thinkers of the western world have been deeply critical of the existing social order.

The real question is why they turned away from liberalism and embraced collectivism as a method of ordering affairs and of realizing men's hopes. Had they become conservatives, it might be argued that they had been forced to serve the dominant businessmen. But what they actually did was to abandon the débris of liberalism to the vested interests, and then they attacked those vested interests with a body of learning constructed on socialist premises.

This would appear to indicate that at some point in its development the liberal philosophy became scientifically untenable, and that, thereafter, it ceased to command the intellectual respect or to satisfy the moral conscience of the leaders of thought.

What happened? Why did it happen? And what shall be done about it? On this voyage of discovery I venture now to ask the reader to embark.

2. *The Fallacy of Laissez-Faire*

We may well begin, I think, by exploring what may be called the cardinal fallacies of nineteenth-century liberalism. We come at once upon a most extraordinary confusion in the whole field of relations between the law and the state and the institution of property on the one hand, and human activities on the other. This confusion is entitled the doctrine of laissez-faire.

No one seems to know who first invented this doctrine or gave it its title. It is said[1] that the idea can be traced back to

[1] Cf. "Laissez Faire," by G. D. H. Cole, in *Encyclopedia of the Social Sciences*, Vol. IX, pp. 15–16.

Italian economists of the seventeenth century, but that the phrase "laissez faire, laissez passer" was first used by a French merchant of the eighteenth century, named Gournay, who was pleading for relief from the intricate local customs tariffs, guild restrictions, and other interferences with the freedom of production and trade that had grown so elaborate since the Middle Ages. But whatever its historical origin, it is clear that the purpose of the maxim was to break down the restrictions of more or less self-contained communities which practised a low degree of division of labor.

In the beginning laissez-faire was, therefore, a revolutionary political idea. It was propounded when men found it necessary to destroy the entrenched resistance of the vested interests which opposed the industrial revolution. It was a theory formulated for the purpose of destroying laws, institutions, and customs that had to be destroyed if the new mode of production was to prevail. Laissez-faire was the necessary destructive doctrine of a revolutionary movement. That was all it was. It was, therefore, incapable of guiding the public policy of states once the old order had been overthrown.

For when the old restrictions of law and custom had been removed, a process which was substantially accomplished in western Europe and America between 1776 and 1832, the real question was this: what laws were to govern the new economy? At this point, as so often happens among old and triumphant revolutionists, the dynamic ideas which had brought the liberals to power were transformed into an obscurantist and pedantic dogma.

The liberals turned to writing metaphysical treatises on the assumption that laissez-faire is a principle of public policy. They sought to determine by abstruse and a priori reasoning what realms of human activity should and what realms should

not be regulated by law.[3] John Stuart Mill, for example, after examining the pros and cons, arrives at the conclusion that "laisser-faire, in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil." But since he had no criterion by which to measure the greatness of a great good, the best he could do was to give his personal opinion as to what exceptions to laissez-faire were justifiable. They happened to be much more numerous exceptions than Herbert Spencer thought justifiable. But that was not because either Mill or Spencer had clear principles to guide him; it was because Mill was a sensitive man in touch with practical affairs, whereas Spencer was a secluded doctrinaire.

The whole effort to treat laissez-faire as a principle of public policy, and then to determine what should be governed by law and what should not be, was based on so obvious an error that it seems grotesque. The error was in thinking that any aspect of work or of property is ever unregulated by law. The notion that there are two fields of social activity, one of anarchy and one of law, is false. Yet that is what Mill and Spencer assumed when they sought to define the proper jurisdiction of the law. I suppose that a solitary man cast ashore on an undiscovered island could be said to have freedom without law. But in a community there is no such thing: all freedom, all rights, all property, are sustained by some kind of law. So the question can never arise whether there should be law here and no law there, but only what law shall prevail everywhere. The latter-day liberals who made a political dogma out of laissez-faire had merely elevated the historical objection to

[3] Cf., e.g., John Stuart Mill's *Principles of Political Economy*, Vol. II, Bk. V, Ch. XI: "Of the Grounds and Limits of the Laisser-faire or Non-Interference Principle," p. 569. Mill speaks of "laisser-faire" rather than of "laissez-faire."

antiquated laws into the delusion that no new laws would or should replace them.

