never forgot. See VIORST at 50, 53. See also note 24 *supra*.

⁴² The judge in the adversary system has a little more supervisory authority over a jury trial than Mr. Ehrenzweig (at 264) indicates, especially in federal courts:

In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *Vicksburg & Etc. R.R. Co. v. Putnam*, 118 U.S. 545, 553 (1886). The court in *People v. Becker*, 340 Ill. 426, 430, 172 N.E. 806 (1930) approved the following instruction:

The jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand; and the jury may also take into consideration the fact, if such is the fact, that he has been corroborated or contradicted by credible evidence or by facts and circumstances in evidence.

See also ILLINOIS PATTERN JURY INSTRUCTIONS 8, 1.01 (2d ed. 1971):

[5] Arguments, statements, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark

While the concept of seisin may have had simple origins,⁴³ tenure was complex.⁴⁴ One man's duties might thus be multiple, diverse, and conflicting, except for the reservation of loyalty to the English king⁴⁵ in the oath of fealty to the lord. The only common duty was submission. But to whom was uncertain. The uncertainty remained even after the Statute of *Quia Emptores* (1290) barred subinfeudation and permitted alienation of land only by substitution.⁴⁶ We are told that feudalism was essentially a contractual relationship:

A Fief was an organically complete brotherhood of associates whose proprietary and personal rights were inextricably blended together. . . . But the earliest feudal communities were neither bound together by mere sentiment nor recruited by a fiction. The tie which united them was Contract, and they obtained new associates by contracting with them.⁴⁷

Yet there appears an antimony among the historians, though it may be due only to our modern concept of contract law:

It will be seen that this was not a communist society, or a 'village community' in the strict sense. But individualism was shackled. The manor consisted of a number of private holders, including the lord, very unequal in wealth and in their relations to one another, but with closely inter-related rights, and all dependent on one another for cooperation on a traditional system. Cash nexus,

See also 9 WIGMORE, EVIDENCE § 2551 at 503 (3rd ed. 1940); ILL. REV. STAT. ch. 110, § 67; ch. 110 A, § 239; FED. R. CIV. P. 51. Mr. Ehrenzweig's description of the evidence decree (at 267) resembles the medieval English medial judgment (HANBURY 88; 2 POLLOCK AND MAITLAND 602, 610), and orders following pre-trial conference. See FED. R. CIV. P. 16; ILL. REV. STAT. ch. 110, § 58.1; ch. 110 A, § 218; Annot., *Remarks or acts of trial judge, criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal*; 62 A.L.R. 2d 166 (1958). See also *Enloe v. Kirkwood*, 120 Ill. App. 2d 117, 256 N.E.2d 459 (1970).

The issue is between a system historically submissive and another historically aggressive, with some similarity in procedure, but with basically divergent tenets whose resolution may well turn upon a psychological evaluation of man's selection, whether autonomous or allonomous, or to what extent a blend of both.

⁴³ See note 15 *supra*.

⁴⁴ HANBURY 30; 1 POLLOCK AND MAITLAND 229 *et seq.*

⁴⁵ HANBURY 33; 1 POLLOCK AND MAITLAND 296, 297, 301.

⁴⁶ HANBURY 55, 57, 66; 1 POLLOCK AND MAITLAND 337. To expect feudal duties of an heir apparent during the life of his predecessor was perhaps too metaphysical for the thirteenth century. Thus the consent of the heir apparent to alienation of land was not required. See D'Arundel's case, Brackton's Notebook, pl. 1054 (1225) and 2 POLLOCK AND MAITLAND 311. The duty of the heir was the duty of his predecessor, who changed such duty from that imposed by the warrant to defend the land himself to that of the warrant to defend the right of the grantee to the land. As to the former duty, see 1 POLLOCK AND MAITLAND 306. Yet the interest of the English lord was in primogeniture; 2 POLLOCK AND MAITLAND 278. Compare the policy of the Chinese emperor Wu Ti of the Han dynasty in 128 B.C. permitting a vassal to transmit a half of his fief to his eldest son and to divide the other half equally among his younger sons, and so to break up the estates and power of great vassals without force; G. N. STEIGER, A HISTORY OF THE FAR EAST 84, 85 (1936).

⁴⁷ MAINE 214. See also 1 POLLOCK AND MAITLAND 301, 418, 419.

freedom of contract, fluidity of labour were the exception and not the rule.⁴⁸

In the following quotation, note again the word "nexus":

Whatever may be the etymology of *felony* . . . there can be no doubt that the word came to us from France, and that in France and elsewhere it covered only the specifically feudal crimes, those crimes which were breaches of the feudal nexus and which would work a forfeiture or escheat of the fief, or, as the case might be, of the lordship; for the lord might be guilty of felony against his man just as the man might be guilty of felony against his lord.⁴⁹

Look now at the Communist Manifesto of 1848:

The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his 'natural superiors,' and has left remaining no other nexus between man and man than naked self-interest, than callous 'cash payment.'⁵⁰

Mr. Brinton emphasizes status, not contract, in summarizing medieval society:

The Church took care of men's souls, the feudal nobility preserved civil order, the peasants and craftsmen worked unenviably and steadily at useful tasks; a beautifully ordered nexus of rights and duties bound each man to each, from swineherd to emperor and pope; each man knew his place, was secure in his place, happy in it; this was a society of *status* instead of the mad competitions and uncertainties of modern society, but a society in which the Christian concept of the equality of all men before God had, so to speak, put a firm floor under the humblest and poorest of men; in short, an orderly, stratified society of morally free men.⁵¹

If the impersonal nexus of a competitive society is decried in the Communist Manifesto, and feudalism is, contrary to English records, idealized and made definitive by Mr. Brinton, Mr. Ehrenzweig sees the present economic system as a throwback to feudalism:

If the medieval laborer saw liberation in an exchange of his feudal status for a right freely to contract for his wages, his descendants have found themselves threatened by contracts of adhesion in their status as a workman, tenant, or insured.⁵²

Yet Walden Two may show an adoption of manorial management to a form of socialism founded on contract.⁵³ In feudal society serfs or villeins may have been bound to the land,⁵⁴ but if a Walden-like society were as universal as was feudalism, the right to leave would be an empty one.

According to Mr. Knight, the payment by some for the protection of a lord in feudal times was work:

A *virgater* (that is, an ordinary half-free villager) usually man-

⁴⁸ 1 TREVELYAN 204.

⁴⁹ 1 POLLOCK AND MAITLAND 303-04.

⁵⁰ VIORST 230-31.

⁵¹ IDEAS AND MEN 201.

⁵² EHRENZWEIG 161.

⁵³ See note 22 *supra*.

⁵⁴ 1 POLLOCK AND MAITLAND 412 *et seq.*

aged to get the traditional amount of meadow and of pasturage rights for his two oxen and eight sheep The labor of farming the domain — strips, closes, and meadow — was done by the villagers. Each unfree virgater had to furnish the lord a certain number of days' labor per week. The commonest figure seems to have been three, though it was sometimes two, four, or even five days. These particular dues were called 'week work'. . . . In England, and quite generally in France, the virgate could not be divided in respect to its responsibility to the lord; but the families of course increased nevertheless. One son would be integrally responsible for the dues in produce, labor, and money; but two or three others, with their families, often got their living from the holding. It must be remembered that divisions like the hide and virgate are artificially standardized in manorial records. Some virgates were much larger than thirty acres, and some hides which were taxed as one hundred and twenty acres are known to have contained as high as one hundred and eighty. Productive capacity as well as acreage was taken into consideration in arranging local dues and national taxes.

In addition to week work, special services known as 'boon works' or 'boon days' were required at times like the harvesting season.⁵⁵

Compare the work credits of Walden Two:

Labor-credits are a sort of money. But they're not coins or bills — just entries in a ledger. All goods and services are free, as you saw in the dining room this evening. Each of us pays for what he uses with twelve hundred labor-credits each year — say, four credits for each workday. We change the value according to the needs of the community. At two hours of work per credit — an eight hour day — we could operate at a handsome profit. We're satisfied to keep just a shade beyond breaking even. The profit system is bad even when the worker gets the profits, because the strain of overwork isn't relieved by even a large reward. All we ask is to make expenses, with a slight margin of safety; we adjust the value of the labor-credit accordingly. At present it's about one hour of work per credit A credit system also makes it possible to evaluate a job in terms of the willingness of the members to undertake it. . . . The sewer man works a little over two hours a day Once in a while we manipulate a preference if some job seems to be avoided without cause We don't specialize in anything. We have time for everything. . . . Leisure. Opportunity. Appreciation. . . . Nowadays I can do more creative thinking or writing in a couple of hours than I used to do in a whole day, when I forced myself to keep going in spite of a distracting weariness.⁵⁶

One of the maxims attributed to the Navaho tribe seems to explain the levelling leavening of Mr. Skinner's adaptation of feudalism:

Formula 3: Avoid excesses. Very few activities are wrong in and of themselves, but excess in the practice of any is dangerous.

⁵⁵ M. M. KNIGHT, *ECONOMIC HISTORY OF EUROPE TO THE END OF THE MIDDLE AGES* 166, 169, 170 (Riverside Press ed. 1926) [hereinafter cited as KNIGHT]. See also 1 POLLOCK AND MAITLAND 364, 624.

⁵⁶ WALDEN TWO 51-52, 92, 178.

This is in marked contrast to the puritanical concept of immorality. To Navahos such things as sex and gambling are not 'wrong' at all but will bring trouble if indulged in 'too much.' Even such everyday tasks as weaving must be done only in moderation. Many women will not weave more than about two hours at a stretch; in the old days unmarried girls were not allowed to weave for fear they would overdo, and there is a folk rite for curing the results of excess in this activity. Closely related is the fear of completely finishing anything: as a 'spirit outlet,' the basketmaker leaves an opening in the design; the weaver leaves a small slit between the threads; the Navaho who copies a sandpainting for a white man always leaves out something, however trivial; the Singer never tells his pupil quite all the details of the ceremony lest he 'go dry,' Singers also systematically leave out transitions in relating myths.

This fear of excess is reflected also in various characteristic attitudes toward individuals. There is, for example, a folk saying: 'If a child gets too smart, it will die young.' The distrust of the very wealthy and very powerful and the sanctions and economic practices which tend to keep men at the level of their fellows have already been mentioned.⁵⁷

The open-endedness of the Navaho society may be compared to the prevalence of experiment in Walden Two.⁵⁸ Yet note the possible tendency toward satisfaction in ritualism if spontaneity is removed. Thus experimentalism might become so steeped in method as to be removed from any objective —

⁵⁷ C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 225-26 (Cambridge ed. 1948). See WALDEN TWO at 75: "There's never any *labor* to spare, because it must be kept at a minimum for psychological reasons." See also WALDEN TWO 178 in note 56 *supra* and at 127 thereof where Mr. Skinner says that in Walden Two, "gifted children aren't held back by organized mediocrity." But the determination of the identity of a gifted child is apparently by teachers at the direction of a Manager under policies determined by the Board of Planners. Hence, the possibility of ritualism remains, even though Mr. Skinner acclaims anonymity of Planners and Managers, and rejects heroes and history. For Mr. Skinner does postulate the parameters of the future within a doctrine of universal experimentation, which could become as mechanical as the examinations for admission to civil office in Ming and Manchu China. G. N. STEIGER, *A HISTORY OF THE FAR EAST* 425, 426 (1936). Not all psychologists are in accord as to testing criteria. See N. L. MUNN, L. D. FERNALD, JR., P. S. FERNALD, *INTRODUCTION TO PSYCHOLOGY* 103-04, 309, 359, 402, 421-65, 657 (3d ed. 1972). Copyright © 1972. Reprinted by permission of Houghton Mifflin Co. [hereinafter cited as MUNN]; R. Noffke, *The Validity of Employment Testing*, 1972 U. ILL. L.F. 388; R. A. Bohrer, *Educational Testing: A Challenge for the Courts*, 1973 U. ILL. L.F. 375. See also A. J. Snider, *Does IQ Test Measure Up?*, Chicago Daily News 13 (Tuesday, December 4, 1973), quoting Dr. Richard Levins, a biologist at the University of Chicago: "IQ is not a clear-cut trait. It is something that develops during the course of a life experience through all kinds of complicated interactions we know little about." See also MUNN 103-04 on testing identical twins reared separately:

When these twins were brought together and tested at the age of twenty-three, the difference in intelligence quotient (I.Q.) was only two points. It should be noted, however, that they had comparable schooling. Other pairs of twins, some of whom differed more widely in educational opportunity, showed differences in I.Q. ranging up to twenty-four points. . . . This finding suggests that even with the same heredity, differences in educational opportunity produce significant differences in intelligence.

At what point and how are gifted children to be identified?

⁵⁸ See note 9 *supra*.

including survival.⁵⁹ For man manipulated by controlled environment may not simply evolve at an accelerated rate, but instead may be so altered as to, in effect, become extinct. Of course, the possibility of this form of extinction is present with or without *Walden Two*.

The relative lack of specialization postulated by Mr. Skinner⁶⁰ in *Walden Two* was also apparent in the operation and management of the feudal manor. Consider the following description of feudal control:

If a lord had several manors, or a single large manor, the successful management of his estate was often a complicated business. The lord of a small manor might direct its operation himself, but the lord usually appointed a bailiff to transact the business for him. The lord of several manors would have a bailiff resident on each manor and also a steward to oversee the work of the bailiffs. The steward traveled about from manor to manor, coming to each manor perhaps two or three times a year. It was his function to be well informed on the condition of the lands, houses, tenants, stock, and tools, to direct the general agricultural policies of the estate — deciding, for example, what fields should be cultivated and what crops should be planted in a given year — to keep the manor stocked with necessary supplies, to see that the bailiff performed his duties properly in relation both to the lord and to the tenants, to advise his lord legally, and to conduct the manorial courts. The bailiff looked after the details of manorial administration. He saw that the right crops were planted at the right time and that the plowing, reaping, and other services were performed well by those servants or tenants whose duty it was to do them. On most manors there was a second official called the reeve, who was one of the villeins and was sometimes elected by them. He acted as the foreman of the villagers, it being his principle duty to see that the tenants contributed the amount of services due. The lord kept himself informed through the oral reports of the steward and the bailiffs and by the written accounts of various kinds which these officials were required to render.⁶¹

⁵⁹ See notes 7, 8, 57 *supra* and note 89 *infra*. See also WALDEN TWO at 176: "To go to all the trouble of running controls would be to make a fetish of scientific method." Danger recognized, but not averted.

⁶⁰ See note 56 *supra*.

