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SOCIAL CRITICISM AND LEGAL PHILOSOPHY: SOME REFLECTIONS ON LAW AND THE NEW POLITICS

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INTRODUCTION

Sociological insights have proven that positive law is not a completely autonomous discipline. Legal rules have a symbolic, as well as a jural, significance; statutes and decisions point beyond themselves to an underlying social conflict of which they are the product. The "law" is, in large measure, the response of a legislator, administrative official, or judge, to demands being made by various participants, seeking through different strategies to realize preferred values.

Like positive law, legal philosophy suffers challenges to its independence. Theories about law cannot be developed in isolation from other truths about the nature of reality. A good deal of legal philosophy reflects this interdependence, *e.g.*, historical jurisprudence, cultural jurisprudence, sociological jurisprudence, as well as legal theories which purport to constitute a strict analysis of the positive law.

Most of these relationships have been happy marriages; the alien discipline often merges with the jural phenomena to form a more comprehensive legal philosophy. But there are also some theories of knowledge which stand over against legal theory, professing insights by which the jural realm must be evaluated, and refusing to be incorporated into the fabric of legal philosophy. Much of the interaction between natural law and positive law has been of such an antithetical character. In contemporary thought, a comparable tension is developing between legal philosophy and modern social theory.

Thinkers such as Herbert Marcuse[1] and Michael Harrington[2] have

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1 In this study attention is primarily devoted to the work of Professor Marcuse, the most influential and provocative thinker in the field of social criticism. His most well-known work is ONE-DIMENSIONAL MAN (1964) [hereinafter ONE-DIMENSIONAL MAN], a compelling study of the way in which modern industrial capitalism frustrates the aspirations of the human person towards autonomy and fulfillment. His more recent book, AN ESSAY ON LIBERATION (1969) [hereinafter LIBERATION], continues the ideas of *One-Dimensional Man* and contains some valuable insights into the motives of student rebellion. For a more complex understanding of Marcuse's thought, his earlier writings should be consulted. Marcuse insists upon rationality in social existence, a compulsion traceable to his interest in Hegel and expressed in REASON AND REVOLUTION (3d ed. 1955). Freudian concepts are examined in EROS AND CIVILIZATION (1955) and play a major role in his continuing analysis of repression. (Marcuse's thought also reveals the impact of Schopenhauer,

developed theories of social criticism by which they seek to measure the actual organization of social life in terms of deeper tendencies immanent within society. Disavowing, in the main, any transcendental authority, the new movement judges existing institutions in terms of the possibilities of human development which are immanent to the social group and can be empirically identified. These forces for humanistic improvement, manifest by discontent and bewilderment, find their aspirations nullified by the status quo. Much of the new theory is devoted to a critique of present social, political, and economic institutions, pointing out why they frustrate more sublime aspirations towards human freedom.

In their books, these thinkers have conducted their evaluations and appraisals forcefully, demonstrating the diverse ways in which modern industrial societies — of both democratic and socialist persuasion — suffocate enormous amounts of human potential. The impulses which drive us to unending production — especially of armaments and gadgets — have their roots in a complex social organization which, while promising peace and prosperity, actually succeeds in threatening and deforming the very persons it would protect. Thus, Professor Marcuse observes:

> If we attempt to relate the causes of the danger to the way in which society is organized and organizes its members, we are immediately confronted with the fact that advanced industrial society becomes richer, bigger, and better as it perpetuates the danger. The defense structure makes life easier for a greater number of people and extends man's mastery of nature. Under these circumstances, our mass media have little difficulty in selling particular interests as those of all sensible men. The political needs of society become individual needs and aspirations, their satisfaction promotes business and the commonwealth, and the whole appears to be the very embodiment of Reason.
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> And yet this society is irrational as a whole. Its productivity is destructive of the free development of human needs and faculties, its peace maintained by the constant threat of war, its growth dependent on the repression of the real possibilities for pacifying the struggle for existence — individual, national and international. This repression, so different from that which characterized the preceding, less developed stages of our society, operates today not from a position of natural and technical immaturity but rather

particularly in an appraisal of the aesthetic impulses behind the new movement. *See* LIBERATION ch. 5.) For a general bibliography of Marcuse's writings, see THE CRITICAL SPIRIT, ESSAYS IN HONOR OF HERBERT MARCUSE, pt. 4 (K. Wolff & B. Moore eds. 1967).

2 Harrington's works include: TOWARD A DEMOCRATIC LEFT (1968); THE ACCIDENTAL CENTURY (1967); THE OTHER AMERICA (1964). For a general discussion of the New Left Movement, see C. LASCH, THE AGONY OF THE AMERICAN LEFT (1969).

> from a position of strength. The capabilities (intellectual and material) of contemporary society are immeasurably greater than ever before — which means that the scope of society's domination over the individual is immeasurably greater than ever before. Our society distinguishes itself by conquering the centrifugal social forces with Technology rather than Terror, on the dual basis of an overwhelming efficiency and an increasing standard of living.[3]

Little can be added to this general indictment. While it cannot be accepted without qualification, most would admit that Marcuse's critique contains a great deal of genuine insight and that it is expressive of truths about the human condition which law and legal theory cannot ignore. On those premises, it remains to be seen how legal philosophy falls within its terms. We must try to understand how an apparently neutral jurisprudence may be an accomplice to the inhuman way of life which the new criticism has so dramatically condemned. Toward this end, we shall try to identify some of the ways in which legal philosophy is subordinate to social theory, and also suggest new directions for jurisprudence — fresh departures for a creative response to a devastating social appraisal of our way of life. In the first instance, we should understand what modern thought considers to be the nature of law.

