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LAW IN THE LIBERAL ARTS*

The Social Dimension: *The Processes of Creation in the Great Society*

ADOLF A. BERLE**

THE YEAR 1964 SAW the culmination of an old era and the announced intent to open a new. The old era recognizably brought to high development the potential elaborated in 1933.

That year laid the foundations of a socially-guided economic system. Politically it was called "the New Deal." This short-hand phrase meant that the federal government assumed responsibility for the functioning of the American economy. It undertook to direct that economy so that it should produce enough to provide comfort for everyone and should so distribute the product that everyone was provided for. Section by section, a social-economic structure was erected.

Policy and purpose were finally codified in the Employment Act of 1946. By that law, the Congress enacted as national policy, use of "all the resources of the United States to achieve maximum employment, maximum production and maximum purchasing power." I attempted a description of this structure in a recent book, *The American Economic Republic*, and need not repeat it here.

The economic effects of the measures, institutions and procedures, now become part of the legal and economic structure of the United States, imperfectly but in substantial measure have achieved their intended end. By 1964,

* This title is taken from the title of a conference on Law in the Liberal Arts conducted by the Catholic University Law School on December 2-5, 1964. The articles in the following pages were delivered at this conference. A summary of the deliberations of the conference by Father Albert Broderick, is also included.

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rather more than one-third of the whole population of the United States has been moved out of proletarian poverty and into middle class comfort. Poverty, previously assumed by Malthusian economics to be the inevitable lot of the great majority, has been reduced to about 15% of the population. Of that number, 5% or 6% probably have available to them, and have capacity to use, tools by which they can lift themselves out. The remaining 10% is a standing challenge to American social-economic engineering. Already it is the declared policy of the incoming Administration of President Lyndon B. Johnson to seek abolition of poverty in that sector also. Meantime, the relative "affluence" of the large majority of our people continues to increase. Every individual worker in this group can expect his real wages and purchasing power to go up about 3% a year. The economic machine as we now have it thus provides a present material base from which the next major advance can be made. Not only is that base now present, but it clearly can be expanded to meet any demands we are likely to make on it in the future.

Against that background, proposal has been made to lift sights and steer toward organization of what is called "the Great Society." The Administration to be inaugurated next month is pledged to undertake the task. Here, we are consciously crossing a great divide in American history. It is essential that we recognize it. For a solid century, all proposals for a better society have been merely economic. No philosopher was needed to prove that hunger was bad. Social thinkers from the early nineteenth century on have assumed that, once problems of production and distribution were solved, men would automatically become honest and unselfish, and Utopia would result. (Marx thought the State itself would then become unnecessary.) But an affluent society was assumed to be an almost impossible ideal. Now (though it has not yet been attained) we are on the threshold of a society offering material comfort to substantially everyone, to an extent undreamed of by our grandfathers. Simultaneously it becomes clear that the driving force from here out will not be primarily economic. It will not be primarily the profit-motive—though that will not disappear. It will be the desire, not merely to have a good living, but even more to make a good life. Developing that set of desires—and offering resources to satisfy them—becomes the precise task for the creators of a great society. That task will involve elements transcending economics. We are therefore bound now to examine techniques and objectives outside the business and economic field. We must examine how these other disciplines can be used as America now seeks to make an affluent society into a great society.

The White House has assembled a large number of working committees or task-forces. In the past few days they have quietly been reporting. Their conclusions will eventually be reflected in legislation proposed to the Congress. All the subjects under study are important though they will have to be sup-

plemented, since they are still primarily economic in character. Reportedly these task-forces have investigated these problems of the national economy: (a) sustaining prosperity; (b) intergovernmental fiscal cooperation (a highly complex and technical subject); (c) reorganization of the Executive branch of the government; (d) foreign economic policy; (e) cost of production; (f) maintenance of income; (g) agriculture; (h) transportation; (i) natural resources.

In addition, task-forces have been reporting on fields outside the economic area. These include (a) education; (b) preservation of natural beauty; (c) health; (d) metropolitan and urban problems.

The first group deal with the improvement of economic and governmental machinery—as indeed they should.

The second group go more into the content of life. In a deep sense they are more important than the economic committees. An economic structure is only a means to an end—not the end itself. Men do not exist to eat and consume. They exist to attain life. If they desired only to survive, the brute levels of primitive life would have been enough; but in that case economic advance would be unnecessary. Man's desire to live above the survival level—first, to live at a level of mere comfort, but eventually to have a life of meaning and significance—has been the driving force requiring higher economic development.

