

The Catholic Lawyer

Volume 2
Number 2 *Volume 2, April 1956, Number 2*

Article 7

April 2016

The Natural Law and Social Justice

John C. Fitzgerald

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

Recommended Citation

John C. Fitzgerald (1956) "The Natural Law and Social Justice," *The Catholic Lawyer*. Vol. 2 : No. 2 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol2/iss2/7>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE NATURAL LAW AND SOCIAL JUSTICE

JOHN C. FITZGERALD†

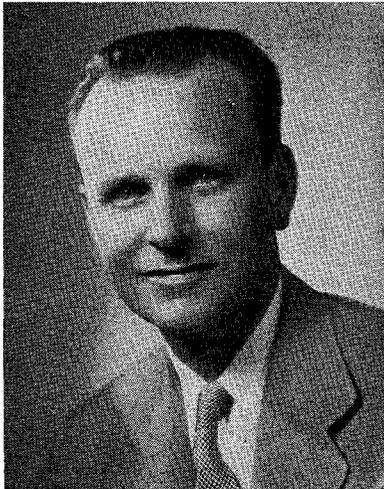
THE TERM "SOCIAL JUSTICE" has been in such general use for the past few decades (both outside and inside the scope of campaign oratory, because I suspect that to many the political synonym of social justice is "fair deal," or "new deal," or "square deal") that, when I first set about the task of organizing some thoughts for this occasion, I turned light-heartedly to LeBuffe and Hayes for a neat formulation of its definition. Out of the world-wide depression and the social encyclicals there must have emerged, I thought, some satisfactory workable definition that could serve at least as a starting point for such a discussion as this. But what did I find in LeBuffe and Hayes? The statement that traditional scholastic jurisprudence recognized only three kinds of justice: commutative, legal, and distributive, the kinds, alas so conveniently assigned to my colleagues of the day and not to myself. And what of "social justice"? LeBuffe and Hayes themselves asked whether there was "warrant to take this term as indicating a fourth new division of justice," and then answered their own question as follows:

Some writers affirm, others deny. Since . . . the whole question is disputed, it seems wisest merely to indicate it. Certainly this much may be said that all the problems which are currently assigned to social justice can be allocated within the framework of the traditional threefold division.¹

†Dean and Professor of Law, Loyola University of Chicago School of Law.

¹ LE BUFFE, S.J. AND HAYES, *THE AMERICAN PHILOSOPHY OF LAW* 379 (1953).

At this point of preparation, it occurred to me that today's discussion might well involve some overlapping, some duplication of effort; and it further occurred to me that there was some disadvantage in not attending the preliminary meetings of those who arranged this schedule and of those who assigned the topics for today. There must be *some* principle of natural law, akin to procedural due process, that protects the absent member who finds himself, at first glance at any rate, assigned a topic which seems to have no existence of its own.



JOHN C. FITZGERALD

But the mere statement that "social justice is non-existent," particularly in the light of the developments of the last few decades, forces the realization that our problem is really one of classification and not of substance.

According to traditional sources, justice includes three elements which in lawyer's language today would be described as an obligor, an obligee, and the subject matter of the obligation. In more traditional terms, it is the obligation of a person owed to

someone other than himself because of the other's title. Whatever differences may exist in the traditional three types of justice reflect merely a change in the persons of obligor and obligee: the obligation from person to person (commutative); from person to society (legal); and from society to person (distributive). The basis of commutative justice is the individual's right to what already is his, to something exclusively ordered to his use. The basis of distributive justice is the individual's right to something which is common property but which society owes him as a member of society; the basis of legal justice is society's right to something which a member of society owes to society.

What is the basis of social justice?

The basis of social justice seems to me to be at a level even more fundamental than, or at least as fundamental as, that of the law of private contracts (commutative justice), or the Selective Service Act (legal justice), or the graduated income tax feature of the Internal Revenue Code (distributive justice). Social justice seems to rest upon three bases: first, upon man's relationship to this planet; secondly, upon man's relationship to man; and thirdly, upon a particular value judgment.