Recent juristic reflections, both here and in Great Britain, have made possible the development of a comprehensive definition of law. The modern analytic school of jurisprudence[4] has successfully challenged the traditional idea, inherited from Hobbes and Austin, that law is essentially the command of a sovereign political authority to its subjects; an order coupled with the threat of sanction in case of disobedience. Modernists have demonstrated that such a conception fails to account for important phenomena which we normally think of as having a legal quality. For example, it is only with difficulty that the passage by Congress of a statute outlawing certain forms of interstate travel can be fit into the Austinian definition. The problem is not only one of identifying the sovereign to whom they are responding, but it is also one of characterizing the discretionary decision of the legislators as a form of obedience to a command. Similarly, in the private sphere, the making of a will is usually understood as being a legal transaction, yet its drafting can hardly be characterized as a reaction to a threat of harm.

The reason why traditional definitions cannot encompass all jural

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3 ONE-DIMENSIONAL MAN ix.

4 The modern analytic school includes thinkers such as H. L. A. Hart, Glanville Williams and Graham Hughes from Great Britain; Ronald M. Dworkin and Herbert Morris in the United States. For a bibliography, see Summers, *The New Analytical Jurists*, 41 N.Y.U.L. REV. 861 (1966). In the present essay, reliance is placed upon the work of Hart, especially his THE CONCEPT OF LAW (1965).

phenomena is that such definitions stress only the *external* aspect of law. Law is, in many respects, a sanctioning process, but that is only part of the story. For a fuller comprehension, one must move from the outside, inward, perceiving attitudes toward law held by the society itself. Analysis should begin with the social group rather than with a projected Leviathan. The way in which officials, lawyers, and private persons view their behavior is as important a consideration as is the viewpoint of a fictitious sovereign.

With Hart, this shift from an *external* to an *internal* perspective is accomplished through an anthropological approach to legal definition. In order to understand law, the evolution of its meaning must be examined in human consciousness. In the evolution from primitive organization to the establishment of mature legal orders certain intelligible features emerge. A primitive society operates with certain basic rules, mostly prohibitory in character. They provide security, but have limitations which a developing society will seek to overcome. The rules are not systematized, and when doubts arise about their meaning, there is no orderly way to overcome the uncertainty. Rudimentary norms are also static: the members of the community have fixed rights and duties, and there is no way of modifying the rules in order to meet the needs of changing circumstances. Finally, the régime is inefficient. Social pressures are the principal means of assuring conformity with prevailing standards; in case of violation, it is difficult to apprehend and punish offenders.

The remedies which evolving societies create to overcome such deficiencies are threefold. The problem of uncertainty is met by the introduction of *rules of recognition.* Some datum, *e.g.*, a stone tablet, a religious document, a human figure, an institution, is considered as an authoritative way of eliminating doubt. If the suggested rule is validated by that authoritative symbol, it can be taken to be the rule of the group. To overcome the immobile quality of primitive norms, *rules of change* are introduced. Society empowers individuals to introduce new primary rules for the life of the group. These may be either public or private powers. The passage of legislation illustrates the exercise of a public power; the execution of a will exemplifies private authority. To overcome the final deficiency — inefficiency — the maturing group develops *rules of adjudication,* conferring upon individuals the power to determine if a primary rule has been broken, and to provide appropriate remedies.

Combining these insights, we see that law cannot be comprehended in terms of the simple model of commands and sanctions. Viewed interi-

orly, as it has evolved in social consciousness, law is understood as a much more complex phenomena. The external, obligatory dimension remains, but it is joined with facilities by which public officials and private citizens identify, modify, and apply the legal rules. In a modern, comprehensive definition, law is a union of primary rules of obligation and secondary rules of recognition, change and adjudication.

Within this contemporary definition, that aspect dealing with secondary rules of change is of particular interest to the average American lawyer. This form of secondary rules is important insofar as it validates the exercise of private powers to achieve desirable results. It is important because it accentuates the jural quality of the professional work in which he is most often engaged. The majority of attorneys make their living in the realm of private lawmaking, drafting deeds and contracts, corporate charters and by-laws — the immense range of documentary expertise by which he helps private persons and corporations realize their personal and social ambitions.

Psychologically, it is important that the lawyer view this work as authentic legal enterprise, and not as marginal activity which suffers by comparison with the "real" legal work such as litigation. Once assured that the private sector of social change is an essential part of law, the practitioner's sense of self-esteem is enhanced. He can now see that

> [i]n carrying out his work as law-maker, the lawyer is at once the architect and the builder of legal relationships. He draws on his legal learning for knowledge of the legal tools and materials he can use and their capacity to bear loads and to withstand stresses. At the same time, he draws on his knowledge of human nature and business practice to gauge the workability of the arrangements he is considering. In addition, he employs his skill in analyzing problems and in using language effectively to make sure that the documents embodying the arrangements he has designed cover all significant contingencies. . . .[5]

Concentration of professional energy upon the sphere of private lawmaking has undoubtedly been productive of much individual and social good. Our ability to facilitate transfers of property, negotiate commercial agreements, and create corporate documents has improved the life-prospects of countless individuals. Moreover, these talents have not been expended exclusively upon the rich. A lawyer's ability to draft charters and contracts is of as much value to labor unions as it is to corporations; indeed, innumerable individuals with small business enterprises are similarly dependent upon these abilities. As the

[5] Cavers, *Legal Education and Lawyer Made Law*, 54 W. VA. L. REV. 177, 180 (1951). *See also* H. HART & A. SACKS, THE LEGAL PROCESS (10th ed. 1958).

war on poverty continues, it is becoming evident that the poor are also in need of legal services of a drafting, counseling and negotiating character.

Yet given this positive good which flows from the lawyer's involvement with the means of private improvement, we must be willing to appraise this commitment in the light of modern social criticism. The material well-being of many is elevated as a result of our labors, but should that be the supreme measure of professional achievement? Are not the innumerable corporate charters, commercial documents, and tax and finance plans, the instruments of a social structure which thinkers like Marcuse would condemn? Are these areas of private lawmaking in which we so proudly participate bound up with a stultifying *ethos* which projects "particular interests as those of all sensible men"? Does our extensive professional involvement with private business objectives preclude us from serving the public good? These are the types of questions which the penetrating insights of social critics[6] force us to examine. Considered reflection upon them could substantially alter the orientation of law and the commitments of the legal profession for the foreseeable future.