⁶¹ W. E. LUNT, HISTORY OF ENGLAND 175 (4th ed. 1957). See also RADIN 41, 82, 166, 174, 175, 465; 1 POLLOCK AND MAITLAND 374, 557, 592, 610, 647, 656, 658; 2 POLLOCK AND MAITLAND 221; PLUCKNETT 23-33, 83-85, 95-99, 216, 233, 365, 448, 449, 741; 1 TREVELYAN 172, 200-02; KNIGHT 179; F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 47, 49 (Cambridge ed. 1908); notes 18, 19 *supra*. Note Mr. Knight's account of the court or courts of the manor at 178-79:

Lordly and peasant government coalesced in the public meeting or court. Some writers have tried to distinguish formally between three kinds of manorial courts: the court baron of the lord in his role of feudal landholder, the old customary court of peasants only, and the court leet (German *Leute* = people) of Norman manors and English parishes. To these authorities, the manor court was a court baron when it dealt with inheritance, transfer or grant of lands, fines for breach of customs, election of officers, etc. When it dealt with purely peasant matters, it was a customary court. It was a court leet when it took up such matters as petty crimes and offenses, breaches of contract and assize

Now, compare the above described steward to the Board of Planners in Walden Two, the bailiffs to the Managers, and the reeve to the Behavioral and Cultural Managers:

'Our only government is a Board of Planners. . . . There are six Planners, usually three men and three women. . . . They may serve for ten years, but no longer. Three of us who've been on the Board since the beginning retire this year. The Planners are charged with the success of the community. They make policies, review the work of the Managers, keep an eye on the state of the nation in general. They also have certain judicial functions. They're allowed six hundred credits a year for their services, which leaves two credits still due each day. At least one must be worked out in straight physical labor. . . . The Board selects a replacement from a pair of names supplied by the managers. . . . There are Managers of Food, Health, Play, Arts, Dentistry, Dairy, various industries, Supply, Labor, Nursery School, Advanced Education, and dozens of others. They requisition labor according to their needs, and their job is the managerial function which survives after they've assigned as much as possible to others You work up to be a Manager — through intermediate positions which carry a good deal of responsibility and provide the necessary apprenticeship. . . . All professional training is paid for by the community and is looked upon as part of our common capital, exactly like any other tool' 'Then you distinguish only Planners, Managers, and Workers. . . .' 'And Scientists. The community supports a certain amount of research. Experiments are in progress in plant and animal breeding, the control of infant behavior, educational processes of several sorts, and the use of some of our raw materials. Scientists receive the same labor-credits as Managers — two or three per day depending upon their work Some of us would be smart enough to get along without doing physical work, but we're also smart enough to know that in the long run it would mean trouble. A leisure class would grow like a cancer until the

(that is, established prices, quantity or quality of bread, ale, etc.) or the regulation of frankpledge groups. These compulsory groups of villagers, all members of which were responsible for the conduct of each, were an institution of the village as a part of the State and not manorial.

In practice there was usually but a single court, which met periodically to transact whatever business required attention. It looked after fines, heriots, reliefs, regrants, the appointment of village officers — the same kind of public matters came up in our town meetings in early New England. The lord or his representative presided Many manors were practically administered by reeves chosen by the manorial courts from among the tenants. Often there was also a bailiff or lord's overseer, but on a small manor the two offices were sometimes combined in the same man The privilege of levying and collecting certain fines was called the 'right of justice,' and was simply a lucrative part of the domain farm. Both free and half-free tenants were summoned as jurors (French, *juré* = one sworn).

See notes 16, 17, 18, 19 and 28 *supra* and main text immediately following note 28, *Compare*, WALDEN TWO 265:

How is the people's will ascertained? In an election. But what a travesty! In a small committee meeting, or even a town hall, I can see some point in voting, especially on a yes-or-no question. But fifty million voters choosing a president — that's quite another thing.

See quotation of Madison from THE FEDERALIST in main text pertaining to note 148 *infra*.

strain upon the rest of the community became intolerable. The [Dairy] Manager was unfamiliar with general principles. He was dealing with cows and milk and fodder and manure. A cream separator did not save labor or time; it got cream out of whole milk. . . . 'As to disagreement, anyone may examine the evidence upon which a rule was introduced into the Code. He may argue against its inclusion and may present his own evidence. If the Managers refuse to change the rule, he may appeal to the Planners. But in no case must he argue about the code with the members at large. . . . You can't propagandize and experiment at the same time. . . . Happiness is one of our indicators, and we couldn't evaluate an experimental culture if the indicator is loaded with propaganda. . . . A Manager must make a job desirable. He has no slave labor at his command, for our members choose their own work. . . . We don't need laws and a police force to compel a pilot to pay attention to a defective engine. Nor do we need laws to compel our Dairy Manager to pay attention to an epidemic among his cows. Similarly, our Behavioral and Cultural Managers need not be compelled to consider grievances.' . . .

'A group of despotic planners might be willing to sacrifice the community . . . They wouldn't necessarily suffer if it failed. They could simply abscond with the funds.'

'That would be a catastrophe . . . Your hypothetical case strikes me as implausible, that's all I can say.'⁶²

The development of a leisure class did occur in England during the thirteenth century, and other developments coincided:

The accumulated wealth of the feudal classes and their call for new luxuries caused the rise of the English towns, and the new middle classes engaged in manufacture, trade and overseas commerce.⁶³

To Mr. Skinner, commerce does not involve mutual advantage.

His objective is self-sufficiency and, to repeat, survival:

An agent of the community kept in touch with the agriculture of the county and frequently found a farmer with a crop which he was not able to harvest. The community would then make a deal to harvest on shares. A fairly stiff bargain could be driven, since the farmer would otherwise lose the crop. . . . We have no imperialist policy — no designs on the possession of others — no interest in foreign trade except to encourage happiness and self-sufficiency. [In speaking of more Walden communities] A planning committee has been suggested to guide us in choosing industries so that we can exchange goods. . . . Walden Six is only seventy miles away, but the other Waldens are too far apart to make barter worth while. . . . If we buy up half the farms which do business in a particular town, we control the town. The feed dealers, hardware stores, and farm machinery salesmen depend on us. . . . Then we can make the area very uncomfortable for non-cooperative landowners, because they have lost their channels of supply and distribution.⁶⁴

One may wonder if any farmers' marketing cooperatives would

⁶² WALDEN TWO 54-57, 78, 164, 210, 233, 269, 271.

⁶³ 1 TREVELYAN 199; see also 198.

⁶⁴ WALDEN TWO 77, 203, 223, 224, 230.

greet the Messianic coming of Mr. Skinner and his numerous Waldens with hosannas or with howls.⁶⁵ Mr. Skinner's opinion that trade has no mutual advantage seems to be shared by Mr. Spengler:

Peasantry, *per se*, does not presuppose any basis but itself. It is, so to say, race-in-itself, plantlike and historyless, producing and using wholly for itself, with an outlook on the world that sweepingly regards every other economic existence as incidental and contemptible. To this *producing* kind of economy there is presently opposed an *acquisitive* kind, which makes use of the former as an object — as a source of nourishment, tribute, or plunder: Politics and trade are in their beginnings quite inseparable, both being masterful, personal, warlike, both with a hunger for power and booty that produces quite another outlook upon the world — an outlook not from an angle into it, but from above down on its tempting disorder, an outlook which is pretty candidly expressed in the choice of the lion and the bear, the hawk and the falcon, as armorial badges. Primitive war is always also booty-war, and primitive trade intimately related to plunder and piracy. The Icelandic sagas narrate how, often, the Vikings would agree with a town population for a market-peace of a fortnight, after which weapons were drawn and booty-making started.⁶⁶

Yet Mr. Skinner has said that anger, fear and rage are wasteful and dangerous,⁶⁷ has disapproved of any competitive sports except tennis and chess,⁶⁸ has defined anger as a part of human repertoire or a response useful in obtaining reinforcement in a competitive world,⁶⁹ has proclaimed that under group control, "Selfish behavior is restrained, and altruism encouraged," and that "Fortunately, the group seldom acts efficiently enough to press its advantage to the limit, and its full power is probably never felt."⁷⁰

Perhaps no member of Walden will draw a weapon, but their form of trade with those not of Walden is indeed related to plunder and piracy. The altruism of a group engaged in this kind of trade is not apparent.

In thirteenth century England, the institution of marriage was subject to the lord's rights of wardship and marriage. In the case of a minor heir of a tenant in chivalry (also known as

⁶⁵ 7 U.S.C. § 608(b); 15 U.S.C. § 17; *Phez Co. v. Salem Fruit Union*, 103 Or. 514, 201 P. 222 (1921); *Spencer Co-operative Live Stock Ass'n v. Schultz*, 209 Wis. 344, 245 N.W. 99 (1932); *Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins*, 162 Minn. 471, 203 N.W. 420 (1925); see Illinois Agricultural Cooperative Act, especially ILL. REV. STAT. ch. 32, §§ 443, 458, 463, 467, 468 (1972). But Mr. Skinner presupposes some community of interest between the Waldens and other cooperatives, WALDEN Two 198.

⁶⁶ 2 O. SPENGLER, *THE DECLINE OF THE WEST* 474 (C. F. Atkinson transl. 1939).

⁶⁷ WALDEN Two 102.

⁶⁸ SCIENCE AND HUMAN BEHAVIOR 127, 340, 374; WALDEN Two 169, 237.

⁶⁹ SCIENCE AND HUMAN BEHAVIOR 162, 163.

⁷⁰ *Id.* at 327, 312.

knight's service or military serjeantry), the rights of wardship and marriage entitled the lord to the custody of the heir and his lands and to dispose of the heir in marriage. The lord's permission was also required for marriage of the villein's daughter or even his son.⁷¹ If the comparison is continued, there may be some rough analogy between these feudal rights and Mr. Skinner's statement that, "The weakening of the family structure will make experimental breeding possible."⁷²

While in medieval England even a villein's land holding was subject to inheritance,⁷³ in Russia, after Alexander II emancipated the serfs in 1861, land was not inherited by peasants:

As a rule the land was not given outright to individual peasants but was transferred to the village communes whose members were to receive equal allotments along with the right of periodical redistribution. In pursuing this course the sponsors of the reform were guided partly by interests of fiscal policy (the commune was made responsible for the payment of its individual members' taxes and redemption installments), and partly by a desire to prevent loss of land by the peasants and the formation of a rural proletariat.⁷⁴

Thus, for all the lord's power, the English feudal system had within it the seeds of property rights correlated with duty; for the degree of representation in local government as reeve or juror afforded to the villein — the harnessing of his aggression to the maintenance of order — crudely at first, began its evolution into a concept of "unalienable rights." But the Russian commune reappeared as the collective farm in Russia before any bourgeois domination and before any machinery enslaved masses of its laborers.⁷⁵

In September, 1958, Mr. Milton Katz was chairman of the United States delegation to a conference on "Socialist Legality" held in Warsaw, Poland. In reporting on the conference Mr. Katz said:

At another point, Professor Ehrlich spoke of the 'concept of legality, indissolubly bound up with the protection of the rights of man. . . .' Mr. Tchikvadze [then Associate Director of the Institute of Law of the Academy of Sciences of the Soviet Union] referred with apparent approval to these observations of Mr. Ehrlich, and on his own account asserted that the 'protection of civic rights and liberties is one of the essential elements of socialist legality.' He argued, however, that the protection of civic rights and liberties was not really a distinct problem from the essential purpose of realizing 'the direction of society by the State,

⁷¹ HANBURY 31, 32; 1 POLLOCK AND MAITLAND 318 *et seq.*, 372; 2 POLLOCK AND MAITLAND 278.

⁷² WALDEN TWO 137.

⁷³ 1 POLLOCK AND MAITLAND 379; 2 POLLOCK AND MAITLAND 278, 427.

⁷⁴ M. KARPOVICH, IMPERIAL RUSSIA 1801-1917 at 37 (Holt ed. 1932).

⁷⁵ J. LAWRENCE, A HISTORY OF RUSSIA 205, (1st. ed. 1960). See note 50 *supra*.

assured by the working class.' In Mr. Tchikvadze's view, under a socialist regime there was a necessary and automatic harmony among the interests of the collectivity and the interests of the individual. In consequence, as he saw it, in order to guarantee the rights of citizens, it sufficed to protect the socialist regime through socialist legality, for 'To assure the protection of the socialist political and social regime signifies at the very same time to guarantee the rights of citizens.'

. . . .

In contemplating the status of the controlling organs of the Communist Party in relation to socialist law and legality, it is possible again to recall a part of the tradition of Roman and Byzantine law. The recollection may bring a wry cast to the mouth. By the third century of the Christian era, the Stoic ideas of the primacy of law, which had been incorporated into Roman doctrine through the work of Cicero and other thinkers during the period of the Roman Republic, had been submerged under imperial absolutism. The Emperor had been proclaimed to be above the law — '*princeps legibus solutus*' — and the doctrine established that 'What is pleasing to the Prince has the force of law, since the people have conferred upon him all their authority and power.' It is not beyond conjecture that this tradition may have contributed to the psychological basis for the contemporary acceptance in Communist Europe of a doctrine that 'What is pleasing to the Communist Party leadership has the force of law' and that the Communist Party leadership is '*legibus solutus*.'⁷⁶

While bookkeeping entries similar to those described by Mr. Skinner were once used in Soviet Russia, there may be some facts from which an inference may be drawn that internal commerce in the Soviet Union is mutually beneficial among the industrial enterprise organizations, retail enterprise organizations, collective farms, and the ultimate consumer whose purchasing power in rubles may be determined by job incentives and his performance, although centrally planned needs prevent any freedom of contract.⁷⁷

⁷⁶ HARVARD LAW RECORD Vol. 27, No. 8 at 4 (Thursday, November 13, 1958).

⁷⁷ D. A. Loeber, *Plan and Contract Performance in Soviet Law*, 1964 U. ILL. L.F. 128, 141. See Z. L. Zile, *Law and the Distribution of Consumer Goods in the Soviet Union*, 1964 U. ILL. L.F. 212, 213 and especially at 215-16: "However, the available evidence does not support a conclusion that speculations about life under communism are actually backed by conscious deeds. Soviet consumers continue buying things and calling them their own." R. DAVID & J. E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 175, 209, 210, 215, 222 (Steven & Sons Ltd. ed. 1968) Copyright © 1968 by Collier MacMillan Ltd. Reprinted by permission of the MacMillan Co. [hereinafter cited as DAVID AND BRIERLEY]. But see J. N. Hazard, *The Soviet Legal Pattern Spreads Abroad*, 1964 U. ILL. L.F. 277 at 288:

Quite a different situation existed in Eastern Europe after the war. Peasants had long owned their own farms in many of the countries concerned. Only a small percentage had tilled land as tenants on great estates. For these tenants nationalization of the great estates was popular, but it would have been another thing to take from well-settled peasant owners of small farms their family plots, as Lenin had done in

Mr. Skinner would deem all of this discussion irrelevant, except perhaps for the principle of necessary and automatic harmony enunciated by Mr. Tchikvadze. History, for Mr. Skinner, is only entertainment, significant in relating the growing weakness of the family. Psychological management is a tool for modeling a culture. History is not. History would prevent the anonymity of the Board of Planners and Managers necessary to the operant-conditioned perpetuation of Walden Two, yet:

A simple historical log of the community is kept by the Legal Manager, but it's not consulted by anyone except Planners and Managers who need information.⁷⁸

While Mr. Skinner says that no one at Walden Two specializes in anything, he requires experts and specialists in its government, because only experts and specialists with a duration of office independent of an electorate can determine and obtain by experimentation the wants of the people.⁷⁹

According to Mr. Skinner, four things are wrong with Russia: a decline in the experimental spirit, excessive propaganda, the use of heroes, and finally the use of power to compel people to behave, rather than the development of a culture in which people behave as they want for their mutual good.⁸⁰ The

his second land decree of February 19, 1918. In consequence, not a single People's Democracy in Europe since the war has followed Lenin's pattern, and even in the Far East the communist-led states of North Vietnam, North Korea and China have refrained from taking title to land. The communist leaders have preferred to disarm peasants politically by other means. This has been done primarily through organization of collective farming associations of various types on land that remains legally the property of the members, although in practice its use is planned by the state.

The more it changes, the more it is the same thing. See notes 56, 61, 62, 73, 74 *supra*.

⁷⁸ WALDEN TWO 235; see also 92, 115, 138, 156, 194, 209, 234, 237; and SCIENCE AND HUMAN BEHAVIOR 409.

⁷⁹ WALDEN TWO 92, 202, 267, 269. See notes 9, 58 *supra*. The comparison of Walden Two to an anthill or beehive (WALDEN TWO 253), may not be entirely inappropriate. At least, as to the beehive, see MUNN 569, 570, 571.

