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Children of the Eighth Day: The Role of International Lawyers in a Post-Modern World

I. The Future as Medieval

Law does not change history; it is history that changes law. In form the process of change is verbal and reasoned, but in substance it is a tacit, near-visceral accommodation to dimly felt patterns of cultural evolution. As Holmes put it:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[1]

During long segments of human experience law changes so gradually that the lawyer functions as a mere manipulator of precedent. As a judge or legislator he constructs the present from a reasoned extrapolation of the past; as an advocate he offers analogies from which those extrapolations are drawn; as a counselor he projects those constructions upon the future. In each role the lawyer's craft is simply the logical application of familiar and established concepts. Small wonder that lawyers become the mandarins of conventional wisdom, the high priests of the status quo. Less wonder that when each would-be revolution is plotted some Dick the Butcher must mutter, "The first thing we do, let's kill all the lawyers."[2]

But eventually the long segment snaps, a revolution succeeds, and the precedent-crammed minds of the lawyers who survive become impediments to their serving the society that emerges. When it is time to construct a post-revolutionary future, precedents of the immediate past are useless; then new precedents must be spun from the imagined postulates of an imminent tomorrow or quarried from the ruins and middens of a remote yesterday.

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[1] O. W. HOLMES, THE COMMON LAW, 1 (1881).

[2] W. SHAKESPEARE, KING HENRY VI, Part II, Act IV, Scene II.

It is the perception of an impressive and growing body of observers that the West is passing through a period of cultural collapse, one of the great time-warps of our chronicle, in which the continuum-segment of several centuries has snapped and man once more faces the task of creating a post-revolutionary future. Robert Nisbet sees the twentieth century as one of the "twilight ages"[3] of Western history which has reached the point of breakdown in public order[4] and moves inexorably toward "a military Leviathan set in circumstances of social erosion and cultural decay."[5] Michael Grant finds the contemporary West "disquietingly identifiable"[6] with fifth century Rome, and places us "somewhere within that range of years"[7] which preceded the fall of the City in A.D. 476. In the pensive last chapter of his glowing narrative of *The Ascent of Man,* Jacob Bronowski confessed, "I am infinitely saddened to find myself suddenly surrounded in the west by a sense of terrible loss of nerve . . ."[8] Alexander Solzhenitsyn suggests that the most striking feature of the West today is a "decline in courage,"[9] which "from ancient times . . . has been considered the beginning of the end."[10] "If the world has not approached its end," he concludes, "it has reached a major watershed in history, equal in importance to the turn from the Middle Ages to the Renaissance."[11]

The unacknowledged dean of all contemporary doomsayers was the Spanish philosopher José Ortega y Gasset, who began six decades ago to predict, with uncanny accuracy and haunting eloquence, the end of the Modern Age.[12] Ortega read the history of the West as a series of recurring plateaus of traditional culture, each rising to a peak of richness only to erode, through rationalism and political radicalism, into an abyss of rebarbarized dissolution. By his reckoning there were three such plateaus:

1. the Ancient World, which spanned the Greek and high Roman civilizations and ended in the third century;
2. the Middle Age, which lasted until 1350; and

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[3]R. NISBET, TWILIGHT OF AUTHORITY at v (1975).
[4]*Id.* at 60–64.
[5]*Id.* at 232.
[6]M. GRANT, THE FALL OF THE ROMAN EMPIRE—A REAPPRAISAL 314 (1976).
[7]*Id.* at 19.
[8]J. BRONOWSKI, THE ASCENT OF MAN 437 (1976).
[9]Solzhenitsyn, *A World Split Apart,* in 44 VITAL SPEECHES OF THE DAY 678, 679 (1978).
[10]*Id.*
[11]*Id.* at 684.
[12]Ortega's theory of eras is scattered throughout his published works, which date from 1902 to 1954 and are collected in the eleven-volume *Obras completas,* (1966-1973 eds.). His most nearly complete statement of the theory is found in a 1948-1949 series of lectures (concerning, and highly critical of, Toynbee's *A Study of History*) published as *Una interpretación de la Historia Universal* (1960), reprinted in IX *Obras completas* 9-242, and translated into English as *An Interpretation of Universal History* (1973). For a detailed account of the theory, including references to relevant passages throughout *Obras completas, see* Waiting for the Barbarians: The Future of the West in the Historical Philosophy of José Ortega y Gasset, Address by Ewell E. Murphy, Jr., 410th Meeting of the Houston Philosophical Society.