THE CONVERGENCE OF LAW AND SOCIAL CRITICISM

There is a sense in which the internal development of law reflects the extralegal critiques of social theory. Consider, for example, contracts. Viewed positively, they are a model of private rules of change.

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[6] Criticism of the private law approach comes from varied sources. Tax law experts could ponder the observations of former Senator Paul Douglas:

> It used to be said by some that the trouble with democracy is that the ablest and best educated men and women in the country do not take part in political affairs, but that if they would only interest themselves more in public matters they would set matters right.
>
> But it has been the extremely able who have inserted these loopholes in the tax laws. The loopholes and even more, the truckholes, are defended against elimination or lessening by other extremely able men. The large hearing room of the Finance Committee seats a hundred and fifty persons. When we considered a tax bill, the room was filled with prosperous lawyers, graduates of greater universities and of the top ranking law schools, whom Assistant Secretary of the Treasury Stanley Surrey once referred to in a burst of admiration as "the best minds in the country," all working to hold what they and their clients had and to enlarge it.
>
> One major trouble with our tax system is, therefore, precisely this: that these "best minds" in the country have largely worked to make it what it is. Not more than one out of every hundred citizens actively working on a tax bill is trying to represent the general interest. And in the halls outside the hearing rooms the lobbyists are as thick as flies, while the publicity men and noisemakers are busily at work in Washington and elsewhere. In the halls of Academe, erudite professors train their students in the intricacies of the tax code so that their students may succeed in the private practice of law by helping wealthy clients avoid taxes and thus beat the government of the people.

Douglas, *The Problem of Tax Loopholes*, 37 AM. SCHOLAR 21, 39-40 (1968).

The agreement process is primarily a vehicle for the creation and exchange of wealth, and the legal profession's contributions to its development have been of vast social significance. Yet, contract law is, in large measure, a reflection not only of the economy, but also of a general way of life which measures human well-being in terms of the production and consumption of material goods. To the extent to which its proponents seek to identify the process with the achievement of happiness, they are now being met with a strong dissent. From the perspective of social criticism, the endless exchange of goods and services diminishes man; the processes of commodity production are an exploitive device which creates servitudes more damaging to the human spirit than any previous forms of enslavement.

> The so-called consumer economy and the politics of corporate capitalism have created a second nature of man which ties him libidinally and aggressively to the commodity form. The need for possessing, consuming, handling, and constantly renewing the gadgets, devices, instruments, engines, offered to and imposed upon the people, for using these wares even at the danger of one's own destruction, has become a 'biological' need. . . . The second nature of man thus militates against any change that would disrupt and perhaps even abolish this dependence of man on a market ever more densely filled with merchandise — abolish his existence as a consumer consuming himself in buying and selling.[7]

These observations are as much a measure of legal theory as they are a critique of the economy. Yet it is possible to discern *within* the growth of the law a humanistic movement which has started to meet the objections to the status quo raised by social criticism.

Individual justice is often a casualty in an affluent society. Where an abundance of "things" is equated with happiness, it seems to be a small loss that the moral dimensions of giving to each his due are obscured in the process of production and consumption. Such an assumption calls into question the integrity of the legal process. Fortunately, law has been responsive to the challenge. The extension of implied warranties of merchantability beyond the immediate parties and the application of these protections to a broadening number of "goods and services"[8] demonstrate that the legal conscience has not entirely ignored the detrimental effects of mass production. And, by interposing law against the exigencies of the market, courts have begun to manifest an awareness of the oppressive power of corporate capitalism. For

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[7] LIBERATION 11.

[8] Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

example, in *Henningsen v. Bloomfield Motors, Inc.*,[9] the New Jersey Supreme Court identified the dominating position of major corporations within the market economy and refuted the suggestion that agreements reached within this system were the result of a bargain struck by equal and free participants:

> The limitations of privity in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality. . . . With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy, it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. . . .
>
> Under modern conditions the ordinary layman, responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer's instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend "upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.' "[10]

Consciousness of inequality has brought other changes to legal doctrine. Viewed as an exercise of private powers, the agreement process is an area of private lawmaking; the participants create for themselves a régime of rights and duties which will facilitate the achievement of their desired objectives. This lawmaking takes place within the bound-

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[9] 32 N.J. 358, 161 A.2d 69 (1960).

[10] *Id.* at 379, 384, 161 A.2d at 82, 83 (citation omitted). The implied warranty concept has been used to remedy injustices in the housing field. *See, e.g.*, Waggoner v. Midwestern Dev., 154 N.W.2d 803 (S.D. 1967); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).

aries of primary rules, but the role of the external sanctioning process is plainly subordinate to the sphere of private choice.

The primacy accorded to the private side of contracts was grounded upon an assumption of equal bargaining power which has become increasingly difficult to sustain. The awareness of disproportionate power in the warranty area has begun to permeate the entire field of contracts. A growing social consciousness that commercial agreements are part of an exploitive process in which financial power often dictates contract terms has begun to shift attention to the public, "external" side of agreements. Thus the Uniform Commercial Code empowers courts to refuse to enforce agreements which are found to be "unconscionable."[11]

An improved understanding of the oppressive realities of economic life has generated a response from that part of law which is concerned with the processes of exchange and consumption. But the detrimental effects of industrial capitalism upon human values is not restricted to the realm of contracts. Concentrations of economic power and the inevitable subordination of human values to private profit have spread through our entire social life. Business considerations are intruded into spheres of existence in which they are out of place. This is especially the case with respect to communications.