⁸⁰ WALDEN TWO 274-76. See also BEYOND FREEDOM AND DIGNITY 72: Immediately after the revolution the government could argue that if many Russians were uneducated, unproductive, badly behaved, and unhappy, it was because their environment had made them so. The new government would change the environment, making use of Pavlov's work on conditioned reflexes, and all would be well. But by the early thirties the government had had its chance, and many Russians were still not conspicuously better informed, more productive, better behaved, or happier. The official line was then changed, and Pavlov went out of favor. A strongly purposive psychology was substituted: it was up to the Russian citizen to get an education, work productively, behave well, and be happy. The Russian educator was to make sure that he would accept this responsibility, but not by conditioning him. The successes of the Second World War restored confidence in the earlier principle, however; the government had been successful after all. It might not yet be completely effective, but it was moving in the right direction. Pavlov came back into favor.

decline in the experimental spirit might have been predicted.⁸¹ While Mr. Skinner rejects propaganda as an obscurant of the indicator known as happiness, yet Walden Two has a Manager of Public Relations to see that "surrounding areas get a good report of us," Sunday meetings with a lesson as to self-control and certain kinds of articulation, psychologists for those for whom the "Code is too difficult," and Behavioral and Cultural Managers.⁸²

This admittedly brief and incomplete historical sketch and comparison attempts to show that Walden Two is not novel in form, but greatly resembles a medieval manor founded in a contract with reciprocal duties between protector and protected, with an avenue for protest (reeve/manager), and with an absolute residuum of control (lord, steward and bailiff/Board of Planners). The only novelty lies in the manner of control in Walden Two by operant conditioning and treatment alone, for the lord did punish persons who disobeyed him, although his reliance for their continuous conformity was upon incentives or reinforcers of use and enjoyment of land and its produce in varying degree, even by villeins.⁸³ While Mr. Skinner may deny "responsibility" and admit only "responsiveness",⁸⁴ the contract signed by new members is more than a memory aid, and the concept of people behaving for their mutual good expresses a base of responsibility in man.⁸⁵ Mr. Skinner's concept of property is communal, yet almost the individual possession of the villein is permitted.⁸⁶ His regressive aim of manorial self-sufficiency and barter reflect Mr. Spengler's distaste for trade as refined piracy.

The real Walden Two difference from feudalism is the elimi-

⁸¹ See notes 57, 58, 59 *supra* and accompanying text.

⁸² WALDEN TWO 168, 198, 199, 205, 210, 219, 269.

⁸³ See notes 31, 50, 61, 73, 75 *supra* and accompanying text.

⁸⁴ SCIENCE AND HUMAN BEHAVIOR 115, 240, 341, 447. See also BEYOND FREEDOM AND DIGNITY 67-71; WALDEN TWO 88, 167, 174.

⁸⁵ WALDEN TWO 162, 163, 254, 298.

⁸⁶ WALDEN TWO 117. The institution of property is a reinforcer, not a topographical accident of ancient Rome. See BEYOND FREEDOM AND DIGNITY 124 to the contrary. On the concept of territorial and possession among animals, see MUNN 367, 569; also note 148 *infra*, and E. FROMM, THE ANATOMY OF HUMAN DESTRUCTIVENESS 115 (1st ed. 1973). Copyright © 1973 by Eric Fromm. Reprinted by permission of Holt, Rinehart and Winston, Inc. [hereinafter cited as HUMAN DESTRUCTIVENESS]:

The assumption that territorialism is the basis of human aggressiveness is erroneous for still another reason. Defense of territory has the function of *avoiding* the serious fighting that would become necessary if the territory were invaded to such an extent as to generate crowding. Actually the threat behavior in which territorial aggression manifests itself is the instinctively patterned way of upholding spatial equilibrium and peace. The instinctive equipment of the animal has the function that legal arrangements have in man It is also worth keeping in mind that . . . most wars start for the purpose of gaining advantages of various kinds and not in defense against a threat to one's territory — except in the ideology of the war makers.

nation of heroes and punishment, and the substitution of operant conditioning for simulation, aggression and aversive environment in the process of selection and evolution. The avenues to accidental or spontaneous change are deliberately and effectively blocked, and the trial by jury and any other method of harnessing aggression to peace is gone.⁸⁷ Mr. Hanbury has said:

The English habit of mind prefers the fortuitous to the systematic; it prefers to leave problems to be dealt with as they arise; in a word, it prefers judicial precedent to codification, which has seemed indispensable to framers of the legal schemes of most, if not all, European countries. In certain fields of criminal and commercial law, it is true, experience has pointed the way to a codifying Act, but the Act which can cover all the manifold cases which may arise has yet to be devised.⁸⁸

We are losing something of ourselves, for the law of cases is itself an experiment; Mr. Skinner would accelerate the process using operant conditioning for the atrophy of even such law as is in the Code of Walden Two.⁸⁹

BRAVE NEW WORLD⁹⁰ — NO HEROES

Mr. Skinner attributes, at least in part, the beginning of the end of the concepts of spontaneity and free will of man to seventeenth century hydraulically operated automatons known to

⁸⁷ WALDEN TWO 128, 254, 255, 292. See also SCIENCE AND HUMAN BEHAVIOR 256; BEYOND FREEDOM AND DIGNITY 153-55.

⁸⁸ HANBURY 24.

⁸⁹ WALDEN TWO 193-95. Note the resemblance of case law and the "patchwork" of science leading to "complex cases." SCIENCE AND HUMAN BEHAVIOR 204. But see BEYOND FREEDOM AND DIGNITY 194: "If the machines man makes eventually make him wholly expendable, it will be by accident, not design." Compare notes 59 and 87 *supra* and main text referring to them, especially BEYOND FREEDOM AND DIGNITY 155: "It might be said that science maximizes accidents . . . The behavioral scientist does not confine himself to the schedules of reinforcement which happen to occur in nature, he constructs a great variety of schedules, some of which might never arise by accident."

⁹⁰ . . . O brave new world,

That has such people in't

Lines spoken by Miranda, daughter of Prospero, wrongfully deposed Duke of Milan, after Prospero has allowed his usurping brother, Antonio, and the abetting King of Naples, Alonso, to find Alonso's son (Ferdinand) playing chess with Miranda, who becomes the bride of Ferdinand, Prospero forgiving Antonio and Alonso. W. SHAKESPEARE, THE TEMPEST, Act V, Sc. I. On Mr. Skinner's penchant for chess, see note 68 *supra*.

On forgiveness, see:

'Love your enemies' is an example — a psychological invention for easing the lot of an oppressed people. The severest trial of oppression is the constant rage which one suffers at the thought of the oppressor.

What Jesus discovered was how to avoid these inner devastations. His technique was to *practice the opposite emotion*.

WALDEN TWO 105-06.

References to "brave new world": WALDEN TWO 53, 232; E. FROMM, THE SANE SOCIETY 198, 312 (Fawcett Reprint ed. 1955). Copyright © 1955 by Erich Fromm. Reprinted by permission of Holt, Reinhart and Winston, Inc. [hereinafter cited as SANE SOCIETY].

Descartes, who analogized human beings to such automatons.⁹¹ Mr. Farrington tells of "the *Pneumatics* of Hero of Alexandria, a work which dates from the second half of the first century of our era," in which Hero wrote of the works of Strato, head of the Lyceum at Athens from 287 to 269 B.C., who conducted experiments in pneumatics and whose pneumatics were applied in the operation of images of ancient deities. "Strato had proudly averred that he did not need the help of the gods to make a world. The gods did not disdain the help of Strato to run this one."⁹² In 280 B.C. Pyrrhus of Epirus defeated the Romans at Heracleia, and according to Plutarch:

The armies separated; and, it is said, Pyrrhus replied to one that gave him joy of his victory that one other such would utterly undo him.⁹³

The era of Strato is not an era of Athenian splendor. Hero wrote at the time of Roman Imperial domination of Alexandria, not at all as a hero, but as a cataloguer of experimentation and its uses. According to Mr. Farrington, Cicero said "that Strato 'abandoned ethics, which is the most necessary part of philosophy, and devoted himself to the investigation of nature'."⁹⁴ Descartes was a subject of the Sun King, Louis XIV.

Erasistratus of Chios, a younger contemporary of Strato, also used an experimental technique, but concluded that arteries are full of air which escapes when the artery is severed, causing a vacuum and so blood followed the escaping air. Farrington says:

This fatally ingenious explanation proved an obstacle for some time to a true view of the function of the arterial system. Four hundred and fifty years later we find Galen disproving the Erasistratan view by careful experiments in vivisection. Nearly fourteen hundred years after Galen Vesalius repeated these experiments before his classes in Padua.⁹⁵

William Harvey, who had been a student at Padua, announced his discovery of the circulation of the blood and the action of the heart as pump to the Royal College of Physicians in London in 1616. Yet Herophilus in about 300 B.C. wrote a treatise *On Anatomy*, another, *Of the Eyes*, and a handbook for midwives, and he knew that the function of both veins and arteries was to carry blood.

⁹¹ SCIENCE AND HUMAN BEHAVIOR 46, 47; BEYOND FREEDOM AND DIGNITY 14.

⁹² B. FARRINGTON, GREEK SCIENCE 169-77, 199, 200 (Pelican Books 1961) [hereinafter cited as FARRINGTON].

⁹³ PLUTARCH, THE LIVES OF THE NOBLE GREEK AND ROMANS 483 (Modern Library ed.)

⁹⁴ FARRINGTON 171. See also note 11 *supra* on Sextus Empiricus, a contemporary of Hero of Alexandria.

⁹⁵ FARRINGTON 208. As to material following, see FARRINGTON at 205-09 and H. BOYNTON, THE BEGINNINGS OF MODERN SCIENCE 489 *et seq.* (W. J. Black ed. 1948).

While Mr. Skinner abjures becoming "enamored of instruments of research,"⁹⁶ yet the infallibility of "a constantly experimental attitude"⁹⁷ may not be so constant if that historical log kept by the Legal Manager is consulted by Planners and Managers for information.⁹⁸ If Erasistratus, an experimenter, was influenced to an incorrect conclusion by Strato, another experimenter, it may be possible that Descartes' analogy has led to a premature report of the death of spontaneity and free will, in spite of evidence of predictability of man's omission or action in any controlled environment. There can be no doubt that Mr. Pavlov could elicit quantities of saliva secretion varying predictably and independently of any unconditioned stimulus, so that the dog is inferentially responsive, and not responsible. But Mr. Pavlov was originally interested in the process of digestion, and sought to explain the secretion of saliva in the mouth in the absence of food.⁹⁹ Mr. Skinner has said:

When you run onto something interesting, drop everything else and study it.¹⁰⁰

Sir Alexander Fleming's discovery of penicillin was occasioned by his observing the dissolution of staphylococci on a growth of mold during a visit with a colleague.¹⁰¹ The resolution of the seeming inconsistency between Mr. Skinner's denial of spontaneity, free will and responsibility, and the fact of their existence in certain persons may be found in the relative infrequency of genius and his confidence in the process of operant conditioning or behavioral engineering in increasing the frequency of discoveries or inventions necessary to man's survival. In short, he sees environmental danger not being confronted by man in a state of illusory freedom following his own self-interest or being manipulated into following the interest of a particular individual or group. Mr. Skinner's operant conditioning is not only proposed as an inoculation against such manipulation, but also as the means of developing every man into an engineered near-genius, operating in cooperative small groups, with genetic engineering as an aid to the self-perpetuation of each such group, thus to become itself an organism. Mr. Skinner is impatient with the patchwork of law and government and economics, and prefers the patchwork of science to insure that no man will act or omit to act except in the interest of the community of men.¹⁰²

⁹⁶ SCIENCE AND HUMAN BEHAVIOR 12.

⁹⁷ Note 9 *supra*.

⁹⁸ Notes 57 and 78 *supra* and note 125 *infra*.

⁹⁹ SCIENCE AND HUMAN BEHAVIOR 52, 53, 54; MUNN 204.

¹⁰⁰ MUNN 49.

¹⁰¹ *Id.* at 310, 311.

¹⁰² WALDEN TWO 137, 144, 256, 257, 262-76, 290-93, 296-99; SCIENCE AND HUMAN BEHAVIOR 204, 322. See also note 8 *supra* and note 135 *infra* on immunization, and WALDEN TWO at 107.

Thus, as he says:

Eventually we shall have no use for Planners at all. The Managers will suffice.¹⁰³

Further, says Mr. Skinner of science:

It is a search for order, for uniformities, for lawful relations among the events of nature. It begins, as we all begin, by observing single episodes, but it quickly passes on to the general rule, to scientific law. . . . In a later stage science advances from the collection of rules or laws to larger systematic arrangements. . . . When we have discovered the laws which govern a part of the world about us, and when we have organized these laws into a system, we are then ready to deal effectively with that part of the world. By predicting the occurrence of an event we are able to prepare for it. By arranging conditions in ways specified by the laws of a system, we not only predict, we control: we 'cause' an event to occur or to assume certain characteristics.¹⁰⁴

In spite of the obvious similarity to the case law of the adversary court system,¹⁰⁵ Mr. Skinner rejects any form of aggression, including argument,¹⁰⁶ and postulates:

A law is thus a *statement of a contingency of reinforcement maintained by a governmental agency*. The contingency may have prevailed as a controlling practice prior to its codification as a law, or it may represent a new practice which goes into effect with the passage of the law . . . How codes of law affect governmental agents is the principal subject of jurisprudence. The behavioral processes are complex, although presumably not novel. In order to maintain or 'enforce' contingencies of governmental control, an agency must establish the fact that an individual has behaved illegally and must interpret a code to determine the punishment . . . The advantages gained when the individual is 'not under man but under law' have usually been obvious, and the great codifiers of law occupy places of honor in the history of civilization. Codification does not, however, change the essential nature of governmental action nor remedy all its defects. . . . In the Divine Law of the Middle Ages, 'legal' and 'illegal' were held to be immutable classifications laid down by absolute decree. . . . But the inevitable consequence was that any analysis of human behavior had to adjust itself to a particular set of established practices.¹⁰⁷

First, according to Thomas Aquinas, Mr. Skinner is incorrect in his statement as to his concept of medieval law:

Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Proverbs viii. 15: 'By Me kings reign, and lawgivers decree just things.' Now laws are said to be just both from the end (when, namely, they are ordained to the common good), from their author (that is to say,

¹⁰³ WALDEN TWO 272. See also note 89 *supra*.

¹⁰⁴ SCIENCE AND HUMAN BEHAVIOR 13, 14.

¹⁰⁵ See note 42 *supra* and main text referring to and preceding it and note 88 *supra*.

¹⁰⁶ See note 21 *supra*.

¹⁰⁷ SCIENCE AND HUMAN BEHAVIOR 339-41.

when the law that is made does not exceed the power of the law-giver), and from their form (when, namely, burdens are laid on the subjects according to an equality of proportion and with a view to the common good). For, since one man is a part of the community, each man, in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole. Wherefore nature inflicts a loss on the part in order to save the whole, so that on this account such laws as these which impose proportionate burdens are just and binding in conscience, and are legal laws.

On the other hand, laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above: — either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vain-glory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws, because, as Augustine says, 'A law that is not just, seems to be no law at all.' Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matthew v. 40, 41: 'If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two.'

Secondly, laws may be unjust through being opposed to the divine good. Such are the laws of tyrants inducing to idolatry or to anything else contrary to the divine law. Laws of this kind must in no way be observed because, as stated in Acts v. 29, 'we ought to obey God rather than men.'¹⁰⁸

The historical basis for the division between legislation (*la loi*) and this scholarly law (*droit savant*), which became Natural Law, is that the work of the universities was only persuasive, while in England the case law of the adversary system developed in a rational, yet pragmatic, method capable of novel experimentation in the adjudication of each dispute. In other words, the deprivation caused by an environment of bloody strife shaped persons toward seeing the rational discriminative stimuli of litigation and adjudication with the predictable novel initial response and later chained responses of a rational system of case law, some transformation of strife, and more productivity. There is no great dichotomy between the reason of case law and the operant conditioning of Mr. Skinner.¹⁰⁹ The gain of battle

¹⁰⁸ T. AQUINAS, TREATISE ON LAW, Question 96, Fourth Article.

¹⁰⁹ DAVID AND BRIERLEY 5, 25, 30, 34, 37, 38, 323, 324, 328, 329, and finally at 333:

It is of course true that English law was fashioned and its legal rules enunciated only as a function of the disputes with which the royal courts chanced to deal. But when the royal courts adjudicated they were not dominated by an empiricism that led them to render a simple equitable solution in each case. While constructing the Common Law system it was always necessary to seek the solution most in agreement with

did not equal the more consistent gain of litigation and adjudication, and man made the novel response part of his repertoire.