3. the Modern Age, which extended from the seventeenth to the early twentieth century.

Beyond those plateaus gaped three abysses of insecurity and chaos:

1. the period following the barbarian conquest of Rome;
2. the so-called Renaissance;[13] and
3. the post-Modern years in which we live.

Ortega fixed the beginning of the Modern Age at 1630, which opened the decade of Galileo's *Dialogue*[14] and Descartes' *Discourse,*[15] but he was less specific concerning the Age's end. George Steiner placed its terminus at 1914, the beginning of the Second Thirty Years' War, in which Europe destroyed seventy million of its kind by military operations, starvation and genocide.[16] Bertrand Russell agreed: "For the next 1000 years people will look back to the time before 1914 as they did in the Dark Ages to the time before the Gauls sacked Rome.[17]

If the Modern Age was fatally stricken in 1914, it follows that the West has since that date been lurching forward on dead momentum, like a mortally wounded mastodon, doomed to extinction and collapse. Precisely how and when the collapse will occur is the subject of varying convictions. Steiner believes that Western man will be destroyed by his own scientific curiosity when he opens an atomic or chromosomal "last door in Bluebeard's Castle."[18] In Roberto Vacca's view the end will come between 1985 and 1995—whether by war or social stress—in the breakdown of the overburdened life-support systems of the modern city.[19] Albert Toffler predicts "the final breakup of industrialism"[20] in an economic debacle of shattering proportions,[21] a thesis fictionalized by Paul Erdman on an energy theme.[22]

If those doomsday scenarios are correct the West is very near the abyss of the Ortegan cycle—the nadir of a tumultuous descent from a peak of enervating richness and the point of arduous reascent to a new plateau of Medieval

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[13]In Ortega's view the word "Renaissance" is a recently coined misnomer for the decadent period that followed the Middle Age. He attributed the usage to Burkhardt, *The Culture of the Renaissance in Italy* (1860) and considered that Burkhardt had taken it from the characterization, originated by a Spanish painter of the mid-nineteenth century, of an artistic style of the fourteenth century. VIII Ortega, *Obras completas* 225. Concurring views of the inappropriateness of the term "Renaissance" are expressed in NISBET, *supra* note 3, at 244-45. In N. Cantor, *Medieval History,* 531-32 (1969), Burkhardt's usage is contrasted with the Ortegan perspective expressed in Huizinga, *The Waning of the Middle Ages* (1924).

[14]GALILEO, DIALOGO DEI MASSIMI SISTEMI (1632).

[15]DESCARTES, DISCOURS DE LA MÉTHODE POUR BIEN CONDUIRE SA RAISON ET CHERCHER LA VERITÉ DANS LES SCIENCES; PLUS LA DIOPTRIQUE, LES MÉTÉORES ET LA GÉOMÉTRIE, QUI SONT DES ESSAIS DE CETTE METHODE (1637).

[16]G. STEINER, IN BLUEBEARD'S CASTLE 29-31 (1973).

[17]B. RUSSELL, THE AUTOBIOGRAPHY OF BERTRAND RUSSELL 1914-1944, at 110 (1969). To the same effect see NISBET, *supra* note 3, at 264, and J. K. GALBRAITH, THE AGE OF UNCERTAINTY 133 (1977).

[18]STEINER, *supra* note 16, at 140.

[19]R. VACCA, THE COMING DARK AGE 170 (1974).

[20]A. TOFFLER, FUTURE SHOCK 404 (1971).

[21]A. TOFFLER, THE ECO-SPASM REPORT ch. 6 (1975).