In our society, the mass media are a means of private gain; acquisition of publishing facilities and radio and television licenses are matters of high finance. As a result, the humanistic purposes of communication are obscured. Where circulation is the decisive criteria for the publication of books and newspapers, genuine enlightenment is lost in sales statistics. Provocative ideas are not of immediate interest since instant satisfaction is the criterion of sales. Ostensibly, the same holds true for radio and television where entertainment is a product delivered to advertisers. Its content is aimed at reaching the widest possible audience, an orientation which inevitably cultivates the baser levels of human existence.

Ironically, these extensions of free enterprise into the realms of communication and culture lead to an unfree society. When the realms of thought and art are invaded by commerce, the real, objective interests of individuals are replaced by immediate, subjective satisfactions. Violent information is substituted for considered reporting, sensual entertainment replaces ennobling drama, and a bombardment of advertise-

11 UNIFORM COMMERCIAL CODE § 2-302. There has been extensive commentary upon the unconscionability concept. *See, e.g.*, Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

ment obliterates the public discussion of vital questions. Subordinated to conditions of production and exchange, the communications media fail to create those conditions by which men can pursue truth, goodness and beauty.[12]

Here, as within the agreement process, law has begun to transform the existing situation into the possibility for a humanistic civilization. Within the prosaic phenomena of standing one can discern a jural development which can significantly affect the influence of business in communications. In *Office of Communication of the United Church of Christ v. FCC*[13] the Federal Communications Commission (FCC) had under consideration the renewal of a license to operate a television station. A church communication office and its members, seeking to present evidence against the renewal, filed a petition to intervene. They wished to show that the station was guilty of racial and religious bias and also broadcast an excessive number of advertisements. The FCC denied the petition on the ground, *inter alia*, that petitioners could not prove the existence of a legally protected interest which would entitle them to intervene. However, the Court of Appeals for the District of Columbia Circuit reversed. Speaking for the court, Judge Burger said:

> The Commission's rigid adherence to a requirement of direct economic injury in the commercial sense operates to give standing to an electronics manufacturer who competes with the owner of a radio-television station . . . while it denies standing to spokesmen for the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.
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12 A dominant theme in Marcuse's thought is that the technological power of advanced industrial societies is totalitarian. Production and consumption (of services as well as goods) is its life-blood; modern technology must stimulate private wants as well as establish social functions. As a result it tends to abolish, or at least substantially obscure, traditional distinctions between public and private existence. Because the importance of wealth must be constantly stressed, commercial modalities are intruded into spheres of existence where they are incongruous. This is especially true of the media because it is an area of existence which, by its nature, engages the spiritual aspects of life. Oral and visual communication calls forth aspirations towards moral values, knowledge and aesthetic contemplation; when the structures are subordinated to commercial considerations the damage to the human spirit is incalculable.

13 359 F.2d 994 (D.C. Cir. 1966).

> [U]nless the listeners — the broadcast consumers — can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the commission in an effective manner. By process of elimination those "consumers" willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones "having a sufficient interest" to challenge a renewal application. The late Edmond Cahn addressed himself to this problem in its broadest aspects when he said, "Some consumers need bread; others need Shakespeare; others need their rightful place in the national society — what they all need is processes of law who will consider the people's needs more significant than administrative convenience."[14]

The prevailing *ethos* is one which equates material abundance with human fulfillment. This assumption — shared by middle, as well as upper class sectors of society — has been challenged by a social criticism which contrasts the propaganda of mass prosperity with insights into a collective sadness and bewilderment. The affluence offered by modern finance and technology is not enough because it diminishes the humanity of those fortunate enough to enjoy its advantages. But the New Left also finds industrial capitalism wanting since it excludes persons from obtaining the goods which it generates.

Existing institutions may frustrate the more sublime aspirations of man, but they have also provided many with a high standard of living. This is a way of life with which most lawyers can identify, but beyond lies the "other America."

> The other America is not impoverished in the same sense as those poor nations where millions cling to hunger as a defense against starvation. This country has escaped such extremes. That does not change the fact that tens of millions of Americans are, at this very moment, maimed in body and spirit, existing at levels beneath those necessary for human decency. If these people are not starving, they are hungry, and sometimes fat with hunger, for that is what cheap foods do. They are without adequate housing and education and medical care.
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> The Government has documented what this means to the bodies of the poor. . . . But even more basic, this poverty twists and deforms the spirit. The American poor are pessimistic and defeated, and they are victimized by mental suffering to a degree unknown in Suburbia.[15]

Law and legal institutions have begun to respond to the realities

[14] *Id.* at 1002, 1004-05, *citing* Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 13 (1963).

[15] M. HARRINGTON, THE OTHER AMERICA 9 (1964).

of poverty. In its response to the needs of the consumer, the jural reaction has involved a reconsideration of traditional concepts. Broadening the meaning of property to include the basic needs of survival as well as the protection of wealth,[16] dusting off forgotten concepts such as rights of travel to aid those in need of welfare,[17] or assuring adequate rights for poor, as well as rich, individuals accused of crime, are some of the ways by which the legal process reveals its awareness of the pervasiveness of poverty.[18]

Yet while all these changes are important they do not carry with them the capacity to bring about a substantial or comprehensive change in existing conditions. Neither in its response to the needs of the affluent whose true humanity has been obscured by economic power, nor its solicitude for the poor, has legal theory or practice developed the instruments necessary for a *total* response to the challenge of social criticism. The lines of jural development sketched herein are important, and are reflective of that case-by-case inductive technique which is our primary form of lawmaking. Yet, in and of themselves, they lack the potential of saving the alienation of modern man, of overcoming the extreme separation of personal and social existence which is the pervasive *malaise* of our time.