The vacuity of the Code of Law postulated by Mr. Skinner is not only founded in his denial that man is responsible, but also in positivism, perhaps deriving from the idea of a sovereign authority, whether monarchy, dictator, oligarchy, or legislature, and best described by the phrase, "the law is the law." A leading exponent of such positivism was Mr. Hans Kelsen:

However, we are not interested here in the question of what specific norm lies at the basis of such and such a system of morality. It is essential only that the various norms of any such system are implicated by the basic norm as the particular is implied by the general, and that, therefore, all the particular norms of such a system are obtainable by means of an intellectual operation, viz., by the inference from the general to the particular. Such a system is of a static nature. . . . The basic norm merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities. The norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm. . . . There is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. . . . Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to

reason, and a deciding factor in the discovery of this solution was the desire to achieve a consistency in legal judgments. This, necessarily, supposed a recourse to logic.

See also 1 BLACKSTONE, COMMENTARIES (J. W. Ehrlich ed. 1959) 26-27:

These judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law Yet this rule admits of exception, where the former determination is most evidently contrary to reason. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. If it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.

Our lawyers tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. Upon the whole, however, we may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law.'

See SCIENCE AND HUMAN BEHAVIOR: on chaining, 224; on deprivation, 68, 146, 147; on discriminative stimulus, 107; on shaping, 91; on "self-control" 230; on "unitary conscience," 287. The use of the words "rational" and "responses" in the same sentence at this point in the main text is deliberate. See note 102 *supra* and main text referring to it. English and American case law do not coincide with Mr. Skinner's concept of a code, but are experimental. See also note 24 *supra*.

be the expression of the 'will of nature' or of 'pure reason.'¹¹⁰
In this light, one can understand, though perhaps not agree with, the lament of Mr. Ehrenzweig:

And brightly, and oh, so sadly, beyond Plato and Freud, a new 'Humanistic' science of 'Self-actualization' has set out to prepare us for higher insights 'transpersonal, transhuman, centered in the cosmos rather than in human needs and interests.' It is that 'science' that as a latter-day religion is to prepare man's 'higher nature . . . for being fair and just,' — only to close a cycle that opened with Heraclitus' divine cosmos 3000 years ago. . . .^[111]

'Positivists' and 'naturalists' agree with anthropologists and sociologists that there are very few acts or demands, if any, that can be called 'just' or 'unjust' in the abstract . . . And the same conclusion must be accepted by those of his [Jung's] 'humanistic' disciples to whom 'good' and 'evil' (always in quotes) will prevail in a brave new world which will be created by 'self-actualization.'¹¹²

The realists tell us that law, like the rules of chess, is only a tool for the prediction of human events, and hence seem in some agreement with Mr. Skinner, who additionally wants to fill this Cartesian (hopefully not Erasistratian) vacuum with operant conditioning.¹¹³

There is something about the admission of Mr. Skinner that his operant conditioning is the sole path to human survival that recalls other names. In reviewing *A History of The Inquisition* by Henry Charles Lea in 1888, Lord Acton said:

He conceives that civilised Europe owes its preservation to the radiant centre of religious power at Rome, and is grateful to Innocent III for the vigour with which he recognized that force was the only cure for the pestiferous opinions of misguided zealots. . . .

From a distinction which he draws between despotism and its abuse, and from a phrase, disparaging to elections, about rivers that cannot rise above the level of their source, it would appear that Mr. Lea is not under compulsion to that rigid liberalism which, by repressing the time-test and applying the main rules of morality all round, converts history into a frightful monument of sin. Yet, in the wake of passages which push the praises of authority to the verge of irony, dire denunciations follow. . . .

And we ask how it came about that, as the rigour of official zeal

¹¹⁰ H. Kelsen, *GENERAL THEORY OF LAW AND STATE* X, A, b, c, B, a, (A. Wedberg transl. 1945).

¹¹¹ EHRENZWEIG 281, quoting A. H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* iii, iv, 122 (1968) [hereinafter cited as MASLOW]. See also, MUNN at 359, 402, 657.

¹¹² EHRENZWEIG 150, again paraphrasing MASLOW 83, 149, 206, 220, 222, *passim*. In addition to the positivism of Mr. Kelsen, consider the postulate that law, like the rules of the game of chess, is no more than a tool to predict the course of human events. A. ROSS, *ON LAW AND JUSTICE* ch. 1, § 3 (1958). On Mr. Skinner and chess, see note 68 *supra*. On a brave new world and chess, see notes 90 *supra* and 120 *infra*. Also on Ross, EHRENZWEIG 58, 59.

¹¹³ See notes 91, 95 and 112 *supra*.

relaxed, and there was no compulsion, the fallen cause was taken up by the Council of Constance, the University of Paris, the States-General, the House of Commons, and the first reformers; that Ximenes outdid the early Dominicans, while Vives was teaching toleration; that Fisher, with his friend's handy book of revolutionary liberalism in his pocket, declared that violence is the best argument with Protestants; that Luther, excommunicated for condemning persecution, became a persecutor? Force of habit will not help us, nor love and fear of authority, nor the unperceived absorption of circumambient fumes. . . . There is a demonstration of progress in looking back without looking up, in finding that the old world was wrong in the grain, that the kosmos which is inexorable to folly is indifferent to sin. Man is not an abstraction, but a manufactured product of the society with which he stands or falls, which is answerable for crimes that are the shadow and the echo of its own nobler vices, and has no right to hang the rogue it rears. Before you lash the detected class, mulct the undetected. Crime without a culprit, the unavenged victim who perishes by no man's fault, law without responsibility, the virtuous agent of a vicious cause — all these are the signs and pennons of a philosophy not recent, but rather inarticulate still and inchoate. . . .¹¹⁴

Lord Acton also wrote the famous words:

Power tends to corrupt; absolute power corrupts absolutely.¹¹⁵

One may infer from Lord Acton's remarks that Mr. Lea was a precursor not only of Mr. Skinner, but of Mr. Kelsen, Mr. Ross, and perhaps even of Mr. Ehrenzweig as well. Lord Acton also notes the "example of the abstract intolerance of the reformers" in Calvin's part in the condemnation and execution of Servetus.¹¹⁶ Calvin wrote of liberty and revolution as being delimited by the true faith:

. . . I shall by no means deny, that either aristocracy, or a mixture of aristocracy and democracy, far excels all others; . . . because it very rarely happens that kings regulate themselves so that their will is never at variance with justice and rectitude; or, in the next place, that they are indued with such penetration and prudence, as in all cases to discover what is best. . . . And as I readily acknowledge that no kind of government is more happy than this, where liberty is regulated with becoming moderation, and properly established on a durable basis, so also I consider those as the most happy people, who are permitted to enjoy such a condition; and if they exert their strenuous and constant efforts for its preservation and retention, I admit that they act in perfect consistence with their duty. . . . But if those, to whom the will of God has assigned another form of government, transfer this to themselves so as to be tempted to desire a revolution, the very

¹¹⁴ ACTON, *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 568, 570, 572 (1907, reprinted in 1967) [hereinafter cited as ACTON].

¹¹⁵ Letter to Bishop Mandell Creighton (1887), in *THE SHORTER BARTLETT'S FAMILIAR QUOTATIONS* 1 (1956).

¹¹⁶ ACTON 184 *et seq.* See Michael Servetus, *Circulation of Blood in the Lungs* in H. BOYNTON, *THE BEGINNINGS OF MODERN SCIENCE* 481 (W. J. Black ed. 1948).

thought will be not only foolish and useless, but altogether criminal.¹¹⁷

Once again, in another setting, the law is the law.

At this point, one becomes concerned about the incorruptibility of the Board of Planners and the Managers in Walden Two,¹¹⁸ even though Mr. Skinner abjures punishment as being less effective than reward because more subject to extinction. For the distinction between the positive and negative reinforcers is obscure; in lay usage both are "rewards". Yet Mr. Skinner assures us that the positive reinforcer is the true reward, and that a schedule of reinforcement will be proportionate to the effect on behavior and not misused. We are also told that the discriminative stimulus does not elicit a response, but simply alters a probability of occurrence, unlike the eliciting stimulus which is more coercive. But the probability of occurrence is high even though dependent upon the variables of personal history, including relevant deprivations and satiations. And so we come back to the token economies of *Wyatt v. Stickney*.¹¹⁹

But there are no heroes in Walden Two:

'But as the child grows older,' I said, 'doesn't he naturally single out particular individuals as objects of interest and affection?'

'That's exactly what we intend,' said Frazier. 'It may happen because of common interests: the artistically inclined will naturally be attracted to artists, the potential farmer will like to hang around the dairy.' . . . 'Have you seen anyone 'Heil Frazier' hereabouts?' said Frazier. 'Have you seen any monogrammed F's on our walls or furniture or silver? . . . In fact, have you heard anyone even so much as mention me? . . . [N]o one in Walden Two ever acts for the benefit of anyone else except as the agent of the community. Personal favoritism, like personal gratitude, has been

¹¹⁷ CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, Bk. IV, ch. 20, VIII.

¹¹⁸ See note 62 *supra*. See also SANE SOCIETY at 238 where it is stated: Each of these great reform movements of the last two thousand years has emphasized one sector of life to the exclusion of the others; their proposals for reform and renewal were radical — but their results were almost complete failure. The preaching of the Gospel led to the establishment of the Catholic Church; the teachings of the rationalists of the eighteenth century to Robespierre and Napoleon; the doctrines of Marx to Stalin. The results could hardly have been different. Man is a unit; his thinking, feeling, and his practice of life are inseparably connected. He cannot be free in his thought when he is not free emotionally; and he cannot be free emotionally if he is dependent and unfree in his practice of life, in his economic and social relations.

See also HUMAN DESTRUCTIVENESS 217:

As far as defensive aggression is a reaction not to real threats but to alleged threats produced by mass suggestion and brainwashing, the same fundamental social changes would abolish the basis for the use of this kind of psychic force. Since suggestibility is based on the powerlessness of the individual and on his awe of leaders, the social and political changes just mentioned would lead to its disappearance and, correspondingly, to the development of independent critical thinking.

Query?

¹¹⁹ See notes 1, 12 and 109 *supra*. See SCIENCE AND HUMAN BEHAVIOR 110, 112, 158, 175, 185, 189, 191; BEYOND FREEDOM AND DIGNITY 32; WALDEN TWO 172; note 142 *infra*.

destroyed by our cultural engineers. No one is ever in debt to any figure, or any group short of the whole community.¹²⁰

All symptoms of domination removed, Mr. Skinner shows us how one is educated to survival in Walden Two by community care from birth, enhancing natural curiosity by freedom of movement of babies on stretched plastic cloth and use of "workshops, laboratories, studies, and reading rooms . . . in lieu of classrooms," no standardization or grades, developmental schedules based on maturation rather than chronological age both in education and in relations with the opposite sex, teaching techniques of learning and thinking, providing opportunity and guidance as to a wide variety of subjects, relying on individual selection of subjects, even including French, "natural" or "functional" reinforcements, experimental lesson schedules, apparently

¹²⁰ WALDEN TWO 145, 234, 235; also 42, 168, 236, 238. See note 78 *supra*. If there is any responsibility or duty in man, this concept might effectively dilute or destroy it. The reduction of the size of the community and the increase of the participation of all members in its economic and social, though not political activities, in WALDEN TWO (notes 61, 62 *supra*), or even in political activities as well in Fromm's communes, do not compensate for individual ownership and operation of property as one of the means of harnessing aggression to duty in the maintenance of society. See notes 15, 48, 75, 86 *supra*. Note that Mr. Fromm recognizes courts and debate as a means of harnessing aggression to the maintenance of society, although Mr. Skinner does not. SANE SOCIETY 214, 267-87; REVOLUTION OF HOPE 107-16; notes 21, 62, 68 *supra*. Both disapprove of the competition and the profit motive. See note 56 and FROMM cited in this footnote. Note Mr. Fromm's comments on Mr. Skinner: HUMAN DESTRUCTIVENESS 34-42, especially at 41:

In the cybernetic age, the individual becomes increasingly subject to manipulation. . . . The individual loses his active, responsible role in the social process; he becomes completely 'adjusted' and learns that any behavior, act, thought, or feeling which does not fit into the general scheme puts him at a severe disadvantage; in fact he is what he is supposed to be.

See also E. FROMM, *THE REVOLUTION OF HOPE* (1st Harper Colophon ed. 1970) at 106 n. 9.

Just as the computer chess player is better than the average chess player but not as good as the chess master, or as the computer can be programmed to compose music a la Mozart or Beethoven without ever reaching the qualities of a Mozart or Beethoven composition. Copyright © 1968. Reprinted by permission of Harper & Row, publishers [hereinafter cited as *REVOLUTION OF HOPE*]. See, again, notes 59, 87, 89, 90 *supra*; *Meet CDC 6400, chess master*, Chicago Daily News, PANORAMA 3 (Saturday, September 12, 1970), telling of one computer programmed by an A-level chessplayer, David Slate, which beat another computer programmed by chessmaster Hans Berliner. See also S. BUTLER, *EREWHON* ch. 25, 196-97 (Signet Books 1961) [hereinafter cited as *EREWHON*]:

The one serious danger which this writer apprehended was that the machines would so equalize men's powers, and so lessen the severity of competition, that many persons of inferior physique would escape detection and transmit their inferiority to their descendants. He feared that the removal of the present pressure might cause a degeneracy of the human race, and indeed that the whole body might become purely rudimentary, the man himself being nothing but soul and mechanism, an intelligent but passionless principle of mechanical action.

See sensory "homunculus", drawing of relative sizes of the body parts reflecting the relative amounts of neural tissue serving each organ. A motor "homunculus" would do the same for body parts pertaining to voluntary motor control in the brain; MUNN at 126.

varied individually according to maturation and ability, but also according to the needs of the community, instead of the fixed ratio reinforcement upon completion of work in a traditional educational system, and by shaping human behavior by imparting techniques of self-control, including frustration tolerance by techniques of deprivation, stimulus, reinforcement, and extinction.¹²¹ Intelligence and fitness for a job are determined by some form of evaluation in *Walden Two*; Mr. Skinner notes the normal spread of I.Q.'s.¹²² As noted, Mr. Skinner varies credits to get unpleasant jobs done, and as to interesting jobs, like doctors, " 'Let them know how many places will be available, and let them decide.' "¹²³ However, Mr. Skinner says, " 'There's nothing wrong with hard work and we aren't concerned to avoid it. We simply avoid uncreative and uninteresting work.' "¹²⁴ Here, Mr. Aldous Huxley's *Brave New World*, though with no clear distinction between behavioral engineering and propa-

¹²¹WALDEN TWO 96, 97, 107, 111, 117, 119-23, 131, 136; see also SCIENCE AND HUMAN BEHAVIOR 156, 191, 192, 207 et seq., 227 et seq., 407; BEYOND FREEDOM AND DIGNITY 82 et seq.; at 82:

Guidance is not as easy as permissiveness, but it is usually easier than midwifery, and it has some of the same advantages. One who merely guides a natural development cannot easily be accused of trying to control it. Growth remains an achievement of the individual, testifying to his freedom and worth, his 'hidden propensities,' and as the gardener is not responsible for the ultimate form of what he grows, so one who merely guides is exonerated when things go wrong.

On midwives see note 95 *supra* about Herophilus; also PLATO, THEAETETUS 150-51 (Jowett 3d ed. 1892) where Socrates says:

Well, my art of midwifery is in most respects like theirs; but differs, in that I attend men and not women, and I look after their souls when they are in labour, and not after their bodies: and the triumph of my art is in thoroughly examining whether the thought which the mind of the young man brings forth is a false idol or a noble and true birth. And like the midwives, I am barren, and the reproach which is often made against me, that I ask questions of others and have not the wit to answer them myself, is very just — the reason is, that the god compels me to be a midwife, but does not allow me to bring forth. And therefore I am not myself at all wise, nor have I anything to show which is the invention or birth of my own soul, but those who converse with me profit.