We can put this in a number of ways. Sordidly, men and women are not customers unless they have two qualifications: educated desires and purchasing power to satisfy them. Without educated desires, they would not be consumers beyond the survival level. Ultimately, the driving power behind economics—indeed behind any advance in civilization—is the desire of men and women to have a good life as they conceive it. The business of economics is to provide both purchasing power and production so that men and women can carry on that quest.

Now desires for the "good life" whose aggregate creates a society do not occur spontaneously. They are the product of what we call "a value system," whose values transcend the elementary value of survival or even of comfort. If a society seeks greatness, it must call out, sustain and develop, greater values and more splendid desires. Once accepted, satisfaction of these become imperatives.

At this point those social sciences which decline to make value judgments must necessarily seek guidance from and find common ground with those other branches of learning in which values are essential. Economists do not undertake to say what men ought to want, or what wants are most important. Rather, they record what men did in response to whatever wants they had. Their predictions are based on the theory that tomorrow's wants will be similar to yesterday's. Sociologists do not say that the structures they de-

scribe are "good" or "bad." They say they exist. Sociologists of the school of the late C. Wright Mills insist that the structure they describe is "amoral." But they decline to define "moral." As individuals, of course, economists and sociologists have their private value system and value judgments but they rigidly separate these from their scientific conclusions. These social sciences endeavor to present data, processes and probable consequences on whose basis statesmen, politicians, managers and others can make reasoned choice of measures. A value system, on the other hand, precisely involves judgments that some results are better than others. Criteria of these judgments are essentially philosophical. The operative value system of a great society is essentially philosophy in action.

Other social sciences do acknowledge and endeavor to give effect to value systems. My own profession—law—explicitly endeavors (however imperfectly and unsuccessfully) to make effective the values involved in public peace and in justice, as each generation conceives and defines these values. The medical profession, in theory, endeavors to forward the values involved in health—as health is conceived and defined. Architecture, in theory, gives effect to combined values of usefulness and beauty, as these are conceived in contemporary life.

Statecraft, planning, in its great or small aspects now must make use of a combination of these disciplines. It can not work merely with the non-value making disciplines. Socially creative politics automatically involve value choices. Either the politicians must make these themselves or they must draw on medicine, philosophy, law and the arts. This highlights the importance of inter-disciplinary studies, as social development goes forward.

Let us apply these considerations to the great affair going forward—the impulse towards "the Great Society."

It must make some great assumptions about human values, and must lay out the lines along which the struggle should be directed. Rushing in where angels fear to tread, let us attempt the outline of that dream. It will be based, I think, on two majestic values: first the value of truth, always unattainable but always pursued, and second the companion value of beauty, never finally crystallized and always expanding. Neither, as we shall see, is abstract. Both call for concrete, direct, though frighteningly difficult measures.

The value of truth demands attention to education, learning and research. The range runs all the way from primary schools to top scholarship in great universities. Adequately realized, this value requires that no child shall fail to go to school up to the limit of his capacity and will. It requires that no school anywhere shall fail to give him the greatest possible stimulus and training. A "Great Society" will thus insist on school reform from the bottom to the top. It will seek to organize a primary school system in which there

shall be a teacher for every 15 students instead of for every 30 or 40. It will require that teachers shall be of the kind and quality President Conant of Harvard has been demanding in his recent books. It will mean that our great universities—some of which are in danger of becoming frauds on the public—shall assure to every student continuous contact with good minds—instead of telescopic views of a professor on a lecture platform, while teaching and contact are left to junior apprentices.

This in turn connotes that education everywhere shall be quite adequately financed: and that no student shall be forced to forego education for economic reasons. It calls for continuing the unparalleled support which society now gives to research, but would emphasize pure research and teaching as effectively as it now engenders applied research.

The cost will run into billions, and raising the money will be the least part of the problem. The value of beauty, once accepted, is no less drastic in its demands. A great society would seek, perhaps impose, higher social standard of community construction and management than American life now exacts. It would ask that every city or town shall cease to tolerate ugliness—and that their architecture, their planning, their streets, their residence sections, shall be distinguished. (This might mean shooting a considerable proportion of advertisers or—more humanely—putting an end to the aesthetic scavenging and blackmail which now insult our eyes and ears at every turn.) It would mean that no home should be constructed which did not evidence its occupant's dignity. It ought to include arrangements giving to every town and every region access to drama, to music, to painting, and to the greater manifestations of the fine arts. It would assume as a necessity far greater support and diffusion of music, of literature, and of the arts.