[22]P. ERDMAN, THE CRASH OF '79 (1976).

austerity. If that is true, we live at a time of unprecedented challenge for students of transnational law, who will be the out-riders of the arduous reascent and and the constructors of a world-order of the new plateau. They can best prepare themselves by looking long and hard at the legal institutions of the Modern Age. Which of those institutions, if any, are fit precedent-foundations for the post-Modern world? On closer inspection, do we see those Modern institutions already reverting before our eyes into mutant Medieval building blocks? The purpose of this paper is to examine three institutions fundamental to the transnational law of the Modern Age, in search of clues to the role of international lawyers in a post-Modern future.

II. The Waning Nation-State

The juridical unit of the Modern Age was the nation. The Greeks saw themselves as citizen-residents of cities, the Romans as citizen-subjects of an Empire, and Medieval man as the giver and receiver of feudal loyalties, but the post-Renaissance world aspired to nationhood. The entire trajectory of the Modern era can be plotted in the development of the nation-state: Born in the communes and merchant-republics, emerging in the erosion of authority of Pope and Holy Roman Emperor, the system matured with the internal unification and external colonization of the great European nations, each linguistically distinct, culturally coherent, and acknowledging no foreign king or flag. In 1914 a precise map of the Eastern Hemisphere could be painted in the half-dozen unyielding colors of the metropolitan powers, each with its African and Asian colonies in dutifully matching livery.

Because Modern man understood legal authority to reside in the nation-state, he comprehended the law beyond national borders as a juridical relation between nations—a "law of nations," by earlier usage, or, in Bentham's less satisfactory but more persistent phrase, "international law."[23] If the Greeks, with their system of city-states, thought of inter-city law at all, it was simply as a datum of conquest and capitulation. The Romans visualized *jus gentium* as a law for foreigners, but nonetheless a law that emanated from Roman sovereignty. Medieval man perceived juridical norms as hierarchic levels of feudal obligation; if he could conceive of a gap between fealties and imagine a law to govern that gap, it was the law of yet another hierarch, the Church. Modern man was different: Having created the nation-state, whose territory by definition was the radius of the king's writ, he thought of the law beyond that radius as a function of state-to-state obligations, explicitly or implicitly consensual, a law outside the state but still founded upon its sovereignty. A late-flowering example of this concept—a consensual transnational law based upon the equality and sovereignty of nations—was the 1920 Covenant of the League of Nations, which required decisions of the As-

[23]The name is attributed to Bentham in H.L.A. Hart, THE CONCEPT OF LAW 231 (1961), *citing* J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, XVII. 25, n.1.

sembly and Council to be made by the unanimous vote of all members present[24] and did not delegate authority to use force against an unwilling state.[25]

Our contemporary system of nation-states and transnational law is considerably altered from those of the 1914 map and the 1920 Covenant. Instead of universal cultural self-containment, we see Germany and Korea split; instead of cohesive national sovereignty, we find political devolution, actual or demanded, in Spain, Britain, Canada and Belgium. Instead of politically defined, precisely delineated and respectfully color-fast colonies, the 1979 map of Africa and Asia is an anarchic swirl of emancipated power-vacuums, a pulsing kaleidoscope of races, religions, tribes and ideologies. Instead of a global structure based upon political nationhood, the contemporary world-order is an acronymic gaggle of economic super-states—European Economic Community (EEC), COMECON, Organization of Petroleum Exporting Countries (OPEC), ANCOM and their lesser siblings—polarized by clusters of military hegemony like NATO, the Warsaw Pact, and the Arab League. Instead of a League Covenant grounded on the equality and sovereignty of nations, we have the United Nations Charter, which grants an unequal veto[26] and expressly delegates authority to use force,[27] and under which all states, however "sovereign," are in practice vulnerable to the parliamentary pretentions of demographically preposterous Assembly majorities.[28] Above these superstructures of supra-national authority there hover, like gathering clouds, thickening assertions of jural norms even further removed from national consent: Marxist orthodoxy and Islamic morality, for example, and the emotional imperative of each newly discovered "common heritage of all mankind."[29]

If the tempo of change is irregular, the trend is unmistakable. The cohesive, cellular nation-state is metamorphosing into a complex organism with decentralized political nuclei and extruded umbilicals of economic and military affiliation. The world is becoming agglomerate, hierarchic—in a word, neo-Medieval. It is as though that shrewd old dowager, the Modern nation-state, had read the fashion news of tomorrow and were quite deliberately casting aside her Congress of Vienna ball gowns for the trains and wimples of the new Middle Age.