Mr. Skinner cites Mr. Shaw's *THE ADVENTURES OF THE BLACK GIRL IN HER SEARCH FOR GOD* to show that practical application of behavioral engineering is based only on an unskilled conjecture and is to be distinguished from the predictability of response in operant conditioning based on scientific fact. SCIENCE AND HUMAN BEHAVIOR 50-54. Socrates was also ridiculed as impractical in his inability to advise another as to how to avoid paying his creditors, or to solve or mitigate the problems of his time in a play. ARISTOPHANES, *THE CLOUDS*. There must be a deep distinction between midwifery and guidance; Mr. Skinner says so.

¹²²WALDEN TWO 53, 127. See notes 56, 57 and 62 *supra*. But Mr. Skinner prefers "a complete survey" to an "incomplete survey" or test in evaluation. SCIENCE AND HUMAN BEHAVIOR 199, 200. WALDEN TWO 173:

'How do you treat a man for a bad case of 'poor work'?, I asked. 'With common sense! Take him off the job. If the boy who has charge of collecting eggs breaks too many, give him other work. And the same with a Manager. But why condemn him? Or blame him?'

¹²³See note 122 *supra*; WALDEN TWO 53.

¹²⁴WALDEN TWO 76.

ganda, comes into close analogy with Walden Two — Alphas, Betas, Gammas, Deltas and Epsilons produced by genetic engineering and conditioned, classically or operatively or both, to submit and accept their jobs. What is interesting to each category is not interesting to the others. Conflict is avoided. Anyone can leave, or, in *Brave New World*, be exiled to a place full of interesting people, or, if a man is of such morality as to be a savage, be placed in a zoo. No aggression, full submission.¹²⁵ Mr. Ehrenzweig says:

But *Plato*, having abandoned his 'Republic's' earlier concern with

¹²⁵ A. HUXLEY, *BRAVE NEW WORLD* 1-38, 77-94, 144, 148, 151, 154, 163, 165 *et seq.* (1968 ed). Of course, in Huxley's World, happiness was the goal, with equilibrium, while in Walden Two, eternal experimentation toward survival, not equilibrium, is the goal. "We'll settle for the degree of happiness which has been achieved in other communities or cultures, but we'll be satisfied with nothing short of the most alert and active group-intelligence yet to appear on the face of the earth." See *WALDEN TWO* 209 and 290. See also note 142 *infra*. Fromm says George Orwell's writings represent contemporary Russia, and Huxley's *Brave New World* is the United States and Western Europe of today, note 90 *supra*. But see A. HUXLEY, *BRAVE NEW WORLD REVISITED* 30 (1958): "That we are being propelled in the direction of *Brave New World* is obvious. But no less obvious is the fact that we can, if we so desire, refuse to co-operate with the blind forces that are propelling us." Moreover, in *Walden Two* there is little "pure research," and Mr. Skinner says: "To go to all the trouble of running controls would be to make a fetish of scientific method." *WALDEN TWO* 56, 176. See also note 59 *supra*. Compare *BRAVE NEW WORLD* 153: "I was a pretty good physicist in my time. Too good — good enough to realize that all our science is just a cookery book, with an orthodox theory of cooking that nobody's allowed to question, and a list of recipes that mustn't be added to except by special permission from the head cook." Compare notes 58, 78, 98 *supra* and main text referring to them. To repeat, Mr. Skinner has set the parameters of his science in much the manner of the "cookery book" of *Brave New World*. On original ideas, *SCIENCE AND HUMAN BEHAVIOR* 254, 255. Compare to such "cookery book", the Musical Banks of *EREWHON* ch. 15, 114:

One of these (the one with the Musical Banks) was supposed to be the system, and to give out the currency in which all monetary transactions should be carried on; and as far as I could see, all who wished to be considered respectable, kept a larger or smaller balance at these banks. On the other hand, if there is one thing of which I am more sure than another, it is that the amount so kept had no direct commercial value in the outside world; I am sure that the managers and cashiers of the Musical Banks were not paid in their own currency.

See also *SCIENCE AND HUMAN BEHAVIOR* at 297-98:

Many generalizations at the level of the group need not refer to behavior at all. There is an old law in economics, called Gresham's Law, which states that bad money drives good money out of circulation. If we can agree as to what money is, whether it is good or bad, and when it is in circulation, we can express this general principle without making specific reference to the use of money by individuals. Similar generalizations are found in sociology, cultural anthropology, linguistics, and history. But a 'social law' must be generated by the behavior of individuals. It is always an individual who behaves, and he behaves with the same body and according to the same processes as in a nonsocial situation. If an individual possessing two pieces of money, one good and one bad, tends to spend the bad and save the good — a tendency which may be explained in terms of reinforcing contingencies — and if this is true of a large number of people, the phenomenon described by Gresham's Law arises.

It is respectfully submitted that Mr. Skinner did not understand *EREWHON*, although he says he did. *WALDEN TWO* 172, 193, 291; *SCIENCE AND HUMAN*

an absolute justice, was satisfied in his 'Laws' with an elaborate system of posited rules.¹²⁶

Yet Plato does not seem to be in disagreement with Mr. Hume, when he says:

Then, as we have many wants, and many persons are needed to supply them, one takes a helper for one purpose and another for another; and when these partners and helpers are gathered together in one habitation the body of inhabitants is termed a State.

Well then, I will speak, although I really know not how to look you in the face, or in what words to utter the audacious fiction, which I propose to communicate gradually, first to the rulers, then to the soldiers, and lastly to the people. They are to be told that their youth was a dream, and the education and training which they received from us, an appearance only; in reality during all that time they were being formed and fed in the womb of the earth, where they themselves and their arms and appurtenances were manufactured; when they were completed, the earth, their mother, sent them up; and so, their country being their mother and also their nurse, they are bound to advise for her good, and to defend her against attacks, and her citizens they are to regard as children of the earth and their own brothers. . . . Some of you have the power of command, and in the composition of these he has mingled gold, wherefore also they have the greatest honor; others he has made of silver, to be auxiliaries; others again who are to be husbandmen and craftsmen he has composed of brass and iron; and the species will generally be preserved in the children. But as all are of the same original stock, a golden parent will sometimes have a silver son, or a silver parent a golden son. And God proclaims as a first principle to the rulers, and above all else, that there is nothing which they should so anxiously guard, or of which they are to be such guardians, as of the purity of the race. They should observe what elements mingle in their offspring; for if the son of a golden or silver parent has an admixture of brass and iron, then

BEHAVIOR 5; BEYOND FREEDOM AND DIGNITY 69. See herein note 57 *supra*. It is not worth sterilizing the earth or man to produce only flowers without weeds; the situation where one man's weed is another man's flower is the only one in which the experimentation required for survival can take place. Granted that Mr. Skinner does no more than present a formula for the adaptation of man to an age of increasing interdependence enhanced by technology, and exchanges individual freedom for group survival, the change seems so great as to amount to extinction. The further harnessing of aggression to peaceful evolution seems preferable. See notes 32, 59, 120 *supra* and main text referring to them. In any event, Gresham's Law and the Musical Banks show how hard it is to keep the lid on tight, as does the "cookery book" science of Walden Two and Huxley's Brave New World. See also W. T. Vukovich, *The Dawning of the Brave New World — Legal, Ethical and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 194.

Most geneticists agree that natural selection is incapable of maintaining a genetically desirable population, given present technology and medical science. Society's ethics will surely demand that medical science continue to care for living persons. Given this premise, 'some consciously guided method of reducing the number of clearly deleterious genes in the reproducing stream' must be adopted.

In short, we are being killed with the sort of kindness which substitutes planning for harnessed aggressive competition.

¹²⁶ EHRENZWEIG 38, 39.

nature orders a transposition of ranks, and the eye of the ruler must not be pitiful towards the child because he has to descend in the scale and become a husbandman or artisan, just as there may be sons of artisans who having an admixture of gold or silver in them are raised to honour, and become guardians or auxiliaries. For an oracle says that when a man of brass or iron guards the State, it will be destroyed.

And therefore we must consider whether in appointing our guardians we would look to their greatest happiness individually, or whether this principle of happiness does not rather reside in the State as a whole. But if the latter be the truth, then the guardians and auxiliaries, and all others equally with them, must be compelled or induced to do their own work in the best way. And thus the whole State will grow up in a noble order, and the several classes will receive the proportion of happiness which nature assigns to them. . . . Here then, I said, is another order which will have to be conveyed to our guardians: Let our city be accounted neither large nor small, but one and self-sufficing. . . . Education, I said, and nurture: If our citizens are well educated, and grow into sensible men, they will easily see their way through all these, as well as other matters which I omit; such, for example, as marriage, the possession of women and the procreation of children, which will all follow the general principle that friends have all things in common, as the proverb says . . . For good nurture and education implant good constitutions, and these good constitutions taking root in a good education improve more and more, and this improvement affects the breed in man as in other animals. . . . You remember the original principle which we were always laying down at the foundation of the State, that one man should practice one thing only, the thing to which his nature was best adapted; — now justice is this principle or a part of it. . . . Further, we affirmed that justice was doing one's own business, and not being a busybody. . . .

[A]nd when they have reached fifty years of age, then let those who still survive and have distinguished themselves in every action of their lives and in every branch of knowledge come at last to their consummation; the time has now arrived at which they must raise the eye of the soul to the universal light which lightens all things, and behold the absolute good; for that is the pattern according to which they are to order the State and the lives of individuals, and the remainder of their own lives also; making philosophy their chief pursuit, but, when their turn comes, toiling also at politics and ruling for the public good, not as though they were performing some heroic action, but simply as a matter of duty. . . . our governesses too; for you must not suppose that what I have been saying applies to men only and not to women as far as their natures can go.¹²⁷

For Plato's Republic greatly resembles Walden Two in emphasizing environment and anonymity, and in discarding heroes. The only difference lies in the use of the word duty; but the

¹²⁷ PLATO, REPUBLIC, Bk. II, 369; Bk. III, 414-15; Bk. IV, 421, 423, 424, 433; Bk. VII, 540 (Jowett ed. 1892). See also note 121 *supra*. On Mr. Hume, see note 3 *supra*.

duty is simply the result of behavioral engineering by a philosopher rather than a psychologist. In any case, Plato no more states a principle of "absolute justice" in the *Republic* than does Mr. Skinner in *Walden Two*. These brave worlds are not new, but old.¹²⁸

Mr. Melville in *Moby Dick* described the rescue of the evil, wild Indian, Tashtego, by Queequeg, the friendly cannibal, using a form of midwifery, from the spermaceti magazine in the Heidelburgh Tun of a sperm whale. In commenting on the sweet death of Tashtego had he perished in the fragrant spermaceti, Mr. Melville said:

Only one sweeter end can readily be recalled — the delicious death of an Ohio honey-hunter, who seeking honey in the crotch of a hollow tree, found such exceeding store of it, that leaning too far over, it sucked him in, so that he died embalmed. How many, think ye, have likewise fallen into Plato's honey head, and sweetly perished there?¹²⁹

Apparently there have been psychological speculations on the character of Captain Ahab.¹³⁰ Mr. Fromm, without referring to the captain, says:

Man seems to take justice into his own hands when God or secular authorities fail. It is as if in his passion for vengeance he elevates himself to the role of God, and of the angels of vengeance. The act of vengeance may be his greatest hour just because of this self-elevation.¹³¹

If vengeance is so related to justice, then let neither philosopher nor psychologist eliminate aggression. Rather, harness aggression through institutions like the adversary system and property rights, with the aid of social and private contracts and duties, to the maintenance of peace, yet having it ready as a source of a response or responses otherwise lost.¹³²

¹²⁸ WALDEN TWO 105. See notes 22, 56, 62, 70, 72, 79, 80, 119, 120, 121, 122 *supra*. On duty and responsibility in *Walden Two*, see note 85 *supra*. On the size of the community in *Walden Two*, see note 61 *supra*. On no heroes, see note 120 *supra*.

¹²⁹ H. MELVILLE, *MOBY DICK*, end of ch. LXXVIII.

¹³⁰ MUNN 493, 716. Of King Ahab, who worshipped Baal, and of his greedy and perfidious wife, Jezebel, see 1 KINGS 16:30 *et seq.* Captain Ahab worked for fighting Quaker shipowners, and hunted *Moby Dick* for vengeance for the loss of his leg.

¹³¹ HUMAN DESTRUCTIVENESS 273.

¹³² See notes 118, 119, 120, 121, 125, 128 *supra*. The inventions of the adversary system, property rights, contracts, and duty are as much born of necessity as is Plato's fluid class-state in his *Republic*. PLATO, *REPUBLIC*, Bk. II, 369. Both Plato and Mr. Skinner agree that tyranny has a democratic origin. PLATO, *REPUBLIC*, Bk. VIII, 562; WALDEN TWO 268; see note 121 *supra*. Both seem to be advocating a "meritocracy." See main text referring to note 127 *supra*, and WALDEN TWO 232. Yet neither has any way short of education, environment, behavioral and genetic engineering to insure that merit will out. As Mr. Fromm and Mr. Skinner differ on debate (note 120 *supra*), so Plato and Mr. Skinner differ on the dialectical, the latter preferring experimentation to reason, although experimentation and reason do not seem to be entirely exclusive, one to the other, in Plato. See note 21 *supra*; PLATO, *REPUBLIC*, Bk. VI, 509, 510, 511.

DUTY, SELECTION AND FREEDOM

While the Republic of Plato may somewhat resemble the Walden Two of Mr. Skinner, they do seem to diverge in the determination of "knowledge." The dialogue *Theaetetus* opens with a conversation between two friends about the bravery of Theaetetus in battle. The servant of one friend reads aloud the transcription of a dialogue between Socrates and Theaetetus which occurred when the latter was a youth:

Soc. The simple sensations which reach the soul through the body are given at birth to men and animals by nature, but their reflections on the being and use of them are slowly and hardly gained, if they are ever gained, by education and long experience.

.....
Soc. Then knowledge does not consist in impressions of sense, but in reasoning about them; in that only, and not in the mere impression, truth and being can be attained?

Theaet. Clearly.

Soc. Then perception, Theaetetus, can never be the same as knowledge or science?

Theaet. Clearly not, Socrates; and knowledge has now been most distinctly proved to be different from perception.

.....
Theaet. I cannot say, Socrates, that all opinion is knowledge, because there may be a false opinion; but I will venture to assert, that knowledge is true opinion: let this then be my reply; and if this is hereafter disproved, I must try to find another.

Soc. That is the way in which you ought to answer, Theaetetus, and not in your former hesitating strain, for if we are bold we shall gain one of two advantages; either we shall find what we seek, or we shall be less likely to think that we know what we do not know — in either case we shall be richly rewarded.

Consider the following statement by Mr. Frazier:

'To put it as bluntly as possible — the idea of having my own way. 'Control' expresses it, I think. The control of human behavior, Burris. In my early experimental days it was a frenzied, selfish desire to dominate. . . . Eventually I realized that the subjects were always right. They always behaved as they should have behaved. It was I who was wrong. I had made a bad prediction.'

WALDEN TWO 288-89. Consider also the following remarks by Mr. McClelland:

It is certainly part of the folklore of science that it represents an attempt to *conquer* nature, to dominate it, and bring it under man's control. Social theorists have noted that the view that man could be more powerful than nature is by no means a common one in history. In fact, the usual belief among the peoples of the world, even today, is that nature is much more powerful than man (witness floods, droughts, earthquakes, and so forth), and that man must somehow placate the gods who control nature. It may not seem too far-fetched to assume that it took an unusual psychodynamic situation to create in some men the apparently irrational belief that they could conquer nature. The blocked aggressive needs of a few scientists, diverted toward nature, may well have fulfilled such an important historic function.