Manifestly if law is to be in the vanguard of change, it cannot limit its horizons to a piecemeal reshaping of traditional doctrines and concepts. Such a modality is essential, but it does not exhaust the potential of legal thought and action. A momentous evolution has already begun to transform the conditions of existence; to be "relevant" legal education and professional practice must be substantially reoriented toward the dynamics of human fulfillment which are stirring beneath a veneer of social tranquility.

NEW DIRECTIONS

In the preceding discussion some of the ways in which the law has reacted to the stimulus of social criticism have been traced. Most of these changes have been carried out within the existing legal doctrines: extending traditional concepts into newer areas of need or making more viable the procedures by which the deeper human issues can be adju-

16 Reich, *The New Property*, 73 YALE L.J. 733 (1964).

17 Shapiro v. Thompson, 394 U.S. 618 (1969).

18 *See, e.g.*, Griffin v. Illinois 351 U.S. 12 (1956). There are other significant developments in other aspects of poverty law. *E.g.*, Canigiana v. Deptula, 59 Misc. 2d 401, 299 N.Y.S.2d 234 (D.C. Nassau County 1969) (stay of ejectment in case involving welfare client). For some *avant garde* reflections see Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 U.C.L.A.L. REV. 787 (1968).

dicated. A great deal of the continuing effort will be along similar lines; this is all to the good. Yet much more will be required if existing social, economic and political institutions are to be transformed so as to serve deeper human aspirations. To develop an agenda for the future we should understand how the New Left views the present.

In its extreme form, the new movement is apolitical. *Refusal* of existing institutions is its *modus operandi*, a rejection not only of the status quo but also of the procedures for change which are part of the established order. From a radical perspective, established institutions of democracy are so removed from authentic needs as to be virtually irredeemable.

> The "unorthodox" character of this opposition, which does not have the traditional class basis, and which is at the same time a political, instinctual, and moral rebellion, shapes the strategy and scope of the rebellion. It extends to the entire organization of the existing liberal-parliamentary democracy. Among the New Left, a strong revulsion against traditional politics prevails: against that whole network of parties, committees, and pressure groups on all levels; against working within this network and with its methods. . . . [F]or them, this is not a question of choice; the protest and refusal are parts of their metabolism, and they extend to the power structure as a whole. The democratic process organized by this structure is discredited to such an extent that no part of it can be extracted which is not contaminated. Moreover, using this process would divert energy to snail-paced movements. . . . And the performance of the courts, from the lowest to the highest, does not mitigate the distrust in the given democratic-constitutional setup. Under these circumstances, to work for the improvement of the existing democracy easily appears as indefinitely delaying attainment of the goal of creating a free society.[19]

In its more moderate forms, the New Left hopes for improvement through changes in political organization. For example, Michael Harrington looks hopefully toward a political alliance of the poor, the working classes and professional elites who are committed to the public sector.[20] Such a union is viewed as a primary means of alleviating the problems of this "accidental century." What then of the legal profession, juridical institutions, the practice of law? If the needs of human freedom became keenly felt, if the emancipation of man from his subservience to industrial capitalism became a jural imperative, what would be the future direction of law and legal theory? And if the re-

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19 LIBERATION 62-63.

20 M. HARRINGTON, TOWARDS A DEMOCRATIC LEFT ch. 10 (1968).

newal of settled principles is inadequate, what new directions are possible?

No one can accurately predict the course of legal evolution, but some tentative observations can be made. The future will be formed by legal educators, students and practitioners who fully comprehend the nature of the human crisis. This is the indispensable personal dimension; reform must be guided by men who perceive and seek the good, those who make human improvement rather than private gain the paramount motive of their action.

Beyond this, there must be a substantial rethinking of legal theory and practice. Traditional legal method is heavily oriented toward an individualistic view of existence. It focuses upon the direct, immediate needs of human beings: the redress of particular harms, the protection of specific persons from the oppressive power of government, the distinct legal needs of separate segments of the community. Without qualification, this is, and shall always be, a desirable commitment. But it must be conceded that this emphasis misses some of the broader issues of social policy. The attitude of law towards concentrations of economic power illustrates the limitations.

Antitrust laws have individualistic objectives. It is considered desirable to break up large business units if they threaten a free enterprise model of relatively small participants operating within nineteenth-century conceptions of an open market. As legal policies designed to insure free competition, they testify to our belief in the worth of individuals whose initiative and creativity would otherwise be crushed by the ruthless power of large corporations. Insistence upon competitive conditions also pays public dividends in terms of product diversity and more realistic price structures. But as corporate organizations become more complex, existing legal policy seems to be an inadequate instrument for the control of increasing economic power.[21]

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21 Conglomerate mergers are illustrative. *See* the discussion by Mr. Justice Harlan in FTC v. Procter & Gamble Co., 386 U.S. 568, 581-604 (1966) (concurring opinion), and Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); *but see* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969). Legal theory in this area seems to be lacking an adequate understanding of how modern technology inevitably leads to a concentration of resources. Such mergers may result in substantial impairment of competition, but it is difficult to identify such effects within settled definitions of illegal advantage. Moreover there is some desire for a "balancing" test, *i.e.*, weighing possible adverse effects against the economies which can result from conglomerates. The real difficulty lies with the remedy. Noncompetitive mergers can be rationally justified, but they involve dangers to the public welfare because of their concentrations of power. What will be needed is a form of governmental regulation, probably some type of agency supervision. For the general potentials of this approach, see the textual discussion accompanying notes 25-38 *infra*.