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[24]LEAGUE OF NATIONS COVENANT art. 5. *Cf.* LEAGUE OF NATIONS COVENANT art. 15.

[25]*See* LEAGUE OF NATIONS COVENANT arts 10, 15, 16.

[26]U.N. CHARTER art. 27, para. 3.

[27]U.N. CHARTER art. 42.

[28]On the issue of whether Assembly resolutions have binding legal effect, *see* Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*", 11 INT. LAW. 529, 532-34 (1977). *Compare* U.N. CHARTER art. 10.

[29]*See* Charter of Economic Rights and Duties of States, ch. III, art. 29, G.A. RES. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 INT'L LEGAL MATS. 251, 260 (1975).

III. The Overmatched Multinationals

The dominant figures of the Ancient World were the farmer-sailors of Greece and the farmer-soldiers of Rome—versatile, undifferentiated men, equally adept with plow and sword. They were succeeded in the Middle Age by the specialized castes of warriors and priests. In the Modern Age authority passed to an entirely new class—the bourgeoisie—which consisted of capitalists and the highly differentiated professionals (lawyers, doctors, accountants, and scientists) who contrived to make their middle-class existence orderly and comfortable.

The production model of the Modern Age was Adam Smith's pin factory[30] and its principle of industrial efficiency was the notion of reducing unit costs by splitting human craftsmanship into progressively simpler and less human functions. It was the age of Manchester, the "dark Satanic mills," and the frenzied assembly line of *Modern Times*. "The real and inhuman excess," as Camus observed, "lies in the division of labor."[31]

As the Modern Age sought to specialize its professionals and to depersonalize its factory workers, it searched for an equally fragmentable and impersonal capitalist. Eventually it constructed the perfect entrepreneur, whose oversight responsibilities could be divided neatly between directors and officers, whose proprietary position could be expressed in infinitely divisible claims of equity and debt, and whose very personality could be altered at will through the bloodless lobotomy of charter amendment or painlessly extinguished by the euthanasia of dissolution. This new creature—the business corporation—came to personify Modern capitalism as explicitly as the uncultured professional specialist and the mindless assembly line worker represented the Modern view of human creativity.

Some corporations grew big, particularly in the Northern Hemisphere, where capitalism was most vigorous. In an age of diminishing distances, almost every big corporation had significant presence outside its jurisdiction of incorporation. Fear of these big corporations spread in nations of more sluggish enterprise, and to legitimize that fear there was devised a pejorative label—"multinational corporation"[32]—which hinted at distinctions more

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[30]A. SMITH, THE WEALTH OF NATIONS ch. I (1776).

[31]A. CAMUS, THE REBEL 295 (1956).

[32]Efforts toward international regulation of the "multinationals" have revealed a significant absence of international consensus on the questions of how to label them and how to define the label used:

(a) *United Nations*

The 1974 Declaration on the Establishment of a New International Economic Order used the term "transnational corporations" without definition. G.A. Res. 3201, art. 4(g), U.N. GAOR (6th spec. sess.), Supp. (No. 1) 3, U.N. Doc. A/9559 (1974), *reprinted in* 13 INT'L LEGAL MATS. 715, 728 (1974).

The 1974 Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations used, in deference to its convening resolution, the term "multinational corporation" and provided an explicit definition thereof: "Multinational corporations are enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be cooperatives or state-owned entities." Yet despite its use of the

sinister than mere bigness or influence. Because many of the sluggish nations were socialist, that label also came to connote companies that were privately owned, yielding the inference that state-owned businesses, however large and transnationally influential, were insufficiently nefarious to merit the epithet.