D. C. McClelland, *On the Psychodynamics of Creative Physical Scientists* ch. 5, 165, 166 in H. E. GRUBER, G. TERRELL, M. WERTHEIMER, *CONTEMPORARY APPROACHES TO CREATIVE THINKING* (1962) [hereinafter cited as *CREATIVE THINKING*].

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Soc. He who led the way into the river, Theaetetus, said 'the experiment will show;' and perhaps if we go forward in the search, we may stumble upon the thing which we are looking for; but if we stay where we are, nothing will come to light.

Soc. The profession of the great wise ones who are called orators and lawyers; for these persuade men by their art and make them think whatever they like, but they do not teach them. Do you imagine that there are any teachers in the world so clever as to be able to convince others of the truth about acts of robbery or violence, of which they were not eye-witnesses, while a little water is flowing in the clepsydra? [*i.e.*, water clock.]

Theaet. Certainly not, they can only persuade them.

Soc. And would you not say that persuading them is making them have an opinion?

Theaet. To be sure.

Soc. When, therefore, judges are justly persuaded about matters which you can know only by seeing them, and not in any other way, and when thus judging of them from report they attain a true opinion about them, they judge without knowledge and yet are rightly persuaded, if they have judged well.

Soc. And yet, O my friend, if true opinion in law courts and knowledge are the same, the perfect judge could not have judged rightly without knowledge; and therefore I must infer that they are not the same.

.
Soc. And what we fancied to be a perfect definition of knowledge is a dream only. But perhaps we had better not say so as yet, for were there not three explanations of knowledge, one of which must, as we said, be adopted by him who maintains knowledge to be true opinion combined with rational explanation? And very likely there may be found some one who will not prefer this but the third.

Theaet. You are quite right; there is still one remaining. The first was the image or expression of the mind in speech; the second, which has just been mentioned, is a way of reaching the whole by an enumeration of the elements. But what is the third definition?

Soc. There is, further, the popular notion of telling the mark or sign of difference which distinguishes the thing in question from all others.

Theaet. Can you give me any example of such a definition?

Soc. As, for example, in the case of the sun, I think that you would be contented with the statement that the sun is the brightest of the heavenly bodies which revolve about the earth.¹³³

¹³³ PLATO, THEAETETUS 186, 187, 200-01, 208. See also BLACKSTONE in note 109 *supra*. Plato's reduction to absurdity may indicate less of a discovery by Copernicus than thought by Mr. Skinner and Mr. Ehrenzweig:

See SCIENCE AND HUMAN BEHAVIOR at 7:

The Copernican theory of the solar system displaced man from his pre-eminent position at the center of things. Today we accept this theory without emotion, but originally it met with enormous resistance.

See EHRENZWEIG at 145:

At one time man believed that his earth was the center of the Universe, unique in its origin and mission. Building on vague dreams and doubts of the past, Copernicus disproved such belief as an illusion. He met a revulsion and resistance which, almost an entire century later, was still

There follows a reduction of the entire dialogue to absurdity, which seems to indicate a method, fallibility, and courageous striving.

Mr. Skinner's emphasis on experiment seems to have a corollary in his finite concept of "knowledge":

The functional control exerted by a stimulus enables us to distinguish between *sensing* and certain other activities suggested by such terms as 'seeing,' 'perceiving,' or 'knowing.' 'Sensing' may be taken to refer to the mere reception of stimuli. 'Seeing' is the 'interpretive' behavior which a stimulus controls. The term 'seeing' characterizes a special relation between behavior and stimuli. It is different from 'sensing' just as responding is different from being stimulated. Our 'perception' of the world — our 'knowledge' of it — is our *behavior* with respect to the world. It is not to be confused with the world itself or with other behavior with respect to the world or with the behavior of others with respect to the world. . . . The environment, whether public or private, appears to remain undistinguished until the organism is forced to make a distinction. . . . Experiments in which organisms are raised in darkness tend to confirm the view that discriminative behavior waits upon the contingencies which force discriminations. Now, self-observation is also the product of discriminative contingencies, and if a discrimination cannot be forced by the community, it may never arise. Strangely enough, it is the community which teaches the individual to 'know himself.'

Some contingencies involving inner stimulation do not, of course, have to be arranged by a reinforcing community . . . But 'knowledge' . . . is particularly identified with the verbal behavior which arises from social reinforcement. Apparently, conceptual and abstract behavior are impossible without such reinforcement. . . . The deficiencies which generate public *mistrust* lead, in the case of the individual himself, to simple *ignorance*. . . . *Interoceptive* stimuli arise mainly in the digestive, respiratory, and circulatory systems. . . . These are the principal stimuli to which one reacts in 'feeling an emotion.' *Proprioceptive stimuli*, on the other hand, are generated by the position and movement of the body in space and by the position and movement of parts of the body with respect to other parts. We usually respond to stimuli of this sort in combination with *exteroceptive* stimulation from the surrounding environment, and we do not always correctly identify the source of stimulation. . . .

strong enough to force his great disciple Galileo to recant. But we have learned to live with the truth, and modern earth-science dates from its discovery. We lost an illusion and began to conquer our world.

See also FARRINGTON 219-20:

Copernicus, in the sixteenth century, was aware that he was reviving the hypothesis of Aristarchus . . . Cleanthes, the head of the Stoic school at Athens, a man devoutly attached to star-worship, who was his almost exact contemporary (the two men died old within a year or two of one another), expressed the opinion that the Greeks ought to indict Aristarchus on a charge of impiety.

Aristarchus probably lived from 310 to 230 B.C. It is respectfully submitted that Socrates or Plato would not have been among those persecuting either Aristarchus or Copernicus, but what of the members of Walden Two? See notes 78, 118, 119 *supra*.

The contention that a knowledge of history, for example, is simply a verbal repertoire does not mean that education is merely rote learning. The student comes also to *understand* the facts of history. . . . The individual agrees with a statement about a historical event in the sense that he shows a high probability of making the statement himself But the high probability which characterizes agreement or understanding may have many sources; knowledge of a given field is coherent and well integrated to the extent that these multiple sources of strength are generally consistent. So far as the present point is concerned, we may note simply that the supplementary sources of strength which distinguish 'understanding' from 'tending to say' do not require us to modify the view that knowledge is a repertoire of behavior. Understanding is a collateral issue which concerns the variables of which such a repertoire is a function.^[134]

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'What is the 'original nature of man'? I mean, what are the basic psychological characteristics of human behavior — the inherited characteristics, if any, and the possibilities of modifying them and creating others? That's certainly an experimental question — for a science of behavior to answer. And what are the techniques, the engineering practices, which will shape the behavior of the members of a group so that they will function smoothly for the benefit of all? That's also an experimental question, Mr. Castle — to be answered by a behavioral technology. It requires all the techniques of applied psychology, from the various ways of keeping in touch with opinions and attitudes to the educational and persuasive practices which shape the individual from the cubicle to the grave. Experimentation, Mr. Castle, not reason.¹³⁵

But Mr. Philip Teitelbaum says:

Even though we correctly use the experimental method to search for 'facts,' what we believe firmly today we may well discard tomorrow.¹³⁶

Man's infinite variety of method to attain an infinite variety of working hypotheses may be founded in his innate curiosity, which may in part stem from the "fact" that eyes, ears, skin, muscles, tendons and joints all have far more receptors than

¹³⁴ SCIENCE AND HUMAN BEHAVIOR 140, 260-62, 409. See also notes 137, 140 *infra*.

¹³⁵ WALDEN TWO 175. See notes 9, 132 *supra*. Mr. Skinner emphasizes synthesis by prediction, but does not reject direct synthesis (break down into components or elements; Plato above), synthesis after fractionation or counterexperiment (Plato's telling the sign of difference), or synthesis by model, (Plato's image or expression of the mind limited by Theaetetus to speech). P. TEITELBAUM, PHYSIOLOGICAL PSYCHOLOGY 10, 11 (R. S. Lazarus ed. 1967). Copyright©1967 by Philip Teitelbaum. Reprinted by permission of Prentice-Hall, Englewood Cliffs, New Jersey [hereinafter cited as PHYSIOLOGICAL PSYCHOLOGY]. But Plato, or Socrates, reduces the dialogue to absurdity to show man's infinite variety of method to attain an infinite variety of working hypotheses. Either Mr. Skinner recognizes no such innate infinite ability of man, or he seeks to retard such ability until man is brought to a level of predictable stability which will enable man to cope with the technological advances resulting from application by man of such infinite ability. See note 102 and main text referring to it. But see WALDEN TWO 291: "It's no solution to put the brakes on science until man's wisdom and responsibility catch up."

¹³⁶ PHYSIOLOGICAL PSYCHOLOGY 11. See note 125 *supra*.

there are nerve cells for the sorting and transmission of data to the area of the brain which prepares and initiates the appropriate response or responses. Thus certain cells and parts of organs are designed so as to be antagonistic to reception, to inhibit reception and to focus. Temporal and spatial summation and mutual inhibition are thus general characteristics of the somesthetic system.¹³⁷

The Bible says:

But I see another law in my members, warring against the law of my mind, and bringing me into captivity to the law of sin which is in my members.¹³⁸

Assume Fechner's law or some related principle that sensation is less in degree as intensity increases applies only to first and possibly second order neurons. Assume that Steven's law or some related principle that sensation increases in greater degree than the degree of increase in intensity applies only to third and possibly to some second order neurons. Then any tool increasing human reception in greater detail and avoiding spatial and temporal summation and mutual inhibition, would result in initial confusion, and rejection or loss of data received unless another tool provided for storage of such data or unless the organism itself devised another sort of coding of such data than that which existed before the discovery of the tool so increasing reception.¹³⁹ We are then born in conflict and shall remain in conflict, for every resolution of a conflict leads to another. Changing the word "conflict" to the word "problem" is no more than an exercise in semantics.

Consider these questions asked by Mr. Teitelbaum:

Does the stimulus control the animal's behavior (automatic) or does the animal's behavior control the stimulus (voluntary)? Is the act a reflex or an operant? . . . If it is unlearned, stereotyped (invariable in form), and is only a consequence of the stimulus, it is a reflex. But if the animal can be taught to use any arbitrary act or sequence of acts to obtain the stimulus or if the animal will actively seek the stimulus and adjust his actions to obtain it (as in maze-running), we can be absolutely certain it is not automatic; it is an operant act, subject to the control of motivational states and past learned experience. Exactly the same reasoning applies to the medial system where stimulation leads to operant behavior which avoids further stimulation. Therefore, these systems in the brain are involved in voluntary approach and avoidance.

How are these systems related to the more automatic unlearned mechanisms of approach and avoidance? Does stimulation of the positive reinforcement system facilitate reflexes of approach such

¹³⁷ *PHYSIOLOGICAL PSYCHOLOGY* 15-52, especially 34, 44; MUNN 112-62.

¹³⁸ *ROMANS* 7:23.

¹³⁹ *PHYSIOLOGICAL PSYCHOLOGY* 44 *et seq.*, on Fechner and Stevens; MUNN 140, 141.

as sucking or grasping? What relation do these systems have to instinctive approach (controlled by internal hormonal states as well as external stimuli)? In this respect, it is interesting that lateral hypothalamic stimulation, which elicits approach to and ingestion of food, is also positively reinforcing; that is, the animal will press a bar repeatedly to produce the brain stimulation that ordinarily induces him to eat. Why should the animal thus work to make himself hungry? Isn't hunger unpleasant? Or are some forms of hunger (appetite) enjoyable?

If the positive reinforcement system facilitates approach, how does it affect avoidance? Perhaps the two systems (approach and avoidance) are mutually inhibitory. Does destruction of one of them 'release' the other from inhibition? We know that medial hypothalamic activity inhibits feeding. Destruction of the ventromedial hypothalamic nuclei leads to hyperphagia, presumably through a release of the lateral hypothalamic feeding system. It should also release lateral hypothalamic self-stimulation. Bartley Hoebel and I have recently shown that it does, supporting the idea that the negative (avoidance) system inhibits the positive (approach) system.

We know that infantile reflexes of approach and withdrawal disappear as voluntary behavior develops. Do the systems for voluntary approach and avoidance develop at the same time? Might they be essential to the development of voluntary behavior? Would destruction of the positive system retard development of voluntary approach, and conversely, would stimulation accelerate it? Clearly there are more questions than answers in this area of physiological psychology.

.....
 Whatever the final interpretation may be, it is clear that any destruction of the nervous system always produces two kinds of loss of function: (1) loss of excitatory function — as in paralysis after damage to cells responsible for movements, or anesthesia after damage to cells involved in sensation; and (2) release phenomena — exaggerations of behavior resulting from the loss of cells that exercise an inhibitory control over excitatory systems in the brain. . . . Presumably, the frontal lobes inhibit reflexes of approach, and thereby subject them to voluntary control. The parietal areas must inhibit reflexes of withdrawal. When these areas are damaged, the voluntary controls are destroyed and the primitive mechanisms are once again released.¹⁴⁰

Mr. Skinner has said that he will not be satisfied with equilibrium in Walden Two,¹⁴¹ and consistently prefers predictability to any concept of homeostasis:

The adaptive character of the increase in probability is sometimes expressed in another way. Deprivation is said to disturb some kind of equilibrium which the strengthened behavior tends to restore. The tendency of living systems to maintain or restore equilibrium, which W. B. Cannon called homeostasis, has been of

¹⁴⁰ PHYSIOLOGICAL PSYCHOLOGY 107, 108, 114; also 61, 67, 79, 81 *et seq.*, and 112.

¹⁴¹ WALDEN TWO 290. See also note 125 *supra*.

special interest to physiologists. The notion of equilibrium is compatible with a functional analysis, but the two should not be confused. A study of equilibrium may enable us to predict the *direction* in which behavior will change as the result of a change in an independent variable, but it will not tell us much more. Equilibrium is hard to define and even harder to observe and measure. A much more clear-cut program is to show how deprivation affects the probability of relevant behavior, and this may be done without mentioning equilibrium.¹⁴²

Please consider again Mr. Hume's thesis that abundance would destroy the idea of justice,¹⁴³ and consider the following remarks of Lord Keynes:

I feel sure that the demand for capital is strictly limited in the sense that it would not be difficult to increase the stock of capital up to a point where its marginal efficiency had fallen to a very low figure. This would not mean that the use of capital instruments would cost almost nothing, but only that the return from them would have to cover little more than their exhaustion by wastage and obsolescence together with some margin to cover risk and the exercise of skill and judgment. In short, the aggregate return from durable goods in the course of their life would, as in the case of short-lived goods, just cover their labour-costs of production *plus* an allowance for risk and the costs of skill and supervision.

Now, though this state of affairs would be quite compatible with some measure of individualism, yet it would mean the euthanasia of the rentier, and, consequently, the euthanasia of the cumulative oppressive power of the capitalist to exploit the scarcity-value of capital. Interest to-day rewards no genuine sacrifice, any more than does the rent of land. The owner of capital can obtain interest because capital is scarce, just as the owner of land can obtain rent because land is scarce. . . . The State will have to exercise a guiding influence on the propensity to consume partly through its scheme of taxation, partly by fixing the rate of interest, and partly, perhaps, in other ways. Furthermore, it seems unlikely that the influence of banking policy on the rate of interest will be sufficient by itself to determine an optimum rate of investment. I conceive, therefore, that a somewhat comprehensive socialization of investment will prove the only means of securing an approximation to full employment; though this need not exclude all manner of compromises and of devices by which public authority will co-operate with private initiative. . . . If we suppose the volume of output to be given, *i.e.*, to be determined by forces outside the classical scheme of thought, then there is no objection to be raised against the classical analysis of the manner in which private self-interest will determine what in particular is produced, in what proportions the factors of production will be combined to produce it, and how the value of the final product will be distributed between them. Again, if we have dealt otherwise with the problem of thrift, there is no objection

¹⁴² SCIENCE AND HUMAN BEHAVIOR 142. See also notes 119 and 125 *supra*; MUNN 331, 332; PHYSIOLOGICAL PSYCHOLOGY 80, 92, 96.