As to man's relationship to this planet: man is under a duty to grow and develop, to seek his end. But, his only source of sustenance is earth-bound; the earth and its products. Therefore, he has a claim to sustenance from the earth. The primary purpose of the earth and its products is to serve man. It does not lose this primary purpose by becoming the private property of an individual. X owns, but X is under an obligation to see that what X owns achieves its purpose. This is the social

aspect of property, the stewardship concept of property. This is Andrew Carnegie's concept for he challenged the wealthy to be "a trustee for the poor, entrusted for a season with a great part of the increased wealth of the community, but administering it for the community." Perhaps this is the rule of St. Benedict of the fifth century who, among his voluntary and religious associates, demanded from each according to his ability and gave to each according to his need; a principle which seems to me to be nothing more than a very attractively worded statement of the underlying rule of social justice, a principle so attractively worded indeed that others have adopted it for purposes entirely foreign to the mind of St. Benedict.

As to the second basis of social justice, man's relationship to man: man as a social animal both physically and mentally awakes, strives, and attains his full growth only by competition, by interaction. Man knows he cannot attain his full potential alone; other human contacts are necessary in order to evaluate ideas, challenge assumptions, stimulate the energies, exchange reassurances, appraise the trial, and pin-point the error; in short, to provide the push and pull, the give and take, that toughen into maturity the mind of man. This is the structure of man. May we recall Aristotle's observation that:

He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a God?

And the third basis of social justice, I suggest, is a value judgment, to wit, the ultimate value-identity of each and every man.

Thus, the obligations of social justice seem to flow from man's relationship to

property, from man's relationship to man, and from the ultimate value of each man.

If our problem of classification involved merely two individual members of one political community, the one wallowing in the luxury of his personal Fort Knox, surrounded by huge deep-freezers containing tons of frozen food, and the other retching from hunger outside the wall, then the obligor, the obligee, and the obligation would be obvious. Moreover, if the obligation (whether termed charity or social justice) were not voluntarily performed, the political community through legal and distributive justice would swiftly provide the answer. But how does one classify when not individuals but groups are involved? When the obligee is not a specified individual but Li'l Abner's Lower Slobbovia or the inhabitants thereof—when no international government exists so that the putative obligor does not come within the territorial jurisdiction of the society to which the legal justice obligation runs or from which the distributive justice duty flows? Furthermore, we must think not in the simple terms of the frozen meat and a hunger-bloated stomach, but rather in terms of a system of production, pricing, and distribution which is so inter-related and complicated that we are apparently incapable of devising ways and means of bringing together, for example, our agricultural surpluses and the millions of underfed fellow human beings ranged around the globe.

Whether we look merely at this nation, however, or at the entire planet, the fundamental fact is that the means of satisfying the needs of man (in that broadest sense of a system of production, pricing, and distribution) are scarce in relation to the needs. *And when the means are scarce in*

relation to the needs, we have a practical demand of social justice.

The problems of social justice today emerge in terms of groups rather than of individuals and in terms of competing systems of economics rather than of a face-to-face exchange of goods for immediate consumption. And although social justice is not limited by the territorial boundaries of a nation, there does not exist that federation of nations, seeking the common good of all peoples, which the basic unity and identity of the human race would seem to demand.

It is not surprising, therefore, to find general agreement on the nature and existence of the practical demands constituting social justice side by side with general disagreement on how to fit social justice into the traditional tri-partite division of justice which was constructed with an eye to simpler, more direct, more obvious relationships.

How do some of the contemporary writers attempt to solve this problem of classification of social justice? There is heavy semantic gunfire here. For a sampling let's turn to Dr. Rommen.

Dr. Rommen apparently identifies social justice with distributive justice. He says:

Social and distributive justice refer to the public authorities who have to take care of the order of the common good, the welfare of the community. Their obligation according to social justice is to bring about such a social order and such economic conditions that the individual member in the community is enabled to fulfill the demands of commutative justice, e.g., pay a family wage. . . . Restrictive legislation for child labor and female labor would thus be a demand of social justice or, as it is sometimes

called, common-good justice.²

He continues:

We may go a step further by giving social justice a larger content than the traditional legal or common-good justice. For social justice addresses the individuals as members of the order of the common good.³

Father Cantwell, on the other hand, suggests that social justice is a fourth species: that it is not commutative justice because it does not concern specified individuals since one cannot designate an individual obligor or an individual obligee; that it is neither legal nor distributive justice because it may exist independently of civil society,⁴ the problem, as I understand it, of Li'l Abner's Lower Slobbovia.