Consequently, when public attention came to be directed toward transnational business activity, scrutiny was limited to the "multinationals" in rejection of more rational criteria such as size and impact. Although this tunnel-vision selectivity insured that the inquiry would produce few useful answers, it greatly facilitated the process of inquiry itself: It was far easier to research the precatalogued sins of General Motors or International Telephone and Telegraph than to penetrate the price policy of the Soviet Ministry of Foreign Trade or to audit the expense accounts of Pemex. Nourished by such facile criteria of investigation, analyzing and deploring the "multinationals" became a favorite pastime of American academics and third-world politicians.

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term, the Group footnoted a preference for "transnational enterprise." U.N. Doc. E/5500/Rev. 1, pt. 1 n.2, ST/ESA/6, at 14 (1974), *reprinted in* 13 INT'L LEGAL MATS. 800, 807 (1974). The 1974 Charter of Economic Rights and Duties of States used "transnational corporations" without definition. G.A. Res. 3281, ch. II, art. 2(b), 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9946 (1974), *reprinted in* 14 INT'L LEGAL MATS. 251, 255 (1975).

The 1976 Assembly Resolution condemning corrupt practices spoke of "transnational and other corporations." I.L.M. 180 (1976). G.A. Res. 3514, 30 U.N. GAOR, Supp. (No. 34) 69, U.N. Doc. A/10034 (1975), *reprinted in* 15 INT'L LEGAL MATS 180 (1976).

In the 1976 Report of the Commission on Transnational Corporations "Work leading to a definition of transnational corporations" was suggested as one of five points of focus for the Commission's programme of work (Paragraph 7(e)). The Commission characterized this topic as "one of the most difficult tasks" it faced (Paragraph 62) and noted a divergence of views on the subject among its national delegations. It mentioned the suggestion of "some delegations" that the definition should cover "all transnational business enterprises, whether public or private" (Paragraph 63) but noted, "Other delegations were not in favour of a definition which would include State-owned enterprises." (Paragraph 64). 15 INT'L LEGAL MATS. 779, 780, 793 (1976).

In the 1977 report of the Commission on Transnational Corporations the Chairman "recognized" the need to define "transnational corporations" (Part II, Paragraph 16) but indicated no progress toward a definition. 16 INT'L LEGAL MATS. 709, 715 (1977).

Davidson & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247, 248 (1978) conclude that United Nations parlance has gradually shifted from "multinational corporations" to "multinational enterprises" and thence to "transnational enterprises."

(b) *Organization of American States*

The 1975 OAS Resolution calling for a code of conduct used "transnational enterprises" without definition. 14 INT'L LEGAL MATS. 1326 (1975).

(c) *Organisation for Economic Co-Operation and Development*

The 1976 OECD Declaration on International Investment and Multinational Enterprises and its accompanying Guidelines used "multinational enterprises". The Guidelines concluded that a precise legal definition is "not required" but noted that the term usually comprises "companies or other entities whose ownership is private, state or mixed" (Paragraph 8). 15 INT'L LEGAL MATS. 967, 969, 971 (1976).

For discussions of the definition issue see Joelson & Griffin, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT. LAW. 5, 8-9 (1977); *The Multinational Corporation and World Economic Development*, 66 PROC. AM. SOC'Y INT'L L. 14 (1972); *Developing and Enforcing Guidelines for Multinational Enterprises*, 70 PROC. AM. SOC'Y INT'L L. 16, 21-22 (1976); Rubin, *Reflections Concerning the United Nations Commission on Transnational Corporations*, 70 AM. J. INT'L L. 73, 84-87 (1976).

Hardly a month passed without the presentation of a learned paper[33] or the passage of a deprecatory resolution on the subject. Implicit in the epithet-oriented agendas were not only the principle that the mythical monster, the "multinational," should be stalked to the exclusion of others of its breed, but the rule that socialist "multinationals" were somehow out of season. It was all quite elegant and fey, a piling of whimsy upon myth, rather like a surrealistic unicorn hunt in which the Master of the Hounds announces that today only blue-horned unicorns will be chased.