¹⁴³ See note 3 *supra*.

to be raised against the modern classical theory as to the degree of consilience between private and public advantage in conditions of perfect and imperfect competition respectively. . . . Within this field the traditional advantages of individualism will still hold good. . . . They are partly advantages of efficiency — the advantages of decentralisation and of the play of self-interest. The advantage to efficiency of the decentralisation of decisions and of individual responsibility is even greater, perhaps, than the nineteenth century supposed; and the reaction against the appeal to self-interest may have gone too far. But, above all, individualism, if it can be purged of its defects and its abuses, is the best safeguard of personal liberty in the sense that, compared with any other system, it greatly widens the field for the exercise of personal choice. It is also the best safeguard of the variety of life, which emerges precisely from this extended field of personal choice, and the loss of which is the greatest of all the losses of the homogeneous or totalitarian state. For this variety preserves the traditions which embody the most secure and successful choices of former generations; it colours the present with the diversification of its fancy; and, being the handmaid of experiment as well as of tradition and of fancy, it is the most powerful instrument to better the future. . . . For if effective demand is deficient, not only is the public scandal of wasted resources intolerable, but the individual enterpriser who seeks to bring these resources into action is operating with the odds loaded against him. . . . Hitherto the increment of the world's wealth has fallen short of the aggregate of positive individual savings; and the difference has been made up by the losses of those whose courage and initiative have not been supplemented by exceptional skill or unusual good fortune. But if effective demand is adequate, average skill and average good fortune will be enough. . . . It is certain that the world will not much longer tolerate the unemployment which, apart from brief intervals of excitement, is associated — and, in my opinion, inevitably associated — with present-day capitalistic individualism. But it may be possible by a right analysis of the problem to cure the disease whilst preserving efficiency and freedom.¹⁴⁴

Congress enacted an Employment Act in 1946 which provides in part as follows:

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and state and local governments, to coordinate and utilize all its plans, functions and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power.¹⁴⁵

¹⁴⁴ J. M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY*, 375-76, 378-79, 380-81 (1935).

¹⁴⁵ 15 U.S.C. §§ 1021-24. Material following quote included in 15 U.S.C.

The bill required the President to submit annually an economic report on current levels of employment, production and purchasing power, together with the levels needed to effectuate the conditions set forth in the policy declaration and program for carrying out the policy. The bill created a three-member Council of Economic Advisers to assist the President, and a Joint Economic Committee of the House and Senate to consider and report on the President's annual economic report.

§§ 1021-24. See also Comment, G.L.S. Shackle, *Keynes and Today's Establishment in Economic Theory: A View*, 11 J. ECON. LIT. 516, 517 (1973):

Investment, then, is free to fall short of what would be needed to fill the full-employment saving gap, the gap between full-employment income and the consumption-spending out of that income. This is the kernel of the theory of employment. It leaves one vital question and a few subsidiary matters to be cleared up. The vital question is: What can *positively produce* an insufficiency of investment? Its logical freedom to differ from saving merely allows us to ask this question, but does not answer it. The answer, however, is implicit in the nature of the inducement to invest, its dependence on expectations which are conjectural and figmental, which depend on 'confidence'; 'confidence' which, of all things, is the one we can have least confidence in, which bad news, confusing news, or lack of news can wither. The rest is mechanism and the answering of questions left open by, for example, the denial to the interest-rate of its role of equilibrating thrift and productivity. The Multiplier was a piece of mechanism, powerful in supporting a case for public works. Liquidity preference destroys the hydraulic theories of money and interest, and shows how and why *valuations* can change without the occurrence of *transactions*. All this is a far cry from smooth and quasi-stable curves or schedules, which Keynes paraded on the front of his stage to mask the horrid void of indeterminacy and non-rationality at its rear.

See also F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 280-82 (Gateway ed. 1972):

The development of Lord Keynes's theories started from the correct insight that the regular cause of extensive unemployment is real wages that are too high. The next step consisted in the proposition that a direct lowering of money wages could be brought about only by a struggle so painful and prolonged that it could not be contemplated. Hence he concluded that real wages must be lowered by the process of lowering the value of money. This is really the reasoning underlying the whole 'full-employment' policy, now so widely accepted. If labor insists on a level of money wages too high to allow of full employment, the supply of money must be so increased as to raise prices to a level where the real value of the prevailing money wages is no longer greater than the productivity of the workers seeking employment. In practice, this necessarily means that each separate union, in its attempt to overtake the value of money, will never cease to insist on further increases in money wages and that the aggregate effort of the unions will thus bring about progressive inflation. . . . If the supply of money and credit were not expanded, the wage increases would rapidly lead to unemployment. But under the influence of a doctrine that represents it as the duty of the monetary authorities to provide enough money to secure full employment at any given wage level, it is politically inevitable that each round of wage increases should lead to further inflation. . . . A monetary policy that would break the coercive powers of the unions by producing extensive and protracted unemployment must be excluded, for it would be politically and socially fatal. But if we do not succeed in time in curbing union power at its source, the unions will soon be faced with a demand for measures that will be much more distasteful to the individual workers, if not the union leaders, than the submission of the unions to the rule of law: the clamor will soon be either for the fixing of wages by government or for the complete abolition of the unions.

The experience of Governor William Bradford of Plymouth Plantation in 1623 may illustrate the difficulty of preserving efficiency *and* freedom when the light anesthetic of common reward changes the response of persons who are the cells of the political organism and partially releases the inhibition which caused the individual to focus on his need:

So they began to think how they might raise as much corn as they could, and obtain a better crop than they had done, that they might not still thus languish in misery. At length, after much debate of things, the Governor (with the advice of the chiefest amongst them) gave way that they should set corn every man for his own particular, and in that regard trust to themselves; in all other things to go on in the general way as before. And so assigned to every family a parcel of land, according to the proportion of their number, for that end, only for present use (but made no division for inheritance) and ranged all boys and youth under some family. This had very good success, for it made all hands very industrious, so as much more corn was planted than otherwise would have been by any means the Governor or any other could use, and saved him a great deal of trouble, and gave far better content. The women now went willingly into the field, and took their little ones with them to set corn; which before would allege weakness and inability; whom to have compelled would have been thought great tyranny and oppression.

The experience that was had in this common course and condition, tried sundry years and that amongst godly and sober men, may well evince the vanity of that conceit of Plato's and other ancients applauded by some of later times; that the taking away of property and bringing in community into a commonwealth would make them happy and flourishing; as if they were wiser than God. For this community (so far as it was) was found to breed much confusion and discontent and retard much employment that would have been to their benefit and comfort. For the young men, that were most able and fit for labour and service, did repine that they should spend their time and strength to work for other men's wives and children without any recompense. The strong, or man of parts, had no more in division of victuals and clothes than he that was weak and not able to do a quarter the other could; this was thought injustice. The aged and graver men to be ranked and equalized in labours and victuals, clothes, etc., with the meaner and younger sort, thought it some indignity and disrespect unto them. And for men's wives to be commanded to do service for other men, as dressing their meat, washing their clothes, etc., they deemed it a kind of slavery, neither could many husbands well brook it. Upon the point all being to have alike, and all to do alike, they thought themselves in the like condition, and one as good as another; and so, if it did not cut off those relations that God hath set amongst men, yet it did at least much diminish and take off the mutual respects that should be preserved amongst them. And would have been worse if they had been men of another condition. Let none object this is men's corruption, and nothing to the course itself. I answer, seeing all men have this corruption in them, God in

His wisdom saw another course fitter for them.¹⁴⁶

Mr. Locke, writing in 1690, agreed with what Governor Bradford wrote nearly seventy years before:

The reason why men enter into society is the preservation of their property; and the end why they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making, whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whosoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavor to grasp themselves or put into the hands of any other an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of the new legislative (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society. What I have said here concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative and the supreme execution of the law, acts against both when he goes about to set up his own arbitrary will as the law of the society.¹⁴⁷

Mr. Madison, writing in *The Federalist*, recognized principles of summation and mutual inhibition, not only in the doctrine of separation of powers, but in other areas:

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

¹⁴⁶ W. BRADFORD, OF PLYMOUTH PLANTATION 1620-1647, at 120-21 (Modern Library ed. 1967). For the Mayflower Compact, see 75, 76, 77.

¹⁴⁷ J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT ch. XIX, § 222. Mr. Locke defined "property" to include "lives, liberties, and estates." SECOND TREATISE ch. IX, § 123. He and Dr. Thomas Sydenham searched for facts in each of their smallpox cases to try to discover the cause of the disease instead of accepting old theories, and he edited Mr. Robert Boyle's GENERAL HISTORY OF THE AIR after the latter's death. H. R. Penniman, *Introduction to J. LOCKE, ON POLITICS AND EDUCATION* 3 (1947). Compare the U.S. Declaration of Independence to the above quotation.

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 The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. . . . But the most common and durable source of factions has been the various and unequal distribution of property . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government. . . . And what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. . . . The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

The inference to which we are brought is, that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.

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 The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended. . . .

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 It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures. . . .

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 Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defence or general welfare. No stronger

proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction. . . . For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the Articles of Confederation. . . .

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.¹⁴⁸

Following is an excerpt from the preamble of The Populist Party Platform of 1892:

Our country finds itself confronted by conditions for which there is no precedent in the history of the world; our annual agricultural productions amount to billions of dollars in value, which must, within a few weeks or months, be exchanged for billions of dollars' worth of commodities consumed in their production; the existing currency supply is wholly inadequate to make this exchange; the results are falling prices, the formation of combines and rings, the impoverishment of the producing class. We pledge ourselves

¹⁴⁸ THE FEDERALIST, J. MADISON, Nos. 10, 41 and 51 at 130, 131, 132, 134, 135, 300, 301, 356 (H. M. Jones ed. 1961). See also M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, Vol. 1 at 20; Vol. 3 at 483 *et seq.* (1966 ed.). See also notes 61, 86 *supra*.

that if given power we will labor to correct these evils by wise and reasonable legislation, in accordance with the terms of our platform.¹⁴⁹

In the absence of legislation such as the Federal Employer's Liability Act¹⁵⁰ or the various state workmen's compensation acts,¹⁵¹ the fiduciary duty of employee to employer and the duty of the employer to pay and to provide the employee with a safe place to work, including only due care in selection of fellow employees without any indemnity owed by employer to employee for negligence of fellow employees, was the same regardless of the size of the employer.¹⁵²

Mr. William Graham Sumner was of the opinion that a process of selection was at work when he said in 1880:

Liberty, therefore, does not by any means do away with the struggle for existence. We might as well try to do away with the need of eating, for that would, in effect, be the same thing. What civil liberty does is to turn the competition of man with man from violence and brute force into an industrial competition under which men vie with one another for the acquisition of material goods by industry, energy, skill, frugality, prudence, temperance, and other industrial virtues. Under this changed order of things the inequalities are not done away with. Nature still grants her rewards of having and enjoying, according to our being and doing, but it is now the man of the highest training and not the man of the heaviest fist who gains the highest reward. It is impossible that the man with capital and the man without capital should be equal. To affirm that they are equal would be to say that a man who has no tool can get as much food out of the ground as the man who has a spade or a plough; or that the man who has no weapon can defend himself as well against hostile beasts or hostile men as the man who has a weapon. If that were so, none of us would work any more. We work and deny ourselves to get capital just because, other things being equal, the man who has it is superior, for attaining all the ends of life, to the man who has it not.¹⁵³

The United States Supreme Court decided that the legislature of the State of New York had no police power to enact a statute which would interfere with the right of Mr. Lochner and any of his employees to enter into a contract that such employee would work over 60 hours in one week or over an average

¹⁴⁹ R. D. HEFFNER, A DOCUMENTARY HISTORY OF THE UNITED STATES 193 (MENTOR 1963). On the Populists, S. E. MORISON and H. S. COMMAGER, 2 THE GROWTH OF THE AMERICAN REPUBLIC 333 *et seq.* (1966).

¹⁵⁰ 45 U.S.C. §§ 51 *et seq.*

¹⁵¹ *E.g.*, the current Illinois Act, ILL. REV. STAT. ch. 48, §§ 138.1 *et seq.* (1972). The first Illinois compensation act was adopted in 1911. R. C. Edwards, *Workmen's Compensation: The Need for Reform*, 1973 U. ILL. L.F. 563. Related statutes are also in ILL. REV. STAT. ch. 48 (1972).

¹⁵² *E.g.*, *Farwell v. Boston & W. R. Corporation*, 4 Metc. 49, 38 Am. Dec. 339 (Mass. 1842), RESTATEMENT (SECOND) OF AGENCY §§ 376, 429, 432, 474, 492 (1957).

¹⁵³ H. S. COMMAGER, LIVING IDEAS IN AMERICA 329 (Harper Colophon Books 1967). Apparently, Mr. Herbert Spencer of England shared Mr. Sumner's ideas.

10 hours a day. But Mr. Justice Holmes dissented:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. . . . United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. . . . Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. . . . The decision sustaining an eight hour law for miners is still recent. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views. . . .¹⁵⁴

With some few exceptions, the resolution of problems created by collective cooperation has been countered by opposing collective cooperation, instead of by abetting the homeostasis of the economy with the harnessing of the aggression of the individual to an effective remedy for redress.¹⁵⁵

¹⁵⁴ *Lockner v. New York*, 198 U.S. 45, 75-76 (1905).

¹⁵⁵ See notes 34, 35, 36, 38, 39, 41 *supra*. See also *Bauer v. Sawyer*, 8 Ill. 2d 351, 134 N.E.2d 329 (1956) on spatial, temporal, and economic limitation of enforcement of a negative covenant, and *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) limiting strict liability of surveyor to a reasonably foreseeable reliant user. There would seem to be an obvious analogy to the limitation of warranty liability under the three versions of U.C.C. § 2-318. The rapid growth of the law of products liability might be more conducive to effective remedial balance if privity were abandoned to U.C.C. § 2-318, if the notice requirement of U.C.C. § 2-607(3) were softened, and if the law of warranty preempted the law of strict liability. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 13 A.L.R.3d 1049 (1962), which seems to have been a case of express warranty by brochure with no ruling that a notice, given ten and one half months after the injury from breach of warranty, was not timely; strict liability there was superfluous. Compare *Heavener v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973) with *Salvador v. I. H. English of Phila. Inc.*, 224 Pa. Super. 377, 307 A.2d 398 (1973), former applying two year tort statute of limitations, and latter applying U.C.C. §§ 2-318, 2-725.

There is an echo of the *Lochner* case in *Fuentes v. Shevin*, 407 U.S. 67 (1972), noted in 6 JOHN MAR. J. PRAC. & PROC. 139 (1972), which may require only a preliminary hearing before seizure in a replevin action, and which may not prevent express waiver of such hearing nor repossession by peaceful self-help under U.C.C. § 9-503. See *Adams v. Southern California First Nat. Bk.* --- F.2d --- (9th Cir., October 4, 1973); *Johnson v. Associates Finance, Inc.*, 365 Fed. Supp. 1380 (S.D. Ill., November 15, 1973). Standards of good faith and unconscionability are better suited to delineate duty and right in such cases than is due process.

The National Labor Relations Act (29 U.S.C. §§ 141 *et seq.*), Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*), Social Security Act (42 U.S.C. ch. 7; 26 U.S.C. Subtitle A, ch. 2; Subtitle C, chs. 21, 23 and 25; Subtitle F), Unemployment Insurance (42 U.S.C. §§ 501 *et seq.*; 26 U.S.C. §§ 3301 *et seq.*), and many other federal and state programs of a similar sort (see ILL. REV. STAT. ch. 48 generally) not only regulate employment and working conditions, but also tend toward provision of minimum subsistence. See R. HOOKER, THE LAWS OF ECCLESIASTICAL POLITY, Bk. I. ch. X, § 2:

All men desire to lead in this world a happy life. That life is led most

While it may be that due process sets higher standards of living for persons committed than for those of us outside,¹⁵⁶ *Wyatt v. Stickney* shows that Mr. Skinner may not rely on cases which hold that Congress determines whether to expend funds for the general welfare and to what degree, as also deciding that the power to confer or withhold unlimited benefit is not the same as the power to coerce or destroy.¹⁵⁷

happily, wherein all virtue is exercised without impediment or let. . . . But inasmuch as righteous life presupposeth life; inasmuch as to live virtuously it is impossible except we live; therefore the first impediment, which naturally we endeavor to remove, is penury and want of things without which we cannot live.