Vangheluwe defines social justice as being the same as legal justice; that virtue which inclines members of a society to render to the society that which is due to it whether from the positive law of the society or from obvious and common necessity because of the common good.⁵ Thus, Vangheluwe believes that the three traditional forms cover every conceivable category of relationship in justice.

Messner suggests that social justice be distinguished from legal justice in that the obligations of legal justice have their basis chiefly in positive law whereas the obligations of social justice are derived principally from natural justice.⁶ And although Messner frequently seems to identify social

² ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 321 (1947).

³ *Ibid.*

⁴ Cantwell, *A Fourth Species of Justice*, II SOCIAL ORDER 69 (1949).

⁵ Schuyler, S.J., *Vangheluwe on Social Justice*, II SOCIAL ORDER 203 (1949).

⁶ MESSNER, *SOCIAL ETHICS* 219-220 (1949).

justice with distributive justice particularly within the framework of an economic system of private production, pricing, and distribution of economic goods, yet he points out that references to social justice usually are to obligations on the part of groups whereas distributive justice concerns the obligation of the state to maintain an adequate social policy.

Josef Pieper in *Justice*, the latest book in his series on virtues which is described as a "summing up of human and political wisdom" (as far as I could determine on a once-read basis, it contains no index) does not use the term or refer to social justice. In discussing the common good, however, he does suggest that ". . . all the good things bestowed in creation (men's capacities and abilities) belong to the 'good of the community,' and that *iustitia distributiva* entails the obligation of granting such abilities the protection, support, and fostering they need."⁷ This would seem to bring what is termed social justice within Pieper's notion of distributive justice and to bring Pieper's notion very close to Messner's.

These differences in the thinking of contemporary writers on the proper classification of social justice pay tribute to the vigor, the dynamic nature, the fruitfulness of the basic concept. These differences emphasize, furthermore, that the purpose of seeking such a classification is merely to aid in the understanding and use of the basic concept.

Social justice is a uniquely significant mandate to the reason: the demand that mankind achieve with the means available the optimum fulfillment of man's life. There cannot be any closed-circuit thinking on a basic concept which challenges man to

bring the fruits of the earth to all mankind. And so we find confirmed by others the LeBuffe and Hayes view that problems currently assigned to social justice can be allocated within the framework of the traditional three-fold division. Note well, that every suggested definition of social justice contained some reference to the common good. There is wide agreement, therefore, that social justice is somehow wedded to the common good. This leads to the thought that some of the difficulties of classification may depart if we consider the obligation of social justice, although resting upon individuals, to consist of a duty to act in the formation and reformation of those social institutions concerned with the common good. It may be considered, in other words, as an individual's duty to participate in the creation of a climate or an environment conducive to the common good.

Before examining the common good, however, let us look for a moment at the American scene. The meaning of a term may well emerge from history; and, in the achievements in the United States through the last few decades, we may find a kind of empirical definition of social justice. As a partial list we may consider safety regulations; laws regulating minimum wages and maximum hours; the regulation of work on Sundays and holidays; special regulation of work by women and children; accident, sickness, disability, and old-age insurance; retirement pensions; insurance of bank accounts; the Securities and Exchange Act; anti-monopoly legislation; tax laws according to the ability to pay; Workmen's Compensation laws; provisions for employment through public works; public housing; laws protecting the right of labor to organize; Unemployment Compensation acts; the lev-

⁷ PIEPER, JUSTICE 89 (1955).

eling out of prices through various forms of credit control; health and welfare funds. This is an impressive litany of social justice.

Messner indeed has suggested that the operating criterion of social justice is the level of the standard of living: the wider and higher the degree of the distribution of the economic products, the higher the level of social justice (to Messner distributive justice).

In this respect, note the following statistics (in each case the comparison is 1929 with 1953 unless otherwise specified); and please visualize these statistics in the form of housing, clothing, food, education, leisure, repaired teeth, and straightened limbs:—the following figures do not take into consideration the decrease in the purchasing power of the dollar.