The same is true of prevailing private lawmaking approaches to business organization and development. The good that flows from this form of law practice has already been considered. What is not sufficiently appreciated, however, is the fact that private business decisions have inevitable social consequences. The private practitioner with a corporate clientele may properly take satisfaction when he creates the legal instruments designed to facilitate the acquisitive growth of companies; but he should also realize that he is thereby involved in activity which may have a profound effect upon the community as a whole. For example, a single corporate merger can significantly affect wages and prices in the immediate, as well as in related, industries. Indeed, broad implications emanate from nearly all particular business decisions. The private planning of the suburban developer leads to enormous social costs in terms of taxes, transportation, education, and race relations. And these are consequences over which "the law" has little or no control.[22]

To better harmonize legal practice with the social dimensions of life, we should reexamine the modern definition of law. Previously, recent developments in legal theory were traced, especially the shift away from Austinian definitions.[23] Rather than conceiving of law as a purely external, sanctioning process, the new theory incorporates internal perspectives into legal definition. The way in which individuals and officials view "the law" is as important as any abstract model of a legal system. Thus, contemporary jurisprudence defines law as a union of primary rules of obligation with secondary rules of recognition, change and adjudication.

We noted earlier that *rules of change* are important because they relate to a lawyer's predominant professional activities of drafting documents needed by individuals to acquire property, exchange goods and services, etc. But it should be remembered that the rules of change are twofold. The idea that law consists of these rules includes the notion of public as well as private powers. To overcome the static quality of rules, a dynamic society confers authority upon public officials to modify and change existing precepts as well as authorizing private modalities of development.

Defining law to include public powers of change overcomes the difficulties which legislative activity raised for traditional theory. The

22 This is a major theme of Harrington. He cogently demonstrated (in THE ACCIDENTAL CENTURY (1967)) how modern business decisions are necessarily social in their effects, and that a good deal of our present difficulties flow from a general inability to comprehend this process.

23 *See* text accompanying notes 1-7 *supra.*

decision of Congress to enact a statute could not be rationalized as an act of obedience to a sovereign power threatening a sanction in case of noncompliance. It can be understood as the exercise of a power conferred upon legislators by society so that law can be adapted to the evolving needs of the nation.

Legislation is a manifestation of public rules of change, the importance of which is bound to increase in the future. But it is the administrative agency which possesses the greatest operative power to transform the present subordination of man into a realm of freedom. At both the federal and state levels the discretionary judgment of agency officials shall, for good or ill, determine the extent to which the vast resources of technology and finance created by industrial capitalism will be used to promote the objective, real interests of the human person.

The issuance of a license by the Federal Power Commission or the Secretary of Interior can determine whether our natural resources shall be exploited for private gain or preserved for aesthetic contemplation. The level of expertise within a state regulatory commission affects the relative power of public utilities. And the war on poverty is, and will continue to be, a war fought with administrative weapons: increased food subsidies, better housing and medical care, quality education regardless of race or class — these are aspirations which, in large measure, must be satisfied by bureaucratic officials and personnel if they are to be satisfied at all.[24]

The attitude taken toward a growth in administrative authority by the legal profession will be an important part of this overall development. It is well to remember that the prevailing feeling of the legal profession for the administrative process is basically negative. Both common-law and constitutional traditions require the lawyer to view the administrator with a jaundiced eye.

The exercise of administrative discretion includes the possibility of arbitrary power, and legal theory approaches the administrative process with that possibility in mind. The lawyer tends to think of the process from the viewpoint of controlling it. He *reacts* to its reality;

[24] Harrington argues that the processes by which public decisions are made should be more democratic. He is especially critical of the tendency of federal programs to be the servant of priorities established in the private sector or as being responsive to the needs of a limited part of the society — *e.g.*, the financing of suburban housing. He would establish agencies for democratic planning to assure that major decisions are made in terms of genuine social need. M. HARRINGTON, TOWARDS A DEMOCRATIC LEFT ch. 2 (1968). Legal theory can assist this process especially to the degree that the reforms hope to make political forums more representative. The stress upon the administrative process in the present essay complements the approach taken by Harrington, for however democratic one would make the basic policy decisions, there remains the task of implementation which is the normal function of administrative agencies.

for every aspect of its activity he has a protective response. To administrative jurisdiction he interposes rights to counsel and common-law standards of proof; to agency decision he replies with the power of judicial review.

Although antagonism between "law" and the administrative process is inevitable, some tension assures the protection of individuals from arbitrary power.[25] However, there is a growing awareness that deference to administrative judgment can be productive of public good. Legal scholars have written of the importance of permitting administrative discretion to function unless the judiciary is convinced that statutory purposes are being contradicted;[26] judges are also becoming conscious of the dangers of pre-enforcement challenges to administrative regulation.[27] More importantly, courts are beginning to use their power of judicial review in a constructive, positive manner which has immense value for the future of legal process and the development of civilization.

The use of our national resources can, of course, materially affect the quality of our civilization. Decisions concerning their use can either continue the exploitation of the material aspects of existence or they can reassert the spiritual dimensions of life. Our society has invested an enormous amount of discretion in agency officials to make these choices. Administrators possess a public authority to make *rules*

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25 For a reminder of this continuing tension see Berger, *Administrative Arbitrariness, A Synthesis*, 78 YALE L.J. 936 (1969).

26 L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 573 (1965).

27 In Abbott Laboratories v. Gardner, 387 U.S. 136 (1966), the Supreme Court sustained a pre-enforcement challenge to regulations promulgated by the Commissioner of Food and Drugs. Dissenting, Justice Fortas wrote:

> With all respect, I submit that established principles of jurisprudence, solidly rooted in the constitutional structure of our Government, require that the courts should not intervene in the administrative process at this stage, under these facts and in this gross, shotgun fashion. . . . In none of these cases is judicial interference warranted at this stage, in this fashion, and to test — on a gross, free-wheeling basis — whether the content of these regulations is within the statutory intendment. The contrary is dictated by a proper regard for the purpose of the regulatory statute and the requirements of effective administration; and by regard for the salutary rule that courts should pass upon concrete, specific questions in a particularized setting rather than upon a general controversy divorced from particular facts.
>
> The Court, by today's decisions . . . has opened Pandora's box. Federal injunctions will now threaten programs of vast importance to the public welfare. The Court's holding here strikes at programs for the public health. The dangerous precedent goes even further. It is cold comfort — it is little more than delusion — to read in the Court's opinion that "It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show . . . that delay would be detrimental to the public health or safety." Experience dictates, on the contrary, that it can hardly be hoped that some federal judge somewhere will not be moved as the Court is here, by the cries of anguish and distress of those regulated, to grant a disruptive injunction.