Acceptance of these values in the sense here contemplated would almost immediately create—and also tend to solve—certain economic and social problems. Techniques of a number of social disciplines would have to be combined to indicate ways by which our great and growing production of good and services could be channeled towards realizing the newly recognized values. Already we are fairly well advanced in the techniques of national economy. That is demonstrated by the effectiveness of the Council of Economic Advisers, working in conjunction with the Federal Reserve Board, the Treasury and the Bureau of the Budget. Our new conception involves working also with state and local governments, as the nascent war on poverty has already shown. Here, economics must work with political science, and both with the emerging discipline of public administration. The three disciplines have to understand each other so thoroughly that they can come up with valid plans.

Again it is already certain that public education will be a major factor at all levels. This means that to the three disciplines just mentioned, education-

al theorists and administrative methods have been chosen, the lawyer becomes indispensable. He must overcome existing legal hurdles involved in the American federal system. He must give form and procedures to the administrative institutions and the supporting financial machinery. And he must assure continuing regard for civil rights and civil liberties as the movement rolls forward.

All this sounds obvious, but is not easily realized. Thirty years ago, with Dr. Gardiner C. Means, I made one of the early inter-disciplinary studies. Its result was the volume called *The Modern Corporation and Private Property*, in which a lawyer teamed with an economist in studying one phase of our economic system. Our aim was not to have an economic study paralleling a legal study. We intended to integrate the two techniques, coming up with a result. Neither the lawyer nor the economist quite cared to surrender his unique position, so integration was not easy; but was nevertheless attained. It will not be too easy for the economist, with his data, and the scholar of public finance, with his technique, to integrate their thinking with, let us say, an educational administrator or the city planner who must set the concrete objectives for each project. Yet there is no escape. The educational administrator must set objectives capable of being reached—abandoning some of his hopes. The economist must relinquish some of his rigidities and preconceptions, even some of his “conventional wisdom” in Professor J. K. Galbraith’s phrase. Out of this common thinking, plans can emerge in shape to be handed to politicians, legislators, and government officers.

Even the most modest start in this process directly engages the talents of further disciplines. Even at outset, it becomes clear that method—that is, how the problems are to be met—is itself of supreme importance. A huge centralized bureaucratic machine could be constructed—as the Emperor Napoleon I constructed a civil service for France which governs France to this day. Or the method might be selected of reliance on local units—a classic American choice which today may be impractical. Intermediate state government might be relied on and local responsibilities stimulated, perhaps with agreed standards of performance worked out for the entire nation—a solution President Conant has recently proposed in his suggestion for educational reform. The possibilities and probable results of these various methods have been, or can be determined by, political scientists and their subordinate discipline of public administration.

Academically we shall probably wind up with a sort of hierarchy. At the top there must be—in fact, there certainly will be—a continuing philosophical debate on values, and their development. Closely allied would be historians: they could be charged (among other things) with attempting to define the impact of thought-currents on events. Presumably their results would be illuminated by sociologists attempting to describe the existing social

structure and its roots and causes. Next would come the economists, statisticians and econometric specialists, recording present capacities, and making predictions. At the engineering level, we would find lawyers attempting to elaborate institutions and set up the relevant rules. In sum, we should have a process of describing what exists, of setting it against the assumed value system, of seeking to repair present omissions and of laying out means of forward movement. This is the rationale of interdisciplinary work in its current phase.

It is not mysterious. There is no mystery when architects work with financiers and construction engineers and get their projects built. These have learned to work together though sometimes uneasily. Architects have already discovered how to work with artists. In wider context, the process is not different when a town, a city, or a social structure, is under discussion.

There remains the great question of impetus—that drive which will impel men to seek a good life, whose aggregate requires a community or a nation to seek a good society. Unquestionably the State can assist—but the American State is not a philosopher or a church. Americans must rely on the ceaseless beat of individual idealists in press or in pulpit, in classroom or in conference, in universities or in local societies, in literature of perception and poetry, in literature of reform and of revolt. All these, leading a society to transcend itself, are the life-force of expanding civilization.

QUESTIONS FROM THE PANEL

Following Professor Berle's talk, a series of questions was directed to him from the floor. Some of the more significant appear below.

Q: I gather, Professor Berle, you think it is more relevant that the lawyer be trained in humanistic values rather than the average person be trained in legal values. Would you agree to that?

