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BOOKS REVIEWED

The Business Conscience. By Luther H. Hodges. Englewood Cliffs: Prentice-Hall, Inc. 1963. Pp. x, 250. \$4.00.

The Paper Economy. By David T. Bazelon. New York: Random House. 1963. Pp. 467. \$6.95.

CONTRA CONTRITA: *A Discursive Book Review*

The English wit, Sidney Smith (being a clergyman was really only an avocation for him), is reputed to have said: "I never read a book before reviewing it; it prejudices a man so."¹ Most book reviewers, fortunately, take his advice. Their reviews, since they have nothing to say, usually also have the virtue of brevity. This is probably the best technique, since not too many people read books and fewer read book reviews. Unfortunately, I have never been able to follow Sidney Smith's admonition. All this, then, is a form of apology for the length of this paper which was to have been a book review of two books, *The Paper Economy*, by David T. Bazelon, and *The Business Conscience*, by Secretary of Commerce Luther H. Hodges.

You will probably not take my advice. I recommend, however, that you read both. Written by men who are completely different—although both were born in the South, Bazelon is obviously an Eastern sophisticate, while Hodges has much of the sweet innocence of a Cambridge Platonist—the two books are strangely complementary. Bazelon recognizes the primary importance of the new managerial class to our economy, and hence our survival.² Hodges gives us a plan for educating these managers to the moral responsibilities which they must assume if Western civilization is to survive. Hodges would do this through voluntary industry or trade ethical codes. Bazelon would take a more direct approach to make the managerial stewards responsible to the society which they serve.

To some people, what is said by Bazelon will seem to be belaboring the obvious. After all, it has been proven for us that some government control of industry was necessary. Even Teddy Roosevelt, a figure, like Lincoln, from the dim historical past, recognized this. The exemplars of dog-eat-dog business warfare (jokingly called by them "free enterprise")—the "Robberbarons"—were, like Billy-the-Kid and other Western badmen, villains. They were comic or tragic depending on the film, perhaps sometimes sympathetic in the way that evil or folly³ may inspire sympathy, but always somewhat unreal, and never genuine heroes. We all knew that government was not evil. Of course, if I did something wrong, it might be *United States v. Kessler*,

1. Pearson, *The Smith of Smiths* 54 (1934).

2. See, e.g., Bazelon, *The Paper Economy* 287 (1963) [hereinafter cited as Bazelon]: "In more or less candid manner, the current discussion assumes control of the primary productive capacity of the nation by a self-perpetuating oligarchy of non-owners. It recognizes, again with more or less clarity, that this is quite a different situation from that formerly existing or still envisaged by classical theory. The discussion then becomes downright relevant when it is further assumed that most of the important activities in our society require large organizations, all large organizations must be managed, and there are some fundamental similarities between all the managers of any and all large organizations. On these assumptions, managers emerge as a class—a new class. (Which proposition becomes even more startlingly significant when it is noted that something similar seems to be happening throughout the advanced world.)"

3. Everybody has a passing moment of attraction toward Mephistopheles; everybody pities Silas Marner and his false goal of money.

but it could also be *Kessler v. United States*. Basically, government was to help people. It stimulated business and gave away food during the depression to keep us all alive and going. It was run by us, for us, as Lincoln said it would be. We weren't afraid of it. We did not regard ourselves as "liberals" or "conservatives" or adherents to any other "ism" than *Americanism*. We *knew* these things, and assumed that all men did. All, of course, except the ineducable—the senile and those so blinded by selfish greed that they refused to recognize that it was the proper function of government to help the people, and prevent their exploitation by those who would place their own self-interest above the welfare of the nation as a whole.

We forgot that the a priori truths of one generation must often be proved to the next. We forgot that at next year's national election millions who will be voting were not yet born when, yesterday, Pearl Harbor was attacked. Many millions more were cute little children who had no comprehension of the country's grave peril then, much less of the economic crisis a decade before which had "proven" once and for all that the government cannot be a mere passive spectator to business collapse and human hardship.

These truths must then be proved, or proved again, for this younger generation. Proof is especially important because unless all segments of our country are able to cooperate in our economic effort we will lose the rest of the world, and then ultimately our own freedom, to the Communists. Proof is especially difficult for two reasons. The first, pointed out by Bazelon, is that the opposing theory (*i.e.*, of non-government) is an emotional mythology rather than a logical theory. The other, pointed out, oddly enough, by the principal exponent of this irrational religion, Senator Goldwater, is the prevalence of a form of "Oedipism," my term for the Senator's frank recognition that his popularity is based on a rejection by the young people of their parent's belief,⁴ among the nongovernment advocates.

Radical conservatism⁵ is a fad, I was recently told—nothing to worry about. It will pass, like goldfish-eating and "rock and roll." But, do we have the time to wait? Our days have been shortened. Mistakes made yesterday could be righted today; for those made today there may be no tomorrow. Reason must triumph now, or it may never again have the chance.

It is the purpose of Bazelon's book, then, to prove again, to those who will listen, these old truths. It is basically, as its name suggests, a theory of political economy. In the following discussion I shall attempt to summarize Bazelon's main points, as I interpret his meaning. Since I agree with most of what he says, I shall also freely interpolate my own opinions.⁶ In this, I hope I do no injustice to the author. It is,

4. See N.Y. Times, Nov. 24, 1963, § 6 (Magazine), p. 25.

5. This is merely my convenient term for the entire complex of "nongovernment," and dog-eat-dog economics advocated by some of the people who today call themselves "conservatives." (Bazelon calls them "Rearguarders.") Names, of course, mean little. The same theory was prevalent in the 19th Century, but at that time went under what today would be considered the diametrically opposite name—"Liberalism." It is both as new and as old as greed and oppression themselves (whence the title of this book review).