Id. at 175-76.

of change in the deepest sense of that jurisprudential expression. There are some encouraging indications that judges are beginning to use their public power of review so as to ensure that administrative decisions are in accord with the real interests of society.

Scenic Hudson Preservation Conference v. FPC[28] is illustrative of this trend. Consolidated Edison sought a license from the Federal Power Commission for a proposed hydro-electric plant on the Hudson River — the so-called "Storm King" project. Conservation groups and affected municipalities opposed the application. When the FPC granted the license, the opponents petitioned the Second Circuit Court of Appeals to set aside the license. The court held that these groups had standing to sue, and interpreted the statutory standards for granting licenses to mean that the agency had the duty to take historical and aesthetical considerations into account in making their decisions. The court, reasoning that the Commission had erroneously rejected evidence of alternative power sources, decided that the agency was accountable for the full exercise of its authority:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
>
> This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[29]

In taking this approach, the court exercised its authority, *i.e.*, public power of adjudication,[30] to ensure that those authorized to direct the growth of our civilization, *i.e.*, public powers of change exercise their commission in a way consonant with the public good. There are important ramifications of this technique, especially as we become aware of the vitality of the administrative agency in the long-range

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28 354 F.2d 608 (2d Cir. 1965).

29 *Id.* at 620.

30 With respect to the judicial process, it is not possible to explain the judicial process solely in terms of rules of adjudication. Courts not only determine a breach of law, they also create it; judges exercise a public power of change as well as adjudication strictly so-called. Indeed the expression "rules of recognition" can also be applied to courts since they do exercise a validating function, especially in the area of constitutional law. For a more thorough discussion of these terms, see text accompanying notes 1-7 *supra*.

uggle to transform the chaos of our "accidental century" into a hu-
anistic age. The impotency of government before the social conse-
ences of private power can only be overcome when administrative
thority measures up to its potential; lawyers and judges have a crucial
le to play in this evolving process.

Another example of this changing attitude of the law toward ad-
inistrative action can be drawn from the field of insurance regulation.
he insurance industry is under the jurisdiction of state regulatory
)dies, agencies which are often poorly staffed and unequal to the
ıancial and legal expertise which the industry can muster. This is
pecially true of rate schedules whereby the insurance interests demand
te increases, contending that higher premiums are required to insure
eir solvency and a reasonable profit. The accounting utilized is often
cepted by the agency with very little probing and depth analysis. Con-
quently, companies often earn excess profits from reserve funds which
ey are able to exclude from the rating calculations. Viewed in its
tality this is an important example of considerations of private utility
tablishing the norms of social policy. Recently, however, the Virginia
ıpreme Court invoked the power of judicial review to compel the
sponsible exercise of administrative authority, thus narrowing the gap
:tween *laissez faire* economics and the public good.

In *Virginia State AFL-CIO v. Commonwealth*[31] the National Bu-
:au of Casualty Underwriters filed, on behalf of over a hundred com-
ınies, an application for an increase in automobile liability insurance
ıtes. The State Corporation Commission held public hearings, reject-
ıg a 9.9 percent increase sought by the Bureau, but granting an in-
ease of 8.2 percent. In fixing the rate, the Commission considered
ıcome derived from investment of unearned premium reserves but
:fused to consider income derived from investment of the loss reserve.
'he Commission reasoned that since the loss reserve constitutes assets
)ntributed by the company stockholders, the policyholders were no
ıore entitled to share in the earnings from that reserve than they would
e vis-à-vis investment earnings from original capital.

On appeal, the Supreme Court of Virginia held that under the
atutory mandate to consider "all relevant factors" the Commission
'as required to consider investment income. With respect to income
:om investment on loss reserves, the court, concluding that the Com-
ıission had confused "earned premiums with earnings," reversed:

> We . . . hold that the Commission should consider income

31 209 Va. 776; 167 S.E.2d 322 (1969).

> from investment of the loss reserve, as well as from investment of the unearned premium reserve, as a "relevant factor" in fixing a "reasonable margin for underwriting profit and contingencies." On remand of this case, the Commission should admit evidence respecting such investment income and, in the light of such evidence and of the evidence relating to the other factors to be considered by the Commission, authorize rates that will provide a reasonable margin for underwriting profit and contingencies.[32]

One further area where the perspectives of judicial process and administrative law will interact is the realm of communications. Freedom of thought and expression is the *sine qua non* of a democratic society; absent the free exchange of ideas the people cannot make intelligent choices about their social or personal destinies. But, as we have already observed, the channels of communication are clogged with commercialism. As a result, the humanistic objectivities of enlightenment are subordinated to the demands of profit maximization. Every aspect of the mass media suffers this servitude and unless it is alleviated the ideals of a free society, one in which the deeper needs of the spirit can flourish, and where real, rather than immediate interests are served, will never be realized.

We have already indicated some of the responses which the legal order has made to this crisis in communicative freedom. Granting standing to persons interested in the public norms relevant to the licensing of the airways is a case in point and developments along this line are continuing.[33] New directions are also emerging, particularly with respect to the right of access to channels of communication.[34] But if we look to the administrative process for creative developments, the results are generally disappointing.

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[32] 209 Va. at 786-87; 167 S.E.2d 327-28 (1969). For a general discussion of these issues see Friedman, *Why Automobile Insurance Rates Keep Going Up*, ATLANTIC, Sept. 1969, at 58.