Meanwhile, back in reality, America's private transnational business found itself increasingly beleaguered. Europe feared an "American challenge"[34] and met it by consolidating European enterprises, private and public, to the scale of the corporate giants of North America. The capital-receiving world erupted in a pox of xenophobic legislation that restricted foreign investment by techniques ranging from the suave ministerial veto of France and the labyrinthine baffle of Japan to the flexible joint venture norms of Canada and the more rigid percentage limitations of Nigeria and Mexico. Some capital-importing nations, like the members of ANCOM, cartelized their investment restrictions by treaty. Most tellingly, state socialism became the paradigm of European economic justice and the industrial model of the developing world. Expropriations spread apace, notably in hydrocarbons, where the spoils of nationalization passed to huge state oil monopolies which in turn joined, or priced in parallel with, OPEC, the super cartel poised at the jugular of the industrial West. As the Modern Age approached its predicted end, its most characteristic economic creation, the private business corporation, had in fact become an internationally endangered species. In the words of one experienced observer: "The vaunted power of the multinational enterprise may have been met by sufficient countervailing power, exercised by both home and host nations, that it is the transnational corporation which is now truly at bay. The long shadow cast by the transnational corporations may be . . . the result of the setting rather than the rising sun.[35]

IV. Beyond Freedom of Contract

The philosophical underpinning of the Modern Age was the individualistic subjectivism of Descartes ("I think, therefore I am"), a revolution in the conceptualization of reality. Ancient man thought that objects existed independently of the observer but Modern man came to believe that the natural world emanated from the mind of the perceiver itself. This Cartesian world-view led to two world-bending ideas. The first was progressivism—the rosy precept that humans are humane, society is sociable, improvement is inevita-

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[33]Aitken, *Multinational Enterprises and International Law: A Selected Bibliography*, 11 INT. LAW. 69 (1977) lists 478 "publications dealing with multinational enterprise activity and its status under international law" that were published during the two preceding decades alone.

[34]J.-J. SERVAN-SCHREIBER, LE DÉFI AMÉRICAIN (1967).

[35]Rubin, *supra* note 32, at 90. *See also* Rubin, *The Multinational Enterprise at Bay*, 68 AM. J. INT'L L. 475 (1974).

ble, and an ideal social order can easily be achieved. The second was the doctrine of the "natural rights of man" which, inverting the Roman meaning of *libertas*,[36] regarded "liberty" not as the privilege of living under law but as a system of rights against the state, like laissez-faire capitalism and unfettered political expression. From progressivism and the doctrine of "natural rights" sprang the conviction that man could improve the world through the revolutions he made in the eighteenth century for the "rights" of the middle class and in the nineteenth and twentieth centuries for the "rights" of the proletariat.

These Modern "rights" were fundamentally different from their Medieval counterparts. For King John at Runnymede a "right" was a narrow privilege conceded or confirmed by a reigning sovereign in favor of persons already bound by a Medieval system of correlative social obligation. For Jefferson and Marx a "right" was a broad immunity rhetorically bequeathed to a future sovereign (the post-revolutionary "people" or "proletariat") free from any burden of correlative obligation. The difficulty came when the revolution succeeded and the new sovereign asserted his immunity. Then the intoxicating poetry of rhetoric had to be translated into the sobering prose of legislation; the soaring vision of "rights" had to be brought down to earth in the creaking, unwieldy machinery of actual government. The creaking increased and the machinery became more unwieldy with each newly invented "right". The individualistic, subjective "rights" of the Modern Age thus led, ironically, to the omnipotent, legalistic Modern state, in which "rights" rested, not on self-executing cultural mores, but on a massive infrastructure of legislators, judges, lawyers, bureaucrats and policemen whose very cost and ponderousness strained the system it was designed to support.