6. Both books which are the subjects of this review are necessarily involved, although not always consciously so, with the ethics, morals or whatever term you wish to apply, of the managerial class. Thus, it becomes relevant to point out the writings of those more directly concerned with morals as I progress. And while these sources are principally those of the Roman Catholic Church, one should seek authority in those sources with which he has some familiarity, and I do so. (Bazelon would probably be surprised to find how much support his theories have in such sources.)

however, only natural, when one has been influenced by a book, to make it a part of himself. This is probably the highest compliment which can be paid to an author. In any event, perhaps he will be satisfied with my wholehearted recommendation that all who are genuinely interested in preserving America and its precious ideology read his book carefully.

For those who always read the "last chapter" first, Bazelon's thesis, logically supported throughout the book, is basically simple. America's technology has the capacity to produce an abundance capable of adequately supplying the needs of all of the citizens of our country, and assisting the rest of the world, if we only use this productive capacity to its fullest, as we did during the war. According to Bazelon, however, our technology is not so used. Instead of concentrating on the production of real wealth (things), American industry concentrates on mere paper profit.⁷ This, of course, is the height of folly, since the only significance of money (it is really only paper) is what it can buy. Money is only a "contract with parties unknown for the future delivery of pleasures undecided upon."⁸ Its only significance for sane people (*i.e.*, excluding the unregenerated Silas Marners, who may just like to feel it) is the real things it can get for us: food, clothing, autos, etc. Unless it can be translated into things it is "unreal."

Whether or not it will be translated into things depends largely upon who gets it. If it goes to a poor person, for instance, it will be used to demand food, clothing, etc., and so is more apt to be translated into things than if it goes to a person who already has sufficient quantities of such material goods.⁹ True, in the old days of real scarcity when our productive capacity was not sufficient to provide enough to go around, money which went to the wealthy would be used for investment in new productive capacity, *i.e.*, expansion. But today, too many producers are not interested in expanding. They are actually afraid of it, since an increase in production may well have an adverse effect on the paper profits of the corporation. The result is that our immense productive capacity is to too large an extent allowed to lie fallow, while piles of paper (or rather, merely entries in various accounting documents¹⁰) accumulate in the "hands" of the "rich," no longer even real people, but now primarily those legal fictions called corporations.

"Well, so what?" you may ask. "All this only proves how well the competitive free enterprise system works. We have plenty to eat. (Go to any restaurant and see how much food is thrown away.) We're all warm in the winter and air-conditioned in the summer, we all have cars." The fact, of course, is that not *all* of us are so well off, as a look around any big city will show. As Bazelon points out: "Over 32 million people live on less than \$50 a week for a family of four and these families include one-fifth of the children and 8 million men and women over 65 years. Everyone can think of that as he pleases, or ignore it: I find it disgusting."¹¹

7. Bazelon 4-5, 13-14.

8. Bazelon 73.

9. In his encyclical, *Mater et Magistra*, Pope John XXIII stated that "the economic prosperity of any people is to be assessed not so much from the sum total of goods and wealth possessed as from the distribution of goods according to norms of justice, so that everyone in the community can develop and perfect himself. For this, after all, is the end toward which all economic activity of a community is by nature ordered." *Id.*, para. 74 (Paulist Press 1962) [hereinafter cited as *Mater et Magistra*].

10. There is not, of course, enough of the green paper around, should everyone suddenly decide to actually cash in his cheques.

11. Bazelon 351.

Of 56 million family units in the United States in 1960, 7.2 million, or 13%, had incomes of less than \$2000 a year.¹² Some of these people may be a bit chilly in the winter, a bit hungry all year round.¹³

Obviously, not everybody can be rich. It is Bazelon's argument, however, that these people need not be poor. And this, he argues can be done without taking anything from the rich.

To use his own words:

[A]n elaborate meal at Voisin does not take food out of the mouth of a Southern millhand. What takes the food out of his mouth is the inability of the system to distribute sufficient income to him to allow purchase of his portion of our farm surplus. The entire upper class in this country could continue exactly the standard of living it enjoyed last year and still, if the system were capable of full production, the charge upon total product would probably not be intolerable. It is not the ownership of paper or managerial status, and the consequent unequal distribution of income, which is decisive; it is the unwillingness to produce by those who control the means of production.¹⁴

Miraculous though it sounds, there is a great deal of truth in what he says.¹⁵

Bazelon does not use any graphs, but, following the old Chinese proverb about a picture . . . , etc., and since most of the people who talk about the "inexorable laws of supply and demand" have never even seen a demand curve, I shall illustrate his point with a graph.¹⁶

Let us assume a downward sloping demand curve (a reasonable assumption) such as one might find in a worldwide market for a typical manufactured item. The more the item costs to the consumer, *i.e.*, the higher its price, the less will be bought, and conversely, as the graph shows, the lower the price the more of the items will be sold since more people will be able to afford to buy them.

No supply curve is shown. One reason for not showing one is that corporations in significant industries do not bother to construct one. Supply curves (as well as demand curves) are hypothetical constructs—what *would* be taken if things *were* such and such. Businesses do not operate on such speculations. Unless, as has sometimes been suggested, they rely on more magical formulae, their production decisions are based on cost computations (including a reasonable profit margin) and sound

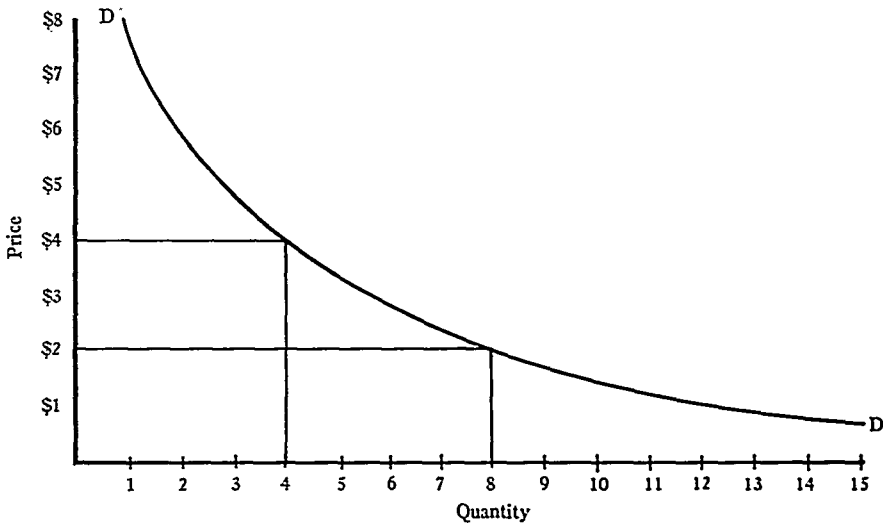
12. *Id.* at 351, 337.