BERLE: In the main, yes. There is always the "*deformation professionnelle*" of the lawyer. I think the layman has to know what the lawyer's difficulty is and what his job is, not asking him for the impossible, and I do not see how the lawyer, being himself the professional in the transaction, can do his job without knowing the humanistic result desired by his peers. I don't see how we can avoid having him know what *they* are trying to do.

Q: Since you seem to suggest that the esthetic aspirations of a people will have to articulate themselves in some kind of a legal structure, it would also seem to indicate the necessity, too, of some kind of legal knowledge, would it not, for those who were furthering these things?

BERLE: I think non-lawyers must know what they are up against. Of course I was there drawing a good deal on some studies made at the Yale Law School with which you are familiar—land use, that grim, unpleasant term which involves the possibility of erecting the framework of a liv-

ing, pulsating fragment of society. That is a humanistic job. What's involved if you zone an area so that no plot may be less than (say) four acres? What's involved if you zone the same area so that no lot shall be less than, say, three hundred feet square, or something of the kind? Translating these restrictions into a picture of who lives here, how he will live and what will happen, is a humanist's job.

I sat in on a fascinating conference in Puerto Rico the other day. Governor Munoz Marin was dealing with the proliferation of super-markets there. It's a small island and its economy could be easily wrecked. The group was trying to see whether they could not work out zoning arrangements so that super-markets should recreate to some extent the old Spanish plazas—these in the old days were not only places of exchange but also by reason of their beauty, places of meeting. Now I can't imagine how any lawyer working at that could do an intelligent job unless he knew what a Spanish plaza had been, what it was, had at least looked at photographs and understood what the actual necessities were.

PROFESSOR PHILIP SELZNICK:* One of the questions about the Great Society that bears upon your own work, Mr. Berle, has to do with the significance of affluence in the achievement of the ideals we want. I have been much impressed by your own suggestions that in the modern corporation we can see the development—that is, in the private corporation, in the private sector—of some sense of conscience, and reasonable self-restraint, and so on. Now I have a question about that, that is of great importance to the whole pattern of development in society. First of all, can we see in the private institution not only the possibilities of minimal self-restraint, but also the possibilities of more positive social responsibilities? I can see pretty clearly the forces that limit some of the large private groups in modern society, some of the more outrageous things they did in earlier times. Can we see in the private sector the possibility of a positive commitment, for example, to the reconstruction of our urban life in cooperation with government? It seems to me, that is the one basic issue we are going to have to face. How much can we rely upon private organizations and private enterprise for this kind of social commitment.

BERLE: Bluntly, not too much. Only up to a point. I don't know anything I have said that was more attacked and, I like to think, more misunderstood than that observation. Actually that book was retranslated in France and because this was picked up it was called *La Société Anonyme et le Conscience du Roi*. (*The Modern Corporation and the Conscience of the King*.)

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What is called "the corporate conscience" is no news to lawyers. We're familiar, of course, with the fact that a corporation is an artificial entity, therefore has no soul, can't take an oath, and so forth and so on. And yet we also know that inside corporations there are men. Actually the conscience of a corporation represents in large measure a rather lively appreciation that if they do not restrain themselves from violating community standards, there will be an intervention by the state. These will follow almost automatically. Any sane public relations department will tell them to be ahead instead of behind such situations. Every corporation lawyer knows that his client will ask him, "*Can I do this?*" and the lawyer will say, "*You can* but you certainly had better *not*, because the next thing is you'll be investigated by the Senate, or the New York legislature, or you'll be in a row with these and these groups in the community." In this way, there is a lively appreciation of the working of a public consensus which limits or guides the technical and legal powers of the corporation.

In some things it is working fairly well. For example, building of factories essentially decent to look at instead of hideous has almost become second nature to the corporations that are "affluent" enough to do it. Those of you who ride on the trains from New York to Washington have seen the line of factories that Johnson & Johnson have constructed. That is some of the best commercial architecture in the United States. Anyone can look at them with pleasure. If you take out the advertising matter (in fairness to them, it is reduced to a minimum), you have a beautiful piece of work.

Your private corporation today is essentially a statist instrument. It is left to private enterprise because the state chooses to do so and not for any other reason. We have made that work well in terms of product. We take some losses in terms of what some of these private enterprise people will do. I note with some interest that the Russians are just beginning to move their productive units more nearly into that frame although it is only a tiny advance.

You *can not* expect corporations to do your humanistic work for you. They do not create humanist standards. The work of making standards is fundamentally the job of the teacher, the priest in the pulpit, of the press and of you and me and all of us. In a democracy, all this produces a political result, if the level does not move up towards the standards on which consensus is reached.