National income has increased from 87.8 billion to 303.6 billion;⁸

Wages and salaries have increased from 50.4 billion to 198 billion;⁹

In the area of supplemental payments (fringe benefits) the employer contribution to private pension and welfare funds increased from 169 million to 5 billion 72 million (in 1954);¹⁰ in 1950, only 10 per cent of the union contracts provided for pensions and only 30 per cent for social insurance—now 45 per cent provide for pensions and 70 per cent for insurance;¹¹

Employer contributions for social insurance increased from 101 million to 5 billion 91 million (in 1954);¹²

⁸ U. S. DEP'T OF COMMERCE, BUSINESS STATISTICS 2 (1955).

⁹ *Id.* at 4.

¹⁰ THE ECONOMIC ALMANAC 450 (Jones and Kaplan eds. 1956).

¹¹ U. S. DEP'T OF LABOR, MONTHLY LABOR REVIEW (September, 1955).

¹² THE ECONOMIC ALMANAC 450.

Compensation for workmen's injuries increased from 278 million to 969 million (in 1954).¹³

Difficult as it may be to define social justice, it is not difficult to see it realized in this index, in this partial list. Social justice is embodied in these developments in the United States. Isn't it very difficult today to recall the fact of the 12 to 14 hour day of a few decades ago, or to recall the 1929 statistic of 20 million families (70 per cent of the population) with family incomes of less than \$2,500, and 60 per cent of the families with incomes of less than \$1,500 a year?

But the greatest achievement in social justice is the acknowledgment by leaders of all segments of the community that man is master of and dominates his economic system; that the economic system is not an end unto itself, but is merely a means to further the common good; and that man has a duty to act in the premises.

This statement of the progress of social justice in the United States is not intended to indicate an opinion that the millenium has been reached. Obviously, there are large areas unaffected by the good health of the country. It is hardly the millenium, for example, when twelve million married women are working; when two million farm families have incomes of less than \$2,000 a year; when our very physical survival is conditioned upon moderation in the use of Vodka. There are mountains of plenty in our land, but there are also valleys of need.

The litany, then, is merely a progress report. We have *experienced* social justice and find it good—it promotes the common

¹³ *Ibid.*

good. Who can measure the extent to which the social encyclicals permeated American thought and stimulated American action during this period?

To return to the speculative order: what is this common good to which social justice is so intimately related? It is social peace and temporal prosperity; it is the general welfare; it is the purpose of society. Maritain describes this concept of the common good in some 750 words; but so well are they chosen that I will risk a very lengthy quotation.

Maritain says:

Thus, that which constitutes the common good of political society is not only: the collection of public commodities and services—the roads, ports, schools, etc., which the organization of common life presupposes; a sound fiscal condition of the state and its military power; the body of just laws, good customs, and wise institutions, which provide the nation with its structure; the heritage of its great historical remembrances, its symbols, and its glories, its living traditions and cultural treasures. The common good includes all of these and something much more besides—something more profound, more concrete and more human. For it includes also, and above all, the whole sum itself of these; a sum which is quite different from a simple collection of juxtaposed units. (Even in the mathematical order, as Aristotle points out, 6 is not the same as 3 plus 3.) It includes the sum or sociological integration of all the civic conscience, political virtues, and sense of right and liberty, of all the activity, material prosperity and spiritual riches, of unconsciously operative hereditary wisdom, of moral rectitude, justice, friendship, happiness, virtue and heroism in the individual lives of its members. For these things all are, in a certain measure, *communicable* and so revert to each member helping him to perfect his life and liberty of person. They all constitute the good

human life of the multitude.¹⁴

Messner as strongly emphasizes the relationship to the individual of the end of society. He says:

The end of society is the help which the individuals obtain from social cooperation as members of society for the fulfillment of their existential ends. Individuals fulfill their ends by their own activity. They are capable of doing so, however, only because their powers are complemented by social cooperation. Since this mutual aid is made available to all by the cooperation of all, it is termed the common good or common utility. . . .¹⁵

Messner repeatedly emphasizes this basic thought: that the purpose of society is to enable men to attain their ends by their own self-determination and self-activity, and that the common good is ancillary and supplemental.