13. "[I]n the economically developed countries, it frequently happens that great, or sometimes very great, remuneration is had for the performance of some task of lesser importance or doubtful utility. Meanwhile, the diligent and profitable work that whole classes of decent and hard-working citizens perform, receives too low a payment and one insufficient for the necessities of life, or else, one that does not correspond to the contribution made to the community, or to the revenues of the undertakings in which they are engaged, or to the national income." *Mater et Magistra*, para. 70.

14. Bazelon 296.

15. This is not to say that it may not be a little more difficult than Bazelon indicates. Certain sacrifices would be entailed. For one thing, labor resources would have to be used more effectively. The currently unemployed would have to be trained, and many of the currently employed retrained. Perhaps, even trained or trainable immigrants would be required for the new productive jobs, once our own unemployment problem were solved. These do not seem like too great a "price" to pay.

16. Obviously, the treatment of the complex subject of economics here must of necessity be incomplete, and the statements made subject to qualifications. For a comprehensive treatment of the subject see Boulding, *Economic Analysis* (3d ed. 1955).



sales predictions.¹⁷ The intersection point of supply and demand curves very rarely determines actual production and price, for the simple reason that the important industrial suppliers are in an economic condition known as oligopoly—and that's no sickness; it means they have the upper hand. Basically, it means that there are a few people (corporations) who have something (or the capacity to produce it) that a lot of people want.

Generally, costs decline with increasing production up to full capacity. This means that, in effect, a basic industry operating below capacity (as, for instance, the steel industry, the most basic in our economy, ordinarily does) can “tap” the demand curve wherever it chooses, until that full capacity is reached. As the graph shows, therefore, our hypothetical industry can choose to sell either four items at \$4 (or 4 billion at \$4000—whatever the appropriate amounts), *or*, and more importantly, it can choose to sell twice as many units at half the price. This is merely an illustration of the virtues of the “Industrial Revolution,” or “mass production” in pictorial form. Of course, the graph is merely for illustrative purposes.¹⁸ To deny its general validity (costs decline while profit can be maintained by greater production), however, is to deny one of the basic tenets of our economic philosophy—that it “has proven more . . . efficient than any other economic system.”¹⁹

That American industry is capable of such efficiency is, moreover, amply illustrated by its performance during the Second World War when not only was the impossible task of producing enough war materiel to win the conflict performed, but, in addition, the general standard of living rose.²⁰

But American industry does not use this efficiency. In short, instead of producing

17. See Guthmann & Dougall, *Corporate Financial Policy* 102 (4th ed. 1962).

18. No completely accurate figures are available on cost and capacity. This is one of the justifications for Bazelon's proposed fact-finding commission. See Bazelon 382-86.

19. The “Platform” of the Conservative Party of New York. See note 53 *infra* and accompanying text.

20. Bazelon 245.

eight, industry chooses to produce four and sell at a higher price. Hodges, referring to the recent steel price-rise attempt, says:

U.S. Steel argued that higher selling prices were necessary in order to widen profit margins and gain more cash for the financing of new machinery. The company said it was caught in a profits squeeze and implied that rising wage costs were the principal villain. Yet *the price increase came at a time when, according to government figures, productivity was rising faster than labor costs. And labor costs per unit of steel output were essentially the same as in 1958, when the industry last raised its prices.*²¹

The paper profit may be the same, or even greater. The real wealth of the country (things) is less. So the poor get poorer and the rich get richer—but only in paper.

By virtue of the "multiplier effect," as economists would say ("snowballing"), inventories and surpluses build up, and these mean a further decline in production. It's all very simple. If you and I went to Coney Island or the County Fair, and I had \$50 while you had only a dime, I could buy as many hot dogs as I wanted, and you could buy none. Even if I ate myself sick I couldn't use up my \$50 on myself. If you and I were the only customers the poor vendor had, he'd soon cut down on his hot dog supply. I'd still have a lot of money I didn't spend, you'd still be drooling, and the hot dog manufacturer would sell fewer (and, therefore, make fewer) hot dogs. And we're all in bad shape: I'm sick, you're hungry, the hot dog man ultimately goes out of business, the rancher who raised the beef, the farmer who raised the feed for the steer—everybody suffers.

In the ultimate depression, the farmers, since they are in the freest market, *i.e.*, the one most responsive to the "laws of supply and demand," are the ones compelled to reduce prices and hence call on the Government to purchase their "surplus" products, so that prices will rise and their total income will remain the same (5,000 bushels at \$1 = 10,000 bushels at 50¢; but a lot more sweat goes into producing the latter—as economists would say, the "marginal cost" is higher). And so it goes. You still don't have any hot dogs, but Government-leased silos have a lot of grain.

All this would be avoided if you had more money, perhaps because steel was producing at full capacity and hired you to help produce it.²²

Certain industries are "basic," then, not only in the importance of their product to production of other products, but in their importance to the entire economy.

When they could produce at eight, should they be allowed to produce at four, when this means that people go hungry as a result? Bazelon's answer is "no." He finds it "disgusting."

If we consider that there are now about one and one-half billion people in the world who are undernourished,²³ and that *10,000 people a day die of starvation*,²⁴ while the United States has enormous quantities of wheat, corn, butter, etc., in warehouses,²⁵ it would seem that, even if the above analysis is not accepted, we

21. Hodges, *The Business Conscience* 115 (1963) [hereinafter cited as Hodges]. (Emphasis added.)

22. A cut in the price of hot dogs to 10¢ would not help as much as this. You could then buy one, but one would not make too much difference, and besides, in a depression you wouldn't even have the dime.