But new laws did replace them. For in a society there cannot for long be such a thing as a legal vacuum. There may of course be a period of disorder when the law governing rights and duties is unsettled or unenforced, and in such periods force, fraud, and chicanery are rife. But some system of law must eventually crystallize as the turbulence of anarchy subsides. A system of capitalist law crystallized in the nineteenth century. In the English-speaking countries it was the common law modified by judicial decision and legislation. While the latter-day liberals were gravely considering what the jurisdiction of the law ought to be, the jurisdiction was at all times universal throughout the economic order.

By virtue of that jurisdiction there was property, there were corporations, there were contracts, there were rights, duties, and immunities, there was money with which to exchange goods and services, there were standards of weights and measures. While the theorists were talking about laissez-faire, men were buying and selling legal titles tc property, were chartering corporations, were making and enforcing contracts, were suing for damages. In these transactions, by means of which the work of society was carried on, the state was implicated at every vital point. All these transactions depended upon some kind of law, upon the willingness of the state to enforce certain rights and to protect certain immunities. And therefore it was wholly unreal to ask what were the limits of the jurisdiction of the state.

It is most important to fix this clearly in our minds, for then we shall be spared much confusion. Let us examine an extreme case: in 1848 Herbert Spencer argued against Boards of Health.[8] 'It is "within the proper sphere of government," he

[8] *Social Statics*, p. 406 (1866 ed.).

says, "to repress nuisances." So if a man "contaminates the atmosphere breathed by his neighbor," he is "infringing his neighbor's rights" and the government may be called upon to deal with him as a trespasser. But for the state to "interpose between quacks and those who patronize them" is, said Spencer, "directly to violate the moral law." Thus he was arguing that if I annoy my neighbor by blowing smoke into his house, I may be punished, but if I kill him by deceiving him into thinking that I am a physician, I go scot-free, and my victim's widow is forbidden to shoot me. Spencer thought he was distinguishing between two realms, one where the state intervenes and one where it does not. But actually the state intervenes in both instances. The only difference is that in the case of the trespasser Spencer would have the law protect the victim, in the case of the quack he would have the law protect the aggressor.

Let us consider next an example of how the law may change by altering the balance of rights and duties. Under the old common law of England a workman who was injured could sue the master for damages. If he had been injured by a fellow workman's negligence, he could still sue the master because the law held the master liable for his servant's acts. Under this system of law the state was ready to intervene on behalf of an injured workman and recover damages for him from his employer. In 1837 this system of law was changed in a decision[4] rendered by Lord Abinger. After that, it became the law that the master was not liable for an injury to a workingman when the injury was due to the negligence of his fellow workingman. So after 1837 the state would not help the injured worker to recover damages from the employer. This was pleasant for the employer. But for the employee it was not so pleasant.

[4] *Priestly* v. *Fowler* (3 M. & W. 1). Cf. *Encyclopedia of the Social Sciences*, article on "Employers' Liability," by Edward Berman. Vol. V, p. 515.

He could now sue only his fellow servant and might expect to get nothing. Years later new laws were enacted designed to increase the employer's liability and improve the rights of the injured employee. These laws worked badly, and finally workmen's compensation laws were enacted based on the principle that an injured workman should not have to sue, but should receive damages according to a definite schedule; the costs were to be covered by compulsory insurance which was carried by the employers. Now surely it would be misleading to interpret these oscillations of the employer's liability and the worker's rights as instances where the state interfered or practised laissez-faire. Before Lord Abinger's ruling the worker had a right which he no longer had after the ruling. The employer had a new immunity. When the compensation laws were enacted, the employer had a new obligation and the employee a new right.

All of this is by way of illustrating the point that the latter-day liberals were deeply confused when they set out to define the limits of the jurisdiction of the state. The whole regime of private property and contract, the whole system of enterprise by individuals, partners, and corporations, exists in a legal contract, and is inconceivable apart from that context.

Just how the latter-day liberals came to overlook something so obvious as that is rather obscure. But apparently they had some sort of notion that because the existing law of property and contracts had not been formally enacted by a legislature, but had evolved by usage and judicial decision under the common law, it was somehow a natural law originating in the nature of things and valid in a superhuman sense. They came to think of these traditional laws of property and contract as prevailing in a realm of freedom, and when statutes they did not like were enacted to amend the traditional law, they thought of them as interferences by the state.

