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## THE LAWYER'S PART IN SOCIAL CHANGE†

A. A. BERLE, JR.

It is conventional to say that we face a changing world. It is unconventional to be convinced of the truth of the remark. Yet, today, the likelihood of sweeping change must be grappled with as reality. For some years experts in economics and in sociology have realized that the coming decade might well be the most turbulent in the modern history of the country. No longer is that realization confined to esoteric scholars. Every headline carries its daily message.

Were it not that we know, darkly, the causes of this climax, the confusion would be merely cause for unhappiness. Actually, as more is known, the more it may be greeted as a brave, though strangely dangerous adventure for the realization of a great dream; and the problem is one of attainment. Claims upon civilization are being presented. So fecund are our technical processes that men have been encouraged to believe that productivity could be led more effectively toward need. Yet the claim is not upon the kindness and charity of civilization, but upon its justice and even more upon its inclusiveness. So arises the insistence of many men that they should be accorded a place in the scheme of things. They sound an ancient cry which led scattered outliers in Europe and England to build towns; to join in mutual defense to find a place for all of the land; to find common meeting ground even for all souls at the universal table of Christ; to hope even for a universal empire; to expect, by satisfying their obligations towards themselves, their country, their civilization and their God, that their lives might be happy and peaceful and their children safely launched. The old instinct finds different expression today; but the deep emotions are the same; and by them is tested the civilization in which we must work.

The swift speed of industry, the rising tide of greater cities, the abandonment of possessory property for the system of organized enterprise in corporate form and for expectation bred by finance, the detachment of men from physical things and their attachment to a system of employment instead has created periodic unbalances. No longer the almost universal place upon the land, the almost certain place within a feudal system, the almost always

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available access to natural resources, the almost universal belief in a spiritual order of the universe. Men adrift and insecure in their economics, in their relationships, and in their hearts seek common action to recreate a life which shall once more be all inclusive; shall once more grant general opportunity; shall once more provide a certain relationship between men, their country, their world, and their universe.

Our problem today is whether this dream shall take place by reason and development, or by virtue of a great and confused struggle.

There is sought, and there must be, a technique for bringing these hopes to reality. If force is that hope, it is barren, since more is involved than subsistence. In our own time we have seen solutions which answer the question without light, without beauty, the endeavor to make "A heaven taken by storm, where none are left but the slain."

Certain professions by custom are made to be midwives. This is strangely true of the law, for history grants us that function. No change in social mechanics has yet taken place save with lawyers acting as draftsmen, if not as creators. They *may* take part in the early debate. But they *must* give it form at the end. It is well at the outset to pause to consider the tools we must use for these are our chief contribution.

The material at hand has changed character. We built the civilization of yesterday upon the institution of possessory property. Emerging from the feudal conception, we thought of the right of possession as the guarantee of a free place in the world. The land and the shop, the lathe and the forge, the mill and the ship were, then, economic instruments within manual possession of men. This changed; so that now most of our productive apparatus is no longer so simple, so understandable, or so direct. There is little possessory industrial machinery in a modern state. The owner has a piece of paper representing nothing more than an expectation that the industrial organism shall continue to function. If it slows down, his paper loses value; if it stops, his claim becomes worthless. Another fragment of possession, the right to work upon the property, has passed to laboring groups. These too are assured of their labor only when the processes of finance and industry continue to turn. I do not complete the long analysis; there is only one possible conclusion. The atom of property has been shattered and resolved into its component ions.

By consequence, shorn of possession, great masses of men must find refuge in collective activity. In business it is the corporation; in labor it is the union; in agriculture, the farmers' group. Humanly, this is nothing more—and nothing less—than the search, through joint action, for those qualities of life which were lost as the rising industrialism deleted the older qualities of individualized property. So today our law must work with great groups, with the relations of men to men, within these groups, with the relations of

groups to groups. No longer can we frame all of thinking on the simple relationship of man to a thing or of a neighbor to a neighbor.

What have we to work with in the armory of the law? We may find that, as changes impend, we revert to problems age old and unchanging.

The first is our peace. It came to us as a gift of a King; a gift beyond all price and so great that today we take it for granted. This peace is our greatest concern. It cannot be held to ransom. No group can maintain that its right includes the upsetting of order. Force belongs to the government alone. Divide it and there can be no law.

The next is our justice. Denied the self-helps which were safe within limits when used by individuals, an even greater strain is thrown upon the institutions by which wrongs are righted. We can ask of great groups their quiescence, but only when means are provided by which their cause may be heard. This was always the work of the courts. They are still our ultimate refuge. But they, too, must be swift to move forward; for awareness of need is at once their function, their task and their safeguard. We dare not rely alone on the logic of precedent; for logic and precedent alike turn only on the premises used. If, as it seems, we have shifted the methods of life, the premises used in our logic must broaden to take in the changes.