23. U.N. Food and Agriculture Organization, *The Freedom From Hunger Campaign, What It Means* (pamphlet).

24. Sheen, *God Love You: Bothered by Conscience?*, *The Advocate*, Dec. 12, 1963, p. 7, col. 1.

25. See U.S. Dep't of Commerce, *The Statistical Abstract of the United States* 638 (1963), for the large quantities of surplus food in storage.

must conclude that there is something wrong with the way our economy operates.

The situation should be regarded not merely as "disgusting," but as sinful. While some do not consider sin very important any longer, let those who do, consider carefully these words: "Depart from me, you cursed, into everlasting fire which was prepared for the devil and his angels. For I was hungry, and you gave me not to eat: I was thirsty, and you gave me not to drink."²⁶

We all have an obligation to our fellow men.²⁷ The most important people in the country have the greatest obligation. The most important people are the "big businessmen," the managerial class, the platonic guardians who control the operation of the largest corporations. They have the greatest power, since they make the decisions as to what production will be. They control the economy. Both Bazelon and Hodges recognize this, as well as all other perceptive commentators on the current socio-economic scene.

But many of these powerful men have not been fulfilling their obligations. Hodges feels that those who do not perform their moral duties are in a minority. But his figures, based largely on a 1961 study by Father Raymond C. Baumhart, S.J.,²⁸ for the Harvard Business Review, indicate that these men represent a very *substantial* "minority." For example, despite the S.E.C. rules on insider's use of secret information, 42% would buy stock in their corporation on the basis of secret information that the price would rise, 14% would tell a friend, 2% would tell a broker.²⁹ Forty-eight per cent admitted they would hire a competitor's employee who knew of a business secret which could hurt their business if utilized by the competitor.³⁰ Seventeen per cent approved expense account padding, and felt that 55% of other businessmen did.³¹ Twenty per cent even admitted that they wanted no advice from clergymen on their moral duties in business.³² The latter is a particularly shocking figure. Probably, few people in any audience pay attention to what they hear, but, when one fifth do not even want to hear, there seems to be little hope for the type of voluntary morality which Hodges advocates.

Even if a majority of businessmen have a proper sense of moral (social) responsibility, as Hodges constantly reassures us they do (despite the multitude of examples to the contrary, with which this book is replete³³), this will not save us if the unscrupulous minority are in control of the most important industries. For instance, 10,000 altruistic restaurateurs will not offset the adverse effect of a handful of men on the board of a large steel company, should they decide to behave anti-socially.

Whether it is a majority or a minority of the managers which is responsible is of no real moment. What is important is that we as a nation have a moral duty—to those who starve or go hungry while we have a surplus—to correct whatever is wrong with our economy. If we do not persuade those who control this economy to

26. Matt. XXV, 41, 42.

27. "[W]e think it opportune to stress here what we have stated in another connection: 'We all share responsibility for the fact that populations are undernourished. [Therefore,] it is necessary to arouse a sense of responsibility in individuals and generally, especially among those more blessed with this world's goods.'" Mater et Magistra, para. 158.

28. Hodges 41-47.

29. Id. at 45.

30. Id. at 46.

31. Ibid.

32. Id. at 226.

33. For instance, the particularly disgusting report of the firm that was trying to sell abroad food condemned here as unfit for human consumption. Id. at 195.

do their moral duty, we will be as guilty as they of the needless suffering and death we perpetuate.³⁴

More effective economic planning is necessary. Hodges suggests that business morals can be elevated by voluntary adoption of trade or industry ethical codes.³⁵ In view of evidence brought forward by Hodges himself, including the disregard of the national interest by United States Steel in its attempted price increase, and the disregard even of positive law by the electrical industry in the recent price fixing cases, such a hope would seem overly sanguine, especially if industry is asked to do the supererogatory: positive charity rather than mere refraining from injury to the nation or violation of its laws. The only corrective would seem to be legislative. This was the view supported by the late Roman Catholic Pontiff, John XXIII, when he said:

[T]o decide what is more helpful to the overall economic situation is not the prerogative of individual productive enterprises, but pertains to the *public authorities* and to those institutions which, established either nationally or among a number of countries, function in various sectors of economic life.³⁶

Indeed, we need not go as far as other papal pronouncements would permit in this regard.³⁷ What is needed, and this is as far as Bazelon goes, is governmental

34. Pope Pius XI, in his *Quadragesimo Anno* (Reconstructing the Social Order), as quoted in Ryan, *The Christian Doctrine of Property* 16 (1923), stated: "Full production and distribution for human needs—'Then only will the economic and social organism be soundly established and attain its end, when it secures for all and each those goods which the wealth and resources of nature, technical achievement, and the social organization of economic affairs can give. These goods should be sufficient to supply all needs and an honest livelihood, and to uplift men to that higher level of prosperity and culture which, provided it be used with prudence, is not only no hindrance but is of singular help to virtue.'"

35. Hodges 203-15.

36. *Mater et Magistra*, para. 99. (Emphasis added.) Pope John pointed out that: "[I]t is necessary that public authorities take active interest, the better to increase output of goods and to further social progress for the benefit of all citizens." *Id.*, para. 52. See also *id.* para. 80. In this the state has a duty, not a mere privilege:

"The State, whose purpose is the realization of the common good in the temporal order, can by no means disregard the economic activity of its citizens. Indeed, it should be present to promote in a suitable manner the production of a sufficient supply of material goods, 'the use of which is necessary for the practice of virtue.' Moreover, it should safeguard the rights of all citizens, but especially the weaker, such as workers, women, and children. Nor may the State ever neglect its duty to contribute actively to the betterment of the living conditions of workers." *Id.* para. 20.

37. Pope Pius XI has stated:

"Public ownership not Socialism—'Certain forms of property must be reserved to the State, since they carry with them an opportunity of domination too great to be left to private individuals without injury to the community at large.'

"Distribution of ownership—'Unless the non-owners get enough income to save and rise to ownership and actually do so, there is no security against revolution.'