There is an emerging form of judicial review in the constitutional area which may parallel the developments vis-à-vis the administrative agency. Some commentators see the decision of the Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967), as the beginning of a movement by which the courts will require states to take positive steps to alleviate injustice. *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39. *Cf.* Michaelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). The extent to which jural energies should be devoted towards that reform route depends upon an assessment of all avenues of change, *e.g.*, the administrative process as well as other modes of "state" action.

[33] *E.g.*, Licensing diversification. *See* Comment, *The Federal Communications Commission and Comparative Broadcast Hearings: WHDH as a Case Study in Changing Standards*, 10 B.C. IND. & COM. L. REV. 943 (1969). The problems of economic concentrations are analyzed in Commissioner Johnson's article, *The Media Barons and the Public Interest*, ATLANTIC, June 1968, at 43.

[34] *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969); Barron, *Emerging First Amendment Right to Access to Media?*, 37 GEO. WASH. L. REV. 487 (1967).

There are very good reasons why our society has been reluctant to increase bureaucratic supervision of the radio and television industries. Normal fear of governmental power is compounded by the dangers of censorship — an apprehension intensified by the recent policy addresses of the Vice President. We should not allow, however, a well-grounded concern to become a social paralysis. The dangers to freedom generated by governmental intervention should not obscure the fact that without meaningful administrative regulation the utilization of the media for the purposes of general freedom, rather than private profit, is simply unattainable.[35]

The improvement of the mass media depends directly upon the personal initiative and responsibility of those involved in the communicative process. What the media will become depends primarily upon what they desire to make of it. But where the form of communication directly involves the public interest — as in the use of the airways — governmental response must be adequate to the public trust. This does *not* necessitate censorship; the genius of the administrative process is such that adequate regulative instruments can be shaped which will promote the public interest without impairing first amendment freedoms.

For instance, the licensing power of the FCC should encompass the networks as well as individual stations. Since local channels rely heavily upon the networks for programming, efforts to control the major vices of the existing system are abortive because they do not reach the source of the problem. Moreover, the fundamental reason for the present system's working against human freedom is that decisions concerning the quality of programming are made in terms of a profit motive. In the main, the type of "entertainment" is not chosen in terms of its potential to elevate the humanistic qualities of the audience, programs are "packages" which are sold to advertisers in terms of their market potential. And as a condition of receiving the program, audiences are subjected to the constant interruption of inane advertisements. As long as this is the normal mode of operation, we have no hope of receiving from the media that quality of enlightenment which is indispensable to a civilized existence.

The public powers of change which we assert as the model of a new jurisprudence can be exercised to improve this situation without impairing basic freedoms. If licensing power were extended to cover

35 Most civilized countries have some measure of governmental involvement in, or regulation of, radio and television. For a review of the European experience, see F. DORIAN, COMMITMENT TO CULTURE (1964).

networks, the emerging notions of the public interest could be applied more meaningfully to the industry as a whole. Prior experimentations with balanced programming standards could be improved. By demanding that licensees devote a certain percentage of the broadcast day to programs of education and public affairs, government could exert a positive influence for the improvement of quality without directly interfering with the actual content of the programs. Additionally, it should be possible to develop reasonable regulations with respect to the frequency of advertisements, although the Congress has hitherto refused to grant such a power to the FCC.[36]

CONCLUSION

For many, life in our industrial society is a smooth comfortable existence. Corporate capitalism and technology have made possible a way of life which would have seemed utopian to our ancestors; however, the advance has been expensive. We are beginning to understand the real costs of affluence: high standards of living are maintained by a transformation of being into buying; the spiritual autonomy and aspirations of man are reduced to commodity proportions; and this one-dimensional community denies its forgotten poor a minimal level of decency.

Contemporary critics — the New Left of social criticism — have added immeasurably to our understanding of how the established system represses the deeper aspirations of the human person toward autonomy and independence. And in so doing they have not only exposed the weaknesses of the prevailing economy, but have also called to account those who help perpetuate the servitudes. Thus, a theory of social criticism stands over against law, challenging its autonomy, calling upon it to rethink its purposes and direction.

In large measure, the rethinking is occurring. In areas as diverse as warranties and standing to sue, we have seen how scholars, practitioners and judges are exploiting the potential of established concepts, extending them to reassert the primacy of justice over materialism. And in the fight to bring dignity to the poor, the viability of traditional norms and techniques is evident. But if legal practice and theory is to

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[36] *See* Blalock, *Television and Advertising*, 28 FED. COM. B. J. 341 (1968). Earlier efforts by the FCC to require balanced programming were ineffective because stations could devote periods of low audience participation for public affairs programming while reserving "prime" time for commercial purposes. The efforts to meet the problem through the establishment of Public Broadcasting Corporation (47 U.S.C. § 396 *et seq.* (1966)), while done for noble motives, in reality evades the issue of governmental responsibility for the abuse of the airways by the major networks.

be in the vanguard of change, it must enlarge as well as deepen its perspectives. Legal theory and practice must become multi-dimensional, conscious of all of the ways that law can be allied with human progress.

New perspectives are needed because private lawmaking has adverse social consequences. The directive force of business has an aura of private initiative, but single choices affect the whole balance of society. Similarly, our concerns have been too singular; legal practice has absorbed the "Adam Smithian" myth that an "invisible hand" moves private choices toward a public good. We must become more responsive to the actual impact of particular decisions upon the entire community if our professional commitments are to be truly in the public interest.

Lawyers can measure up to social criticism by giving as much attention to public powers as they have given to private lawmaking. Much of the future lies in a creative union of administrative and judicial authority. Federal and state agencies will make the basic humanistic decisions and these choices will be guided by a positive form of judicial review. Through the cooperative exercise of these public powers of change, lawyers, judges and administrators can shape a new civilization. By cultivating these public capacities we can hope to overcome the dichotomy between personal and social existence and make modern society responsive to the real, objective needs of the human person.