A few wise men sensed the unreality of those supernatural Modern "rights" that sprang unlegislated from the rhetorical brow of Zeus and walked the earth, like zombies, without casting the shadow of correlative obligation.[37] Others feared the inherent fragility of a culture dedicated to personal freedom but grounded only on law.[38] Their voices were lost, however, in the enthusiastic stampede to rhetorically create and legalistically implement ever more numerous and progressively individualistic "rights" of the citizen against his state.

In this "rights"-ridden Modern society the linchpin of private law was the "right" of contract, the principle that a man was not frozen forever in a

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[36] *See* VII ORTEGA, OBRAS COMPLETAS 77.

[37] "I utterly disbelieve all postulates of human rights in general," snorted Holmes. 2 HOLMES-LASKI LETTERS 888 (M. Howe ed. 1953). "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny." Kepner v. United States, 195 U.S. 100, 134 (1903) (Holmes, J., dissenting).

[38] "The defense of individual rights has reached such extremes," Solzhenitsyn observed, "as to make society as a whole defenseless against certain individuals." Solzhenitsyn, *supra* note 9, at 680. "[I]t will be simply impossible to bear up to the trials of this threatening century with nothing but the support of a legalistic structure." *Id.*

glacier of feudal status but could freely change his position by private negotiation. There were persistent limits to this freedom— minority, usury, and the vague contours of "public policy," for example—but for centuries the great saga of Western law was the progressive emancipation of the individual from fixed social relationships toward the unfettered mobility of free contract. Sir Henry Maine's complacent summation was entirely accurate in its day: "[We] may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*"[39]

That day was 1861. Since then the Western law of contract has retraced its steps. The "free" contracts of master and servant abdicated to workman's compensation, minimum wage, and enforced collective bargaining. "Free" sale of goods yielded to pure food and drug laws, compulsory warranties, legislated credit restrictions, and the doctrine of adhesion contracts. "Freedom of association" was subdued by the antitrust laws. "Freedom of commerce" became a furtive, fleeting thing, caught domestically in tight meshes of taxation and regulation, and glimpsed internationally only in the rare interstices between the quotas, tariffs, subsidies, cartels, exchange controls, export/import restrictions and boycotts that fix the norms of contemporary transnational trade.

Across broad fronts the present movement of commercial law is counter-Modern, pro-Medieval, from private contract to collective status. It is a reflection in microcosm of the general demise of the individualistic freedoms that were unique to the Modern World.[40] However posterity may regard it, the present picture is clear: The face of contract, like that of the waning nation-state, seems turned expectantly toward the sunrise of a newly dawning Middle Age.

V. A Byzantine Hypothesis

Relatively simple techniques have been sufficient for American international lawyers dealing with the mutant legal institutions of the recent past. When the law-making authority of the waning nation-state began to disperse to political subregions and economic super states, the relevant legislation could be found in the statutes and regulations of the new mini- and maxi-sovereigns.[41] When state-owned "multinationals" threatened to overmatch

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[39]H. S. MAINE, ANCIENT LAW 170 (1861).

[40]"We live in an age," Orwell wrote, "in which the autonomous individual is ceasing to exist—or perhaps one ought to say, in which the individual is ceasing to have the illusion of being autonomous." 2 G. ORWELL, *Literature and Totalitarianism*, in THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 134 (1968). "It may be," mused Isaiah Berlin, "that the ideal of freedom to choose ends without claiming eternal validity for them, and the pluralism of values connected with this, is only the late fruit of our declining capitalistic civilization: an ideal which remote ages and primitive societies have not recognized, and one which posterity will regard with curiosity, even sympathy, but little comprehension." Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 172 (1969).

[41]Such services as the CCH *Common Market Reporter*, the Gide Loyrette Nouel *Dictionnaire du Marche Commun*, and the Inter-American Development Bank's *Regimen de las Inversiones*

their capitalistic competitors, the legal power of the state entities could be discerned from their organic acts and charters[42] and their local vulnerabilities gauged under the Foreign Sovereign Immunities Act.[43] And lawyers—domestic as well as international—learned long ago how to cope with a legal system reverting from contract to status.