"A distribution of income that will permit maximum employment—'Social justice demands that such a scale of wages be set up . . . as to offer to the greatest number opportunities of employment and . . . means of livelihood.'

"Price-proportions—'Also "a reasonable relationship between prices."'" Quoted in Ryan, *op. cit. supra* note 34, at 16. See also *id.* at 11; *Mater et Magistra*, para. 116.

regulation of business in order that it serve the common good of all men. "[P]ublic authority . . . can determine more accurately upon consideration of the true requirements of the common good, what is permitted and what is not permitted to owners in the use of their property . . ."38

The forms of regulation positively proposed by Bazelon are mild indeed: (1) National rather than state licensing of the largest corporations;³⁹ (2) A Power Review Commission;⁴⁰ and (3) A tax on unused productive capacity.⁴¹ He would also allow "nationalization or public ownership, on occasion, for revenue purposes."⁴² For example, the Post Office Department could be allowed to operate like a "private" public utility (A.T.&T.). It could be allowed to make money. This is hardly a demand for socialism. "[P]rice controls, material priorities, and the more or less gently forced cooperation of capital and labor . . .,"⁴³ used to win the Second World War, would be used, but only if necessary to win the "war of *total social competition*"⁴⁴ which is our only means of preventing Russian domination of the world.⁴⁵

The three main proposals are, of course, merely illustrations of the means to be used to accomplish the basic end: the managers of American business should be subjected to democratic control, *i.e.*, they must be responsible to the *people*, rather than merely to themselves, as is the case at present in large public issue corporations with wide dispersal of share ownership.

Let's get it straight, to speak in the terse, conversational fashion of Bazelon—nobody is against business. But business has certain obligations which it must fulfill in behalf of the society which sustains its being. The people have the right to expect certain things from this indispensable creature which they have, by their consent, created. Business must meet its social responsibilities, that is, its responsibilities to the people. The educational process necessary is analogous to "toilet training" for children.⁴⁶

This is no denigration, since as every psychologist knows, toilet training is a very delicate process. The parents love their child, and do not want to hurt it in any way, yet the child must ultimately be "socialized," in the psychological sense, *i.e.*, made aware of its social responsibilities. On the other hand, excessive coercion in the training process may be psychologically destructive. A fine balance must always be drawn

38. Fremantle, *The Papal Encyclicals 231-33 (1956)* (quoting Pope Pius XI in his *Quadragesimo Anno*). See also Pope Pius XI, *Quadragesimo Anno*, para. 81 (Treacy transl. 1939):

"The exigencies of the common good finally must be regulated with a view to the economic welfare of the whole people."

39. Bazelon 280.

40. *Id.* at 383. Its function would be "to identify existing power centers wheresoever throughout American society, and then periodically to review the exercise of these powers by the stewards thereof." *Ibid.* Bazelon proposes that if the Commission is not a practical political suggestion, it should exist "at least in our heads." *Id.* at 382. I would make it a reality.

41. Bazelon 461. (An interesting substitute for Henry George's old "Single Tax" on unused reality.)

42. *Id.* at 254.

43. *Id.* at 455.

44. *Id.* at 424.

45. *Ibid.*

46. This is my expression, not Bazelon's. Business should be free to make choices, but, just as under the present tax laws, certain choices should be made more advantageous than others.

between absolute or irresponsible freedom ("licence") and complete domination ("fascism," "socialism," "communism," or whatever name you prefer, for absolute regimentation). Such a balance is not impossible in the "education" of the members of an economic society, and, in fact, it is a moral necessity.⁴⁷

Certainly, the entire frightening catalogue of business abuses recounted by Hodges should be the subject of regulation. Should the President have had nothing more at his disposal than his own and the public's righteous indignation at United States Steel's attempt to place "selfish short range considerations"⁴⁸ ahead of the national interest by its abortive price rise? Should an unscrupulous American firm be permitted to sell abroad food condemned here as unfit for human consumption?⁴⁹ Can anyone really disapprove a law which compels business only to produce what it can, when this will increase the well-being of all?

Apparently, some do. Rejecting the common good, they would instead place their faith in materialistic economic anarchy. Their errors, rejected in the past by the leaders in economic thought in our country, and condemned by our religious leaders (including the spiritual head of the entire Roman Catholic Church⁵⁰), are growing more prevalent. Their "Big Symbol," according to Bazelon, is "The Free Enterprise System."⁵¹ Bazelon adds "a little dab of reality" to show that "the current image of [this] . . . system and the obvious facts are incommensurable."⁵² His point can be well illustrated by an examination of the "Platform" of the "Conservative Party of New York State." Its general program states:

The Conservative Party is dedicated to our American tradition of limited constitutional government, individual liberty and self-reliance. We strongly advocate the strengthening of our *free enterprise* economy because economic freedom and political liberty are inseparable, and because *competitive private enterprise* has proven more productive and efficient than any other economic system.⁵³

The language is carefully chosen. Obviously, no one can be against the "American Tradition," "individual liberty," nor even "self-reliance." (One wonders, however, if

47. "[T]win rocks of shipwreck must be carefully avoided. For, as one is wrecked upon, or comes close to, what is known as 'individualism' by denying or minimizing the social and public character of the right of property, so by rejecting or minimizing the private and individual character of this same right, one inevitably runs into "collectivism" or at least closely approaches its tenets." Fremantle, op. cit. supra note 37, at 231 (quoting Pope Plus XI).

48. Hodges 122.

49. Id. at 195.

50. "Just as the unity of human society cannot be built upon class warfare, so the proper ordering of economic affairs cannot be left to free competition alone. From this source have proceeded in the past all the errors of the 'Individualistic' school. This school, ignorant or forgetful of the social and moral aspects of economic matters, teaches that the state should refrain in theory and practice from interfering therein, because these possess in free competition and open markets a principle of self-direction better able to control them than any created intellect. Free competition, however, though within certain limits just and productive of good results, cannot be the ruling principle of the economic world. This has been abundantly proved by the consequences that have followed from the free rein given to these dangerous individualistic ideals." Pope Pius XI, *Quadragesimo Anno*, para. 94 (Treacy transl. 1939). See also Mater et Magistra, paras. 23, 28.