But, of course, the old unamended traditional law depended upon the implied willingness of the state to intervene: the rights which existed under that law could enlist the services of the policeman, the jailer, and the hangman. Without the implied willingness of the state to intervene with all its power, the rugged individualist who preached laissez-faire would have been utterly helpless. He could not have obtained or given valid title to any property. He could not have made a contract, however free. He could never have organized a corporation with limited liability and perpetual succession. The rugged individualist may have imagined that in his economic life he was the person that God and his own will had made. But in fact he was a juristic creature of the law that happened to prevail in his epoch. For, as Ernest Barker has said: "It is not the natural Ego which enters a court of law. It is a right-and-duty-bearing person, created by the law, which appears before the law."[5]

Were there any question about the thesis that capitalism developed in a context of historic law and not in the free realm of Nowhere, the conclusive evidence would be found in the fact that the substance of law has been continually modified. What is it that courts and legislatures have been doing these hundred and fifty years if not defining, redefining, amending, and supplementing the laws of property, contract, and corporations, and of human relations? They have done other things, too, such as to raise armies, provide social services, and distribute benefits and privileges. But at the same time they have never been letting alone, on the theory that they are not within the jurisdiction of the state, the rights and duties which are the legal foundation of the division of labor. And in the course of their lawmaking and adjudicating, they have been adding to and

[5] From the Translator's Introduction to Otto Gierke's *Natural Law and the Theory of Society*. Vol. I, p. lxxi.

taking away from the ever-changing rights and duties which are the substance of property and of contract and of corporations.

The preoccupation of the latter-day liberals with the problem of laissez-faire is a case of the frustration of science by a false problem. It is not an uncommon occurrence. It is something like the persistent effort of astronomers to explain the motions of the solar system by treating the earth as the fixed centre of it; the progress of astronomical science was arrested until it had been observed that the earth was not the fixed centre of the solar system. Now the progress of liberalism was, I am convinced, halted by the wholly false assumption that there was a realm of freedom in which the exchange economy operated and, apart from it, a realm of law where the state had jurisdiction.

The consequences of the error were catastrophic. For in setting up this hypothetical and nonexistent realm of freedom where men worked, bought and sold goods, made contracts and owned property, the liberals became the uncritical defenders of the law which happened actually to prevail in that realm, and so the helpless apologists for all the abuses and miseries which accompanied it. Having assumed that there was no law there, but that it was a natural God-given order, they could only teach joyous acceptance or stoic resignation. Actually they were defending a system of law compounded from juristic remnants of the past and self-regarding innovations introduced by the successful and the powerful classes in society.

Moreover, having assumed away the existence of a system of man-made law governing the rights of property, contract, and corporation, they could not, of course, interest themselves in the question of whether this law was a good law, or of how it could be reformed or improved. The derision poured out upon the latter-day liberals as men who had become complacent

is not unjustified. Though they were probably not more insensitive than other men, their minds stopped working. Their unanalyzed assumption that the exchange economy was "free," in the sense that it was outside the jurisdiction of the state, brought them up against a blank wall. It became impossible for the latter-day liberals to ask the question, much less to find the answer, whether the existing law was good and how it could be reformed. That is why they lost the intellectual leadership of the progressive nations, and why the progressive movement turned its back on liberalism.

3. *The Enchanting Promise*

But though the development of liberal ideas was halted, it was halted, so to speak, on the main road of human progress. The liberals had come upon the fundamental clue to the only kind of social order which can in fact be progressive in this epoch. They had discerned the true principle of the mode of production which the industrial revolution was introducing. They had understood that in the new economy wealth is augmented by the division of labor in widening markets; and that this division of labor transforms more or less self-sufficient men and relatively autonomous communities into a Great Society.[6]

It was no accident that the century which followed the intensified application of the principle of the division of labor was the great century of human emancipation. In that period chattel slavery and serfdom, the subjection of women, the patriarchal domination of children, caste and legalized class privileges, the exploitation of backward peoples, autocracy in

[6] Cf. Graham Wallas, *op. cit.* My own *Public Opinion* is a study of democracy in the Great Society; *A Preface to Morals* is a study of certain moral and religious consequences of this social transformation.