If the doomsday scenarios are correct, however, and the rate of institutional change is approaching the point of descent into the Ortegan abyss, the international lawyer's task will soon become more difficult. At a given velocity legal institutions will not merely change, but vanish. Could the legal profession as we know it survive the disappearance of the bourgeoisie it was created to serve? At what point would legal reasoning itself become a new Linear A, fascinating but undecipherable to posterity?

Such a zero-point mutation is suggested by Roberto Vacca's hypothesis of universal relapse. For the advanced nations of the Northern Hemisphere he projects a century or more of Dark Age in which population will be halved, systems of transportation and communication will fall into desuetude, great cities will become abandoned squatter-warrens, production will fall, credit will vanish, barter will replace cash, and daily life will become a marginal resistance to brigandage and siege.[44] In such an environment it is difficult to see a present function for law beyond simple record keeping and the preservation of rudimentary order. International law would again become a dream of the future, contingent upon the laborious rebuilding of societies to national scale from smaller modules of family and commune.

Michael Grant's analogy between the contemporary period and the fall of Rome[45] suggests a more hopeful hypothesis for America. There was not one Roman Empire, he reminds us, but two. In A.D. 364 the domain was separated into a Western Empire centered in Italy and an Eastern Empire administered from the Bosporus. Rome fell in 476 but Constantinople survived until 1453. In the millenium that intervened—dark then regenerative for Europe, bright then dimming for Islam—Byzantium lived out her own imperial cycle, now rallying the West, now mastering the East, always evolving rich and intricate institutions of her own. Grant sees our contemporary West divided, like the Roman Empire, between Europe and America. The new barbarians, he infers, are the Communists. He fears that when Communism attacks the European West, America, like the Roman East, will not intervene to save its weaker partner.

Extranjeras en los Países de la ALALC and *Derecho de la Integracion* are, in effect, annotated statute-books of the new economic superstates.

[42]Serviceable translations of the formation-instruments of state oil entities are available in Barrow's *National Oil Company Statutes.* Banco Interamericó de Desarollo's *El Regimen Legal de las Empresas Públicas Latinoamericans y su Acción Internacional* (1977) is a pioneering country-by-country study of state entity law in Latin America. As regards the socialist "multinationals" these are prototypes of the corporation law hornbooks of the future.

[43]28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-11.

[44]VACCA, *supra* note 19, ch. 14, 15.

[45]Grant, *supra* note 6, ch. 8.

There is a certain poignant plausibility in the vision of a Byzantine United States as the survivor of a Europe overrun by the new barbarians: a United States in hegemonic relation, perhaps, with the resources of Canada and the Caribbean but isolated defensively from the USSR and its Eurocommunist satellites; a United States trading warily with a developing but introspective People's Republic of China, with a Japanese economic empire of Southeast Asia, and with a militant, expansive Islam; a United States adapting and perfecting her legal institutions in the crucible of self-reliance and adversity. Such a world would put those institutions to their most harrowing test and, to defend them in a hostile world, would demand the ultimate in skill of America's international lawyers.

Whether reality becomes the lunar landscape of Vacca's new Dark Age or the isolated Byzantine survival suggested by Grant's analogy, or neither, the prospect of seeking world order in a post-Modern age cannot be shrugged from our minds as patent absurdity. The stir of change, the intimation of time-warp, is unmistakable in the contemporary air. Neither should we suppress the prospect from our consciousness as unthinkable horror. If we are nearing the abyss we are also approaching the point of reascent. "All of us, among the ruins," wrote Camus, "are preparing a renaissance beyond the limits of nihilism. But few of us know it."[46] Thornton Wilder said it best:

> Nature never sleeps. The process of life never stands still. The creation has not come to an end. The Bible says that God created man on the sixth day and rested, but each of those days was many millions of years long. . . . Man is not an end but a beginning. We are at the beginning of the second week. We are children of the eighth day.[47]

[46] CAMUS, *supra* note 31, at 305.
[47] T. WILDER, THE EIGHTH DAY 16 (1967).