51. Bazelon 24-25.

52. Id. at 25.

53. Introducing: The Conservative Party of New York State (folder).

the latter means that Officer Tippet's widow and children should starve, but for the charity of the American public, because he was "careless" enough to work for a police department which provided no benefits for them, but in the service of which (and his country) he had the poor foresight to be killed.)

It is also probably true that American enterprise *can* be more productive and efficient than any other system. It has been (thanks also at least in part to our abundant natural resources) in times of war.⁵⁴ But, as indicated above, its productiveness and efficiency at present leave something to be desired.

No one can be opposed to "strengthening" our economy. This can probably only be done, however, by greater regulation, and, therefore, I'm sure this is not what the "Platform" means. What its endorsers apparently want is more "free enterprise," and more "competitive private enterprise." This theory is known technically as *Laissez-Faire Liberalism*. It was very popular in the 19th Century, and resulted in the amassing of huge fortunes for a few, and conditions worse than slavery for the many. Far from being "inseparable" from political liberty, it is probably its chief obstacle. As our late President, whose political theories embodied that delicate balance necessary between individual rights and the needs of the community, recalled to us:

Over 1,900 years ago the Roman philosopher Seneca said: "A hungry people listens not to reason nor cares for justice nor is bent by prayers." Human nature has not changed in 1,900 years, and world peace and progress cannot be maintained in a world half-fed and half-hungry.⁵⁵

"Free" in the sense of unregulated enterprise means the right to poison these hungry people. It should come, then, as no surprise to us that the 10,000 people who will die tomorrow are unmoved by our talk of political freedom today. When, as a result of "free enterprise's" failure to give them enough to keep alive, they choose the slavery of Communism, as has happened in Cuba, and is happening in many other places in Latin America, we have a striking disproof of the theory of the inseparability of economic freedom (*i.e.*, the freedom to plunder) from political freedom, which is really the freedom of the majority to run its own community, including the economy of that community.

"Free enterprise," and "competitive private enterprise" are, of course, both exposed by Bazelon as mere religious (one might say anti-religious) slogans.

In the first place "private enterprise" is not really private, he argues, since private property is dependent upon the state, *i.e.*, the only thing that makes it mine (private) is the state's coercive power.⁵⁶ Here, however, Bazelon goes too far.⁵⁷ A more cogent argument is that property is more and more in fact not private, but concentrated in the hands of public corporations, in which the "owners" own only a piece of paper—a stock certificate. The real "property" is the control over these corporations which is held by a few thousand bureaucrats, who constitute the new managerial class.⁵⁸

Consider their power:

If you rank big corporations and governments according to revenue, you have eight

54. Compare, however, the treasonable attitudes of some segments of business even in wartime. Hodges 123-26.

55. U.N. Food and Agriculture Organization, Freedom From Hunger Campaign News, Sept. 1963, p. 2 (highlights of an address by President John F. Kennedy given at the opening of the World Food Congress).

56. Bazelon 53, 64.

57. *Mater et Magistra*, para. 109.

58. Bazelon 193.

corporations after the Federal government before you get to the first state, California; then another five before arriving at New York State and New York City; and ten more before Pennsylvania. Out of fifty-five organizations with a billion or more annual revenue (1958), only nine are official governmental units.⁵⁹

Yet, these men comprise self-perpetuating oligarchies. With the enormous power these corporations possess our choice is not really between free enterprise and public government, but between private government and government by the people.

These giant corporations are not people. They are creatures of the state, *i.e.*, the people (even though they may be much more powerful than the particular state which gave them birth). In this sense, too, they are not "private." Clear distinctions should be drawn between the individual shoemaker on the corner and these fictitious behemoths which are "private" and "free" only in the sense that they insist that the public has no right to interfere in any way with them.

Further, they do not even believe in competition themselves. The electrical industry price-fixing case shows this. Many other examples could be given. Mr. Hodges states that Andrew Carnegie "even saw a positive good in the trend toward monopoly power,"⁶⁰ a manifest contradiction of the idea of free competition. Bazelon argues that all the big industrial leaders agreed. In big industries, with few producers (oligopoly), clearly decisions are made, as indicated above, in terms other than those of the automatic interaction of supply and demand factors, *i.e.*, not as a result of free competition. They plan rather than rely on competition.⁶¹ And, as Bazelon puts it: "It is not a question, in the modern world, of planning or not planning. It is only a question of who does it, and how well. And for whom. And how soon."⁶²

If anything, big business wants to get rid of competition. As a result there is increasing concentration ("organization," as Bazelon would say) and less competition. The 1948 FTC report quoted by Hodges stated:

No great stretch of the imagination is required to foresee that if nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the country, or the government will be impelled to step in and impose some form of direct regulation in the public interest. In either event, collectivism will have triumphed over free enterprise . . .⁶³

Thus, regulation is inevitable. Either we have strong anti-trust laws to prevent business planning from destroying competition, or we allow the growth of monopoly and then regulate the resulting winner of the jungle warfare (as Bazelon favors). Whether "fair competition," as favored by Hodges,⁶⁴ *i.e.*, regulated by anti-trust laws, or closer supervision of a single producer, as favored by Bazelon, is better for the people, I would leave to Bazelon's fact-finding Power Review Commission. Incidentally, Catholics who still cling to the "free-private-competition" religion, despite practical proof to the contrary, might perhaps be interested in hearing Papal thinking on the subject:

59. *Id.* at 194. Those who think that the United States Constitution was established to protect these big corporations should remember that the first general corporation law was not enacted until 1811. Ballantine, *Corporations* § 9, at 37 (rev. ed. 1946).

60. Hodges 61.

61. Bazelon 203, 367.

62. *Id.* at 370.

63. Hodges 159. We may differ with the FTC's pessimistic conclusion, as to the effect of government intervention.

64. *Id.* at 148-67. Hodges favors voluntary business action to insure this fair competition.