The Holy Father in his 1942 Christmas message said:

The scope of social life is perfection of the human person . . . while every moral association, if necessary, if we look to its ultimate usefulness, is in the end directed to the advancement of all and of every single member. For they are persons.

Pieper states that the common good is *the good*, viz., the very essence of those good things for the sake of which the community exists, and which it must attain and realize if all of its potentialities are to be brought to fruition.¹⁶ Then Pieper makes the following very interesting suggestion:

For this very reason it appears impossible to give a truly exhaustive, definitive defini-

¹⁴ MARITAIN, *THE PERSON AND THE COMMON GOOD* 42 (1947).

¹⁵ MESSNER, *SOCIAL ETHICS* 118-119 (1949).

¹⁶ PIEPER, *JUSTICE* 87-88 (1955).

tion of the *bonum commune*; for no one can state with complete finality what the potentialities of the human community are, what the human community “fundamentally” is.¹⁷

Hence, the common good may be a primordial idea not subject to further clarification—a dramatic teutonic disposition of a 750 word French definition!

We find at this point, therefore, a jinder of the nature of man and the common good, for the common good is itself determined by the nature of man. As men, we are subject to that built-in inclination, that built-in urge: seek your ends. Messner sums up these built-in ends of man as follows:

Self-preservation, including bodily integrity and social respect (personal honor); self-perfection physically and spiritually, including the development of one’s faculties for the improvement of the conditions of one’s life, and provision for one’s economic welfare, including the necessary property or income to provide for the future; the enlargement of one’s experience, knowledge and receptivity of the values of beauty; self-propagation by mating and the rearing of offspring; benevolent interest in the spiritual and material well-being of one’s fellow-men as equal in their value as human persons; social fellowship to promote common utility, which consists in the establishment of peace and order, in facilitating the achievement of the material and cultural welfare of all, in the attainment of the knowledge and control of the forces of nature and society for these purposes; the knowledge and worship of the Creator, and the ultimate fulfillment of one’s self in union with Him.¹⁸

These are not mandates imposed upon us by some conference of pseudo-intellectuals. These are the facts of human

existence. These ends are built-in; this is our design. We have choices, but there are signposts to happiness and built-in directional signals. And society serves the common good by assisting us to attain these ends.

How are these ends related to social justice and to supplemental unemployment benefits (often referred to as “sub”)? Stability of individual income is, of course, directly and immediately improved along with all the other security aspects of employment. But, considering these individual ends in the light of the ends of all members of the community, the common good, then we must consider the effect of “sub,” not only upon the individuals directly involved, but also upon all other groups in the community, i.e., upon the entire wage and price structure. In short, social justice demands that we appraise “sub’s” effect upon our entire economy. Let’s keep this question hanging in the air for a few moments as we shift to another principle which is relevant to the issue.

Messner suggests that the obverse side of the common good is the principle of subsidiarity, and that subsidiarity is another name for social justice. What, then, is this principle of subsidiarity?

In *Quadragesimo Anno*, Pius XI described it in the following words:

. . . [J]ust as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable, and it retains its full truth today. Of its

¹⁷ *Id.* at 88.

¹⁸ MESSNER, *SOCIAL ETHICS* 21 (1949).

very nature the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them.¹⁹

This principle of subsidiarity calls for the highest feasible degree of self-autonomy; a person to the limits of his powers is to be entrusted with self-determination and the responsibility for the fulfillment of his own ends. This principle of subsidiarity seems to rest squarely upon man's most significant freedom, freedom of the will, and upon the conviction that man's faculties cannot be developed without exercise. The greater the range of choice, the higher the self-reliance; the greater the personal responsibility, the more of a man. This is the conviction that man best achieves his personal and social ends by his own action. Subsidiarity is the do-it-yourself principle; as you move away from personal responsibility, as others do-it-for-you, you become less of a man.

And subsidiarity increases the effectiveness of the action because there are forces built in a man's will inclining him to protect what is his own: to protect his own family, his property, his community, his nation, his human race, and through protecting these things, thereby to protect his own perfection.