Such acts seem to foster counter-cooperation except insofar as they pertain to subsistence. See also the cooperatives in note 65 *supra*.

The logical evolution of "no fault" auto insurance is the disappearance of tort law which may eliminate harnessed aggression to be replaced by fees, fines, strict license requirements, and extension and intensification of government as opposed to private actions. G. W. R. Palmer and E. J. Lemons, *Toward the Disappearance of Tort Law — New Zealand's New Compensation Plan*, 1972 U. ILL. L.F. 693. This may be eventually a regression to the era preceding the action of trespass and the Assize of Novel Disseisin. See J. D. Fuchsberg in 1967 U. ILL. L.F. 565, 574.

Arbitration is a process related to the judicial adversary proceeding, but courts may allow litigation to proceed and stay arbitration. See ILL. REV. STAT. ch. 10, §§ 101 *et seq.*; 9 U.S.C. §§ 1-14 and J. E. Souk, *Arbitration or Litigation? United States District Court Orders Resolving the Issue Should Be Appealable* under 28 U.S.C. § 1292, 1973 U. ILL. L.F. 338. Whether stayed or not, arbitration is a form of harnessing aggression within the parameters of a civilized society, and not so deleterious to evolution as the entire displacement of rational, correlative duty and right.

There are some instances where an agent's duty to give information to his principal may conflict with a public duty to withhold such information until it is widespread. RESTATEMENT (SECOND) OF AGENCY § 381; 15 U.S.C. § 78j(b); J. Rapp and A. M. Loeb, *Tippee Liability and Rule 10b-5*, 1971 U. ILL. L.F. 55; C. J. Cobine, *Elements of Liability and Actual Damages in Rule 10b-5 Actions*, 1972 U. ILL. L.F. 651. See also *Faberge, Inc.*, S.E.C. Release No. 10174 (May 25, 1973), C.C.H. Fed. Sec. L. Rep. (Current) ¶79, 378 noted in 62 ILL. B.J. 221 (1973). Carried to an extreme, such restrictions on private duty could be deleterious to the extent of requiring Mr. Skinner's ultimate solution, but it is still possible to recover the homeostasis of Mr. Hume and of Mr. Madison. There is a rough analogy from these insider-tippee cases to the U.C.C.'s limiting liability, yet enabling ready recovery under warranty, good faith, and unconscionability doctrines. Debt should be similarly regulated, but not abolished after incurred, in the absence of bankruptcy. R. E. Speidel, *Enforcing Security Interests in Consumer Goods: Some Notes on the Vicious Cycle*, 7 U. RICH. L. REV. 187 (1972).

Apart from the above, there are many statutes and regulations on credit, consumer products, and combinations or acts in restraint of trade, and employment and working conditions which are directed to maintenance of duty and right in the manner of the "mean" suggested by Mr. Madison, without the extreme of "survival of the fittest" which, strangely, both Mr. Skinner and Mr. Sumner adopt, though with such different ends. Query whether government procedures of budget, taxation, and expenditure hit Mr. Madison's problem of political apportionment, but avoided his "mean" solution?

¹⁵⁶ See notes 1, 132, 142 *supra*.

¹⁵⁷ *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); BEYOND FREEDOM AND DIGNITY 35-36. See also *City of New York v. Richardson*, 473 F.2d 923 (2d Cir. 1973) holding that the Social Security Act (42 U.S.C. §§ 301 *et seq.*) in making federal funds available on matching fund basis for public assistance programs does not render Act unconstitutional under Amend. 5, 9, 10 or 14 nor under Art. I,

Does Mr. Skinner really mean to equate us all with people whom Dr. Erasmus describes in the following passage:

And now, by the immortal Gods! I think nothing more happy than that generation of men we commonly call fools, ideots [*sic*] lack-wits and dolts; splendid Titles too, as I conceive 'em. I'll tell ye a thing, which at first perhaps may seem foolish and absurd, yet nothing more true. And first they are not afraid of death; no small evil, by Jupiter! They are not tormented with the conscience of evil acts; not terrify'd with the fables of Ghosts, nor frighted with Spirits and Goblins. They are not distracted with the fear of evils to come, nor the hopes of future good. In short they are not disturb'd with those thousand of cares to which this life is subject. They are neither modest, nor fearful, nor ambitious, nor envious, nor love they any man. And lastly if they should come nearer even to the very ignorance of Brutes, they could not sin, for so hold the Divines.¹⁵⁸

§ 8, ¶1 on theory that local governments are coerced into sharing in fiscal responsibility for public assistance. See notes 1, 119 *supra*.

¹⁵⁸ D. ERASMUS, THE PRAISE OF FOLLY 150-51 (Walter J. Black ed. 1942). See note 12 *supra*. EHRENZWEIG at 230 *et seq.* criticizes the test of responsibility as a criterion for punishment, and, at 231-41, admits punishment to be an effective deterrent to "post-oedipal crimes" *not* requiring the offender to overcome Freudian repressed desires, but not to "oedipal crimes" such as "killing" which requires overcoming strongest repression, saying that any other course would be irrational retribution founded in aggression and vengeance. See note 23 *supra* on Mr. Ehrenzweig's similar criticism of tort law, but see also notes 129, 130, 132 *supra*. ILL. REV. STAT. ch. 91½, § 9-6:

If any person is finally found to be in need of mental treatment or mentally retarded, the court, as part of the hearing shall consider the alternative forms of care or treatment which are desirable for and available to the patient, including but not limited to hospitalization. . . .

§ 1-11:

'Person In Need of Mental Treatment,' when used in this Act, means any person afflicted with a mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years.

§ 1-12:

'Mentally Retarded and Mental Retardation,' refer to subaverage general intellectual functioning generally originating during the developmental period and is associated with impairment in adaptive behavior. Impaired adaptive behavior may be reflected in delayed maturation or reduced learning ability or inadequate social adjustment.

§ 10-6 makes the writ of habeas corpus available in such cases. § 12-1 requires every patient to have "adequate and humane care and treatment." § 14-1 provides for judicial review of "a final administrative decision of the Department" of Mental Health. On care and treatment in state institutions, see § 100-7. On assignments for educational or training purposes, see § 100-33.1.

ILL. REV. STAT. ch. 38, § 6-2:

(a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (b) the terms 'mental disease or mental defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

There ought to be some legislative or judicial attempt to integrate grounds

It is also possible that Mr. Skinner is warning us of an oncoming variant application of Gresham's law if we fail to go back to his Walden Two, for the Employment Act of 1946, an engine of fiscal and monetary power, has made money so "bad" as to drive it toward the level of *Erewhon's* musical bank currency, while political power has become the currency of the world.¹⁵⁹ Mr. Daniel Bell has correctly stated:

In other words, the corporation may be a *private enterprise* institution, but it is not really a *private property* institution. (If the assets of the enterprise are primarily the skill of its managerial employees, not machinery or things — and this is preeminently true in the science-based industries, in communications, and in the so-called 'knowledge industries' — then property is anyway of lesser importance.) And if ownership is largely a legal fiction, then one ought to adopt a more realistic attitude to it. One can treat stockholders not as 'owners' but as legitimate claimants to some fixed share of the profits of a corporation — and to nothing more.

.
In the past, there was an 'unspoken consensus,' and the public philosophy did not need to be articulated. And this was a strength, for articulation often invites trials by force when implicit differences are made manifest. Today, however, there is a visible change from market to non-market political decision-making. The market disperses responsibility: the political center is visible, the question of who gains and who loses is clear, and government becomes a cockpit.¹⁶⁰

for civil involuntary commitment with the defense of insanity; see *State v. Clemons*, 110 Ariz. 79, 515 P.2d 324 (1973). Analysis solely on the basis of Freudian concepts such as those applied by Mr. Ehrenzweig seems inadequate. But the test of likelihood of harm is criticized by Justice Flaschner as inadequate definition capable of such judicial interpretation as would put "the heat" on judges, for example in the case of an exhibitionist. See note 1 *supra* citing article by Justice Flaschner, ILL. REV. STAT. ch. 38, § 6-2(b) above, and § 11-9 on Public Indecency. At least, a judge is as reasonable as a psychologist or psychiatrist, though perhaps not as focused on the patient. C. Fleetwood, *Recent Developments in Criminal Insanity Tests*, 1966 U. ILL. L.F. 1116. See *People v. Misevic*, 32 Ill. 2d 11, 203 N.E.2d 393 (1964), *cert. denied*, 380 U.S. 963 (1965). But see provisions for determination of competency of defendant and for his commitment if determined incompetent, ILL. REV. STAT. ch. 38, § 1005-2-1:

- (a) for the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:
- (1) to understand the nature and purpose of the proceeding against him:
 - or
 - (2) to assist in his defense.

Upon becoming competent, defendant, so committed but later sentenced after proceedings resumed, is to be credited with time of commitment period. ILL. REV. STAT. ch. 38, § 1005-2-2.

Hence, there are at least three sets of tests on responsibility in Illinois, apart from the "reasonable man."

Contract is older than feudalism and is used by Mr. Skinner in WALDEN TWO. See notes 22, 47, 53, 56 *supra*. Shall we say that remedies for breach of contract involve any more punishment than leaving Walden Two, after working for credits, with no more than the few possessions brought in? All form contracts are not the sort of adhesion contracts described by Mr. Ehrenzweig, see notes 41, 52 *supra*.

¹⁵⁹ See notes 125, 135, 144, 145 *supra*.

¹⁶⁰ D. BELL, *THE COMING OF THE POST-INDUSTRIAL SOCIETY* 294-95 (1st ed. 1973). Copyright © 1973. Reprinted by permission of Basic Books

Mr. Dostoyevsky wrote of a Grand Inquisitor of Seville who, at a Second Coming, took Christ prisoner and said:

Doest Thou know that the ages will pass, and humanity will proclaim by the lips of their sages that there is no crime, and therefore no sin; there is only hunger? . . . No science will give them bread so long as they remain free.

.
And if it is a mystery, we too have a right to preach a mystery, and to teach them that it's not the free judgment of their hearts, not love that matters, but a mystery which they must follow blindly, even against their conscience. . . . We have corrected Thy work and have founded it upon *miracle, mystery and authority*.

.
I left the proud and went back to the humble, for the happiness of the humble. . . . To-morrow I shall burn thee. Dixi.¹⁶¹

One Longinus, who probably lived and wrote in the first half of the first century A.D., said this of himself and others of his time:

No; perhaps for such as we, it is better to be ruled than to be free, since once our greed for ill-gotten gain were let loose, as from a prison, against our neighbors, it would inundate the whole inhabited earth with ill.

And in general . . . the natures of the men born in these days have an indolence of spirit that is all-consuming, in which indolence all of us save a few spend their lives, working at a task or taking it up only to get praise or pleasure, and never doing so for that conferring of benefits on others, which deserves our ardent efforts and men's honor.¹⁶²

But the response obtainable by free persons who allow the best of them to perform is the greatest advantage known, and it is the duty of each one of us to find what is her or his best repertoire, and to perform, including in such performance, the selection of the most capable among us. No principle was ever harder to apply. No application was ever more required.

As Mr. Bell says:

But what does not vanish is the duplex nature of man himself — the murderous aggression, from primal impulse, to tear apart and destroy; and the search for order, in art and life, as the bending of will to harmonious shape. It is this ineradicable tension which defines the social world and which permits a view of Utopia that is perhaps more realistic than the here-and-now millenium on earth that modern man has sought. Utopia has always been conceived as a design of harmony and perfection in the relations between men. In the wisdom of the ancients, Utopia was a fruitful impossibility, a conception of the desirable which men

Inc. [hereinafter cited as BELL].

¹⁶¹ F. DOSTOYEVSKY, *THE BROTHERS KARAMAZOV*, Pt. Two, Bk. Five ch. 5, 262, 266, 269, 270 (Modern Library, C. Garnett transl.)

¹⁶² LONGINUS, *ON THE SUBLIME* ch. 44 (Translated by Benedict Einarson). See EHRENZWEIG 178 in his note 68.

should always strive to attain but which, in the nature of things, could not be achieved. And yet, by its very idea, Utopia would serve as a standard of judgment on men, an ideal by which to measure the real. The modern *hubris* has sought to cross that gap and embody the ideal in the real; and in the effort the perspective of the ideal has become diminished and the idea of Utopia has become tarnished. Perhaps it would be wiser to return to the classic conception.¹⁶³

Mr. Skinner at one point rejects equilibrium as an unworthy goal,¹⁶⁴ and at another point says equilibrium "is hard to define and even harder to observe and measure."¹⁶⁵ Mr. Skinner also would discard aggression as a destructive emotion,¹⁶⁶ and would have the Board of Planners and Managers anonymously lead experiments without reason.¹⁶⁷ If this comes to pass we shall be left without a scale and without a sword, but allowed to keep the blindfold.

While justice and equilibrium are hard to measure, hard to discern, and subject to human, fallible search, who ever said that the search would be easy? The "happiness" of the Declaration of Independence seems to have been more related to homeostasis than ecstasy, which derives from a Greek word meaning "to put out of place, derange."¹⁶⁸ The confusion wrought by the increased reception of the new tools of industry, economics, and

¹⁶³ BELL 488-89. For a possible alternative, see F. A. HAYEK, *THE ROAD TO SERFDOM* (1965), at 13, 70, 144 and 183, discussing Lord Acton. See notes 114, 115, 116 *supra*. For another possible alternative, see B. BETTELHEIM, *THE INFORMED HEART*, reprinted in J. KATZ, J. GOLDSTEIN & A. M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1st ed. 1967), at 195:

Those who give in to it, who have withdrawn all vital energy from the world, can no longer act with initiative, and are threatened by it in others. They can no longer accept reality for what it is; having grown infantile, they see it only in the infantile perspective of a wishful denial of what is too unpleasant, of a wishful belief in their personal immortality. . . . When Lengyel and many other prisoners were selected to be sent to the gas chambers, they did not try to break away, as she successfully did. Worse, the first time she tried it, some of the fellow prisoners selected with her for the gas chambers called the supervisors, telling them she was trying to get away. . . . I believe they did it because they had given up their will to live. . . . As a result they now identified more closely with the S.S. who were devoting themselves to destruction, than to those fellow prisoners who still had a grip on life and hence managed to escape death.

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EHRENZWEIG at 56 says Mr. Kelsen's positivism was not chargeable with the rise of Nazism. Two more alternatives: A Brave New World such as Walden Two, or the adaptability and resiliency of Charles-Maurice de Talleyrand-Perigord.

¹⁶⁴ WALDEN TWO 290.

¹⁶⁵ See note 142 *supra*.

¹⁶⁶ See notes 67, 68, 69, 132 *supra*.

¹⁶⁷ See notes 78, 125 *supra*; WALDEN TWO 175: "Experimentation. . . . not reason."

¹⁶⁸ See note 125 *supra*. H. M. JONES, *THE PURSUIT OF HAPPINESS* 4 and at 9 (Harvard Univ. Press 1953), quoting Mr. George Mason, and at 164, 165 paraphrasing Mr. Thomas Jefferson.

science, including psychology, may yet be defined as just another problem inherent in man's innate summation and mutual inhibition, to be resolved by man's realization of his limitations and of his ability to use such new tools to conquer any environment. For example, to use a computer to beat a chessmaster using another computer.¹⁶⁹ The "mean" is the thing. Mr. Madison was right.¹⁷⁰

¹⁶⁹ See note 120 *supra*.

¹⁷⁰ See note 148 *supra*.