Just as the unity of human society cannot be founded on an opposition of classes, so also *the right ordering of economic life cannot be left to a free competition of forces*. For from this source, as from a poisoned spring, have originated and spread all the errors of individualist economic teaching. Destroying through forgetfulness or ignorance the social and moral character of economic life, it is held that economic life must be considered and treated as altogether free from and independent of public authority, because in the market, that is, in the free struggle of competitors, it would have a principle of self-direction which governs it much more perfectly than through the intervention of any created intellect. But free competition, while justified and certainly useful, provided it is kept within certain limits, clearly cannot direct economic life—a truth which the outcome of the application in practice of the tenets of this evil individualistic spirit has more than sufficiently demonstrated. Therefore, it is most necessary that economic life be again subjected to and governed by a true and effective directing principle. This function is one that the economic dictatorship [referring to “the trustees and managing directors of invested funds,” *i.e.*, the managerial class] which has recently displaced free competition can still less perform, since it is a headstrong power and a violent energy that, to benefit people, needs to be strongly curbed and wisely ruled. But it cannot curb and rule itself. Loftier and nobler principles—social justice and social charity—must, therefore, be sought whereby this dictatorship may be governed firmly and fully. Hence, the institutions themselves of peoples, and particularly those of all social life, ought to be penetrated with this justice, and it is most necessary that it be truly effective, that is, establish a juridical and social order which will, as it were, give form and shape to all economic life⁶⁵

Not even Bazelon is that scathing in his denunciation. Not even he is that forceful in his demand for control.

The ultimate end of society is to bring men to God. Its immediate end is the “common good.” This is a function of law.⁶⁶ Business, too, is merely a means to securing that end. Regulation of business is therefore not evil. To the extent that it serves the good of the people of our nation and our “neighbors” of the world it is a positive good. It belongs to us the people to order the economy to suit this common good of mankind.⁶⁷

“Government,” *i.e.*, the people, must not abdicate this duty:

With regard to civil authority, Leo XIII, boldly breaking through the confines imposed by Liberalism, fearlessly taught that government must not be thought a mere guardian of law and of good order, but rather must put forth every effort so

65. Pope Pius XI, *Quadragesimo Anno*, as quoted in Fremantle, *op. cit. supra* note 38, at 233. (Emphasis added.) The Pope goes on: “Free competition and still more economic domination must be kept within just and definite limits, and must be brought under the effective control of the public authority, in matters appertaining to this latter’s competence. The public institutions of the nations must be such as to make the whole of human society conform to the common good, *i.e.*, to the standard of social justice. If this is done, the economic system, that most important branch of social life, will necessarily be restored to sanity and right order.” Pope Pius XI, *Quadragesimo Anno*, para. 118 (Treacy transl. 1939). (Italics omitted.)

66. Aquinas, *Summa Theologica*, Q. 90, art. 2 provides that “law must needs concern itself properly with the order directed to universal happiness.” We need not go as far as this: “But the good of the multitude is greater and more divine than the good of one man.” *The Governance of Rulers* 74 (Sheed & Ward 1938). It is the beauty of the Constitution that the interests of both the majority and the individual (even against that majority) are protected. See also *Mater et Magistra*, para. 66.

67. Aquinas, *op. cit. supra* note 66.

that "through the entire scheme of laws and institutions . . . both public and individual well-being may develop spontaneously out of the very structure and administration of the State." Just freedom of action must, of course, be left both to individual citizens and to families, yet only on condition that the common good be preserved and wrong to any individual be abolished. The function of the rulers of the State, moreover, is to watch over the community and its parts; but in protecting private individuals in their rights, chief consideration ought to be given to the weak and the poor . . .⁶⁸

If we sincerely dedicate ourselves to "liberty and justice for all," as we do verbally whenever we pledge allegiance to our flag, and to government by and for the people, the purpose to which the great Lincoln pledged our nation, we will all make the right decisions: we will do our duty to God, our fellow-citizens, and the world, and we will be saved in heaven and on earth.

If we fail to do our duty through greed or indolence, or fear of the strong, America and the rest of the world will be lost. Economic anarchy will lead to political slavery. The choice is yours.

Mane, Thecel, Phares.

ROBERT A. KESSLER*

1

Too Grave a Risk: The Connally Amendment Issue. By Denison Kitchel. New York: William Morrow & Co. 1963. Pp. 128. \$3.75.

It is characteristic of our day that great issues tend to be framed in slogans. One such issue is the extent to which the United States shall submit its particular interests to the arbitrament of international tribunals; that is, specifically, whether this nation shall restrain in any meaningful way its commitment to abide by decisions of the International Court of Justice. The Connally Amendment¹ restricts that commitment and we must decide whether it is to be retained. A sober decision here will depend in turn upon the answers to certain fundamental questions: first, whether the basic dispute now sundering the world and threatening the survival of its remaining free portion is amenable to solution by a court of law; and second, whether the so-called World Court is itself such a court. To an unfortunate degree, the legal community has skirted these basic questions, and the matter of the Connally Amendment has been unduly sloganized. So it is that repeal of the amendment is often urged as a means of achieving "world peace through law,"² and the amendment itself is disparaged as "self-judging,"³ a label with inaccurate connotations.

In 1946, the United States Senate voted to accept the compulsory jurisdiction of the International Court of Justice (the World Court, as it is called), but provided that the acceptance would not apply to:

68. Pope Pius XI, *Quadragesimo Anno*, as quoted in Fremantle, *op. cit. supra* note 38, at 230. See also Mater et Magistra, para. 37: "[C]ivil authority should reassume its function and not overlook any of the community's interests. Finally, on a world-wide scale, governments should seek the economic good of all peoples."

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1. 61 Stat. 1218 (1946); S. Res. 196, 79th Cong., 2d Sess., 92 Cong. Rec. 10697 (1946).
2. Kitchel, *Too Grave A Risk: The Connally Amendment Issue* 11 (1963).
3. *Id.* at 81.

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States.⁴

The six emphasized words constitute the Connally Amendment, which was adopted, by a vote of 51 to 12, on the proposal of the late Senator Tom Connally, then Chairman of the Foreign Relations Committee.