Now what of "sub" and social justice? Do the latter's unalterable majestic imperatives command approval or disapproval of "sub"?

What is the relationship between "sub" and the common good? We must resolve this question of fact by turning to what are called principles of economics. Assume that the end of our economy is the widest dis-

tribution of economic goods through the optimum production and the lowest price. Our question then becomes: from the point of view of social justice, how, if at all, will "sub" affect the entire wage structure and the entire price structure? Here, in my opinion, enters a long parade of variables. The relation of "sub" to the end of the economy can be discerned only by a complicated process of economic analysis applied to a body of facts *not yet in existence*, or at least not yet on the record.

A few samples of the facts not yet on the record:

What will be the effect of "sub" on accelerating automation in other industries (i.e., will it increase labor costs to the point that other groups will increase the tempo of automation and thus increase unemployment)?

Will it in fact stabilize employment, as all hope, or will it shift the instability to suppliers?

Will it help to prevent depressions by assuring a steady flow of purchasing power, or will it force up prices thus reducing real wages and inviting a depression?

These are the type of questions of fact which the practical judgment must work over before the practical judgment can reduce the gap between the universal laws and the concrete situation; the imperatives operate through and upon men, not in a vacuum. The natural law is a teleological thing. Here is the end; here are the means; which are the best means? But all the relevant facts are not on the record. So, it is submitted, the answer to "sub" is essentially empirical, and we must await it. The alternative to waiting is to attempt to beat the air. What will happen, for example, to predictions as to the effect on our economy of "sub" if, as

¹⁹ *Quadregesimo Anno*, para. 79, FIVE GREAT ENCYCLICALS 147 (Paulist Press 1953).

has been predicted, the peaceful use of atomic energy results in annual family incomes in the United States of \$25,000 within 80 years?

There are two respects however in which I venture the opinion that the Ford "sub" should evoke unqualified approval.

The conduct during the negotiations of both Ford and the Union (UAW) has been described as a model of responsible behavior. The Union, for example, gave three years advance notice of what it would seek. The New York Times referred to the contract as "free American bargaining at its best." *This is the method* of the natural law. A problem is to be solved on some basis other than whim, or arbitrary action, or the flexing of muscles. From the public relations releases that came to my attention, both Ford and the Union were hungering and thirsting after justice. I would conclude that *both* were seeking the common good and social justice.

Secondly, isn't the Ford "sub" a prime example of subsidiarity? This is a dynamic economy. It is on the march at the rate of a 2 per cent annual increase in production for the past century. A dynamic economy requires change. Change means temporary unemployment. "Sub" merely socializes that risk of temporary unemployment, which is a necessary incident of a dynamic economy. Current unemployment compensation rates are out of joint with reality; they average \$25 a week. Will government aid be sought or will private parties tackle this problem themselves and attempt to work out a solution at a non-governmental level? Solving this problem through a collective bargaining agreement creates confidence in our system of private economy. The alternative

is to seek relief exclusively at the governmental level.

In these two respects at any rate (i.e., furthering both the principle of subsidiarity and the employment of the natural law method of prudence, the practical judgment), I suggest that "sub" is in the finest traditions of the natural law. It is maturity and not decadence. And although we must refrain from entering any judgment on "sub" in its entirety, may one not say at least that "sub" cannot be presently found to be opposed to the natural law? A directed verdict in favor of "sub" is not warranted, but isn't there enough in the record to let it go to the jury?

Finally, the natural law is not a substitute for thought. It is a mandate to think; prudence is our most important product. There are principles for guidance, but no principle guarantees the right concrete action for the common good.

Although in the mansion of the natural law there is wide latitude for differences of opinion as to diverse economic theories (such as those underlying "sub"), we cannot ignore the demands of social justice any more than we can ignore a thermonuclear explosion. Social justice may be difficult to classify, but it packs a Marciano-punch.

Either the basic demands of social justice are actualized through self-determined actions at levels consistent with the principle of subsidiarity, or confidence in our social-economic-political system is diminished and those seeking social justice turn to the provider state, the paternalistic state, for relief; and the paternalistic state then supplies the needs of the complacent, passive, un-men, until the millions of little cells of repressed energy burst their bounds—and the cycle starts again.