Because we are feeling our way there have grown up rules called rules of administration. Imperfectly we name this administrative law. This must supplement, through closer application to circumstance, the law of legislatures and the law of the courts. In earlier form, the administrative arm of the government was so trammled by legal procedure that our law schools have sought to free it from restraints which are often improvidently laid upon it. In reaction, there were evolved means and doctrines designed to free administrative power from the relative impotence to which it had been too often subjected. We are ready now for the third stage—doctrines and means by which administrative processes, which can so easily affect the lives of many men, shall be themselves made sure and orderly. Administrative bodies, no less than a court, are bound by underlying principles of jurisprudence. Their results must not merely be just. They must be reached by roads which convince the world of their justice. A tribunal, whether court or administrative, needs not only to decide the question. It must conquer even the mind of the group against which it decides, by convincing that group that its cause has been fairly heard, that the decision was fairly taken; that the ultimate interests of the community have been made to prevail. In this aspect we are still groping. There must be not only clarity of procedure, but realization that an administrative tribunal can never be partisan. Whether making a regulation, or deciding an adversary proceeding, it must adhere to a standard as high as the code of ethics we have been wont to call judicial. When government must undertake to preserve,

in intricate group relations, the interests of the whole people, it must so handle itself that it can never be perverted.

There have been times when the great financial interests had unduly easy access to the processes of government; occasionally, even, to the proceedings of courts. There have been times when political machines had a similar easy road. There have been times when other great groups, which still were those of special interests, established their special contacts. One by one we must banish all of these special groups, wherever found or by whomever promoted, from court justice, and from the analogous government processes of administration and legislation.

The time is now ripe, it seems to me, for the development of a new concept in American law. This is the conception of unwritten constitutional law, which shall implement and fill out the frame of government embodied in our written constitution. We have, I think, been slowly developing a range of constitutional law which surrounds and rounds out the conception of our constitutional forbears, just as the unwritten constitution of Britain has served through the evolving generations to steady the course of the British Government. Based on principles, it can endure; lacking rigidity, it can evolve. This unwritten constitution must be written, not on paper, but in the minds and instincts of men. It will be peculiarly in the custody of the legal profession. To it we must look as the great powers needed to operate a modern civilization are ceded one by one to the government, which is, today the only agency capable of wielding them.

The legal profession itself must change with the times. No longer can any lawyer believe he exists to serve his client. He cannot represent a special interest to the exclusion of other considerations; indeed, in doing so, he misrepresents both himself and his client. If his client cannot see the interest involved, because he is himself a party to the cause, his lawyer must see the larger issues for him. It is no accident that the great legal reputations of our generation rest, not on the work done by lawyers for hire, but on their public or their unpaid extra-professional activities—as is the case of Brandeis and Darrow, of Cardozo or Seabury. For law is not a matter of going through judicial processes, of shifting losses, of collecting judgments, or of drawing a set of satisfactory papers. These are means only. Behind the court, behind the judge, beyond the corporate mortgage and the file of documents, there are endless human beings desiring to live, to work, to realize themselves. Only as our procedures, our papers, our legislation and our administration permit an even greater number of people to satisfy their lives, is our technique useful. It is for this, and only for this, that our profession exists.

My impression is that we have to work swiftly. The climax impending can be handled only by the most elastic minds acting in the light of the clearest

realization of ultimate human interests. This calls for an intense self-discipline on the part of all of us. We have not that safeguard which the medical profession enjoys. Too many of us are not constantly tested by having to work with a patient who is ill and wishes to get well. Too many of us are removed from the ultimate results of what we do. I have wished, sometimes, that our friends in New York who drafted the laws permitting, and the papers creating some of our financial pyramids could be forced to watch the results of their acts; that they could be made, like Scrooge in the *Christmas Carol*, to observe the misery created when the bubbles burst and the life savings of little people were wiped out. Because we do not have this test, we are compelled to realize it intellectually; to realize it individually in terms of people, commercially in terms of economics and social movements. Then we can deal wisely with the problems subtended alike by the smallest private case, and by the largest government task. So great are the changes which in any case we have to make, to bring our legal machinery abreast of our technical and industrial development, that we can no longer trust the lawyer who knows only the law, and not the life it is designed to serve.

I have stressed the probability of a coming climax. This, in my mind, is cause for hope rather than fear. Centuries have a habit of producing such climaxes. In prospect they disturb men's minds; but, in retrospect, we look back and wonder why the obvious was so obscure. It happened politically in Europe a century ago when the outworn frame of feudalism gave way to what we call democracy. In our time we have to retranslate our economics so as to include with the methods of individualized possession, the technique of group enjoyment in great industrial areas. Since the law must be the instrument of that change, it behooves us to be swift in study, ranging in thought, and clear in perception. If we are working with a system not yet brought up to date, we are at least seeing, darkly, a scheme of things which may be far better. If old illusions are going by the board, new visions are becoming clear. If we are visibly drawing to the end of a phase, we have at least leave to hope that the next phase will bring something far finer. If we are about to forget some past mistakes, perhaps we are also to remember some values we should have realized.

This stage of an end and a beginning is not new in history. In an equivalent time many years ago, a poet gave it phrase: "Each age is a dream that is dying; or a dream that is coming to birth."