In this little book, Denison Kitchel, a practicing attorney of Phoenix, Arizona, has done well in describing the World Court and the implications of the Connally Amendment, and in so doing he has met the fundamental issues. After recounting the history of the World Court, and its precursors—especially the Permanent Court of International Justice of the League of Nations—Mr. Kitchel addresses himself to the character of the World Court as a court of law. The fifteen members of the Court have considerable academic, political, and practicing legal background, but only one can claim prior judicial experience—Judge Moreno Quintano, who thirty-two years ago served a term on a municipal court in La Plata, Argentina. Although no Communist nation has accepted the jurisdiction of the Court, the President and one other judge are from Communist nations. The American representative on the Court is Dr. Philip C. Jessup, former Director of the Institute of Pacific Relations, who was chosen in 1960, nine years after the Senate refused to confirm his nomination as a representative to the UN General Assembly. Nominations to the Court are not made by the governments of the nominees, but by a private nominating committee designated by each government. Hence the President and Senate of the United States have no function in nominating judges for the World Court. Five judges are elected by the General Assembly and the Security Council (the veto does not apply) once every three years, and each judge serves nine years. Owing to the embryonic state of international law, the judges take no oath to uphold any law, but rather each makes “a solemn declaration in open court that he will exercise his powers impartially and conscientiously.”⁵

Mr. Kitchel next examines the sparse record of the World Court: it has, in over fifteen years, decided eleven quite minor cases, disposed of five on technical points and rendered twelve advisory opinions to the United Nations.⁶ The author concludes from the record: “It seems quite apparent that where a nation is bent on wrongdoing it will not go to the Court. It seems equally clear that where a nation believes its vital self-interest to be at stake in a dispute with another nation it will not risk a decision by the Court.”⁷

In his important Chapter V, the author correctly observes that the World Court was not designed to have any jurisdiction other than that conferred upon it by consent, *i.e.*, a nation can become involved in a dispute before the Court only to the extent that it has consented to do so in advance. Moreover, the Court's jurisdiction extends only to disputes concerning the interpretation of a treaty, concerning any question of international law, or concerning a breach of an international obligation, or the nature or extent of the reparation to be made for the breach of an international obligation. These grants of jurisdiction are subject also to the underlying restriction that the Charter of the United Nations, of which the Court is a part, provides that the United Nations shall not “intervene in matters which are essentially within the domestic jurisdiction of any state . . .”⁸ The Connally Amendment, therefore, does

4. 61 Stat. 1218 (1946). (Emphasis added.)

5. Stat. Int'l Ct. Just. art. 20, 59 Stat. 1057 (1945).

6. Kitchel, *op. cit.* supra note 2, at 39-52.

7. *Id.* at 52.

8. U.N. Charter art. 2, para. 7.

not deprive the Court of any jurisdiction which it otherwise would have. "It merely confirms the assurance that was given us and every other nation at the time the United Nations Charter was accepted—the assurance that the United Nations would not intervene in any matter which is primarily of domestic concern."⁹ More to the point, it simply prevents the Court from deciding for itself what matters are essentially domestic, a type of reservation which has been characteristic of American arbitration and similar treaties since at least 1897. The wisdom of that prevention is readily seen, for there is no appeal from a decision of the Court. The decisions, moreover, are enforceable by the Security Council of the United Nations, and Mr. Kitchel argues persuasively that it would be out of recent character for the United States to interpose its first veto against such enforcement. Most importantly, though, the reservation is wise for two reasons. As the author infers, the World Court is really not a court at all in the sense in which we understand the term. It serves no identifiable or describable body of law, and it is hedged about by no adequate safeguards against arbitrary, politically motivated action. The second reason is that the conflict between Communism and the free world is, because of an unbridgeable definitional chasm between them, incapable of settlement by a major resort to the forms of legal adjudication. This is the burden of an illuminating correspondence between Mr. Kitchel and his mentor, the late Judge Learned Hand. Mr. Kitchel summarizes their final conversation on the point:

In this discussion . . . Judge Hand confirmed his agreement with my two basic premises—first, that the World Court was really not a court at all, and second, that there was really no such thing as international law. But we remained apart in our respective evaluations of the risk involved.

In our last meeting, I said to him at one point in our discussion:

"Am I correct in thinking that the differences in our evaluations of the risk involved in repealing the Connally Amendment stem primarily from the differences in our evaluations of the techniques and objectives of the international Communists?"

"Yes," he replied, "I would agree that that is the fundamental basis of our disagreement. I will go along with you on every other point, but I believe that the danger to the very existence of humanity is so great that we must take the chance of being tricked or duped. Perhaps it's because I am getting too old and too tired. I wish I had the energy to agree with you, but I have not."

The issue was clearly defined. What, then, is the risk involved?¹⁰

The author concludes that the risk is too great to forego the minimal protection afforded by the Connally Amendment. Nor, he asserts, would repeal of the amendment contribute materially to the emergence of the World Court as an organ of law. "The truth is that the United States is further committed to the World Court than any other major power. The Court has failed to achieve acceptance in spite of our leadership—certainly not because of any aloofness on our part. The facts are revealing."¹¹

This short treatment of a large issue is written both for the layman and the lawyer. It will be of service to both, in that it defines the Connally Amendment issue clearly and accurately. In view of recent actions of the General Assembly of the United Nations, especially in relation to the Congo, South Africa and Angola, it is quite

9. Kitchel, *op. cit.* supra note 2, at 64.

10. *Id.* at 101-02.

11. *Id.* at 76.

conceivable that the World Court, were it given the power by repeal of the Connally Amendment, could decide, without right of appeal, that such problems as Guantanamo Bay, the Panama Canal and racial relations in this country are not essentially domestic concerns of the United States and therefore are proper matters for adjudication by that Court. The price of a wrong choice on the Connally Amendment may well be an irretrievable cession of American independence. The legal profession has a particular duty to inform the public on both sides of the issue so that, whatever the choice, it will be knowledgeable and conscious. Mr. Kitchel is to be commended for the contribution he has made to that education.

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