

Book Reviews

LAW, SOCIETY, AND INDUSTRIAL JUSTICE. By Philip Selznick.
Russell Sage Foundation, New York, N.Y., 1969. Pp. viii, 282.
\$7.00.

Whatever may be the moral posture we adopt toward it, it is a fact that we function in a society dominated by large organizations. In today's America the requirements of organizational life and democratic principles at best live in tension with one another. The sense of remoteness or inaccessibility of the authorities which govern one's life, and the sense of powerlessness one may feel with respect to these authorities have contributed to the contemporary existentialist mood.

Law, Society, and Industrial Justice is a study of the capacity of large scale, special-purpose organizations to establish justice. The book is optimistic in tone and maintains that the legal potential exists but must be located in the social dynamics of the institutions themselves. It accepts the dictum of Eugen Ehrlich that "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."¹

This work, then, is best viewed as an exercise in sociological jurisprudence. Law is seen as a process unfolding in a social context and not as a static set of rules. The book, by providing an accounting of some particular sociological truths, attempts to make the law sensitive to new circumstances altering our institutions.

Selznick draws on the sociology of administration and complex organizations, an area in which he has been a major contributor. He discusses the impact of the development of legal order in the private organizational sector on the evolution of the law. Selznick feels uncomfortable with those legal doctrines which he contends distort the realities of organizational life. He singles out the concession theory, which argues that organized groups have only such legal status conceded them by the law, and the fiction theory, which insists that corporations exist only as creatures of legal artifice.² According to Selznick, "a sociological theory of the corporation would pay little attention to the technical procedures that create the formal status of incorporation. . . . It would be more concerned with the . . . compelling realities of internal social structure . . . especially the way power is amassed, justified, distributed and used."³

This concern for the distribution and allocation of power leads Selz-

¹ E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* XV (1936).

² See R. POUND, *JURISPRUDENCE* IV, 222 ff. (1969).

³ P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 44 (1969).

nick to propose an enlarged definition of the nature and composition of the corporate group. Again, he is not content with fixed legal definition and offers instead a spacious conception of membership which he argues is more congruent with the facts of corporate life. Following the lead of Abram Chayes, corporate membership is allowed to all those having a relation of sufficient intimacy with the corporation to be subject to the authority of the system.⁴ This definition goes beyond employees to include as members any individuals or groups possessing demonstrable status, rights or relational interests.⁵ The definition of membership becomes crucial, for it determines the line between those we recognize as entitled to a regularized share in the decision-making process and those we do not.⁶

Selznick's reading of the realities of corporate life leads him to question whether, in the formal legal order, there is not an erosion of the traditional doctrine regarding master-servant relations and the employment contract. One of the most important sections of the book deals with the tension between the modern realities of organizational association and traditional premises of the law of contracts. Selznick attempts to show the inappropriateness of such premises of the modern law of contracts as voluntarism, limited commitment, mutuality, and privity of contract.

A law of associations is presented as a preferred alternative to these contract principles. According to Selznick, such a law has three basic commitments:

- (1) to sustain the vitality of the group structure of society;
- (2) to regulate group action in the interests of the community as a whole;
- (3) to protect the rights of individuals who encounter the power of the organized group.⁷

The law of association is best understood as a "system of order embodying specialized mechanisms for certifying rules as authoritative and for safeguarding rule-making and rule-applying from the intrusions of particularistic forms of direction and control."⁸ The major theme of the book can be seen as an attempt to develop and sustain a "corporate conscience" in the structure of the organization. Such a conscience could, in the words of Berle, be "marked as a right by the individuals and interests subject to the corporate power."⁹

The author maintains that in order to develop a law of associations it is necessary to bring to private organizations legal ideals and theory

⁴ Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 41 (Mason ed. 1959).

⁵ See, e.g., Chafee, *The Internal Affairs of Associations Not for Profit*, 43 *HARV. L. REV.* 993, 1001-06 (1930). See also K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 121 (1949).

⁶ Chayes, *supra* note 4, at 41.

⁷ P. SELZNICK, *supra* note 3, at 37.

⁸ *Id.* at 7.

⁹ *Id.* at 71 n.86.

hitherto restricted to public government. For Selznick, such an extension poses no imposing obstacles. As a prelude to his discussion in chapter seven of private government and emergent law, Selznick discusses the generally hazy distinction between what is public and private in American law. Due process is singled out as the cardinal principle of public law in American jurisprudence. Selznick argues forcibly that the principles of due process have a warrant beyond the terms of a written constitution and ought to be considered part of our common law. The principles of due process then become the framework of a law of governance for private organizations. They provide "the route by which public-law principles . . . may be legally applied to private settings."¹⁰ They "should apply wherever some men rule and others are ruled."¹¹

Viewed in this light, the book is broader than a study of due process and job rights in modern industry. It is also relevant to governance in other large scale organizations such as universities. The motivating force behind Selznick's proposals is his assertion "that the private organization can be more oppressive than the state and that the loss of a job, or the right to pursue a profession, or the opportunity to continue one's education, may be far more hurtful than a term in jail."¹² Selznick concludes that "when these deprivations are inflicted arbitrarily, and there is no recourse, a gap in the legal order exists."¹³

There is no automatic or simple process whereby a law of associations and principles of due process take root in private organizations. What Selznick attempts to reveal is the current existence of a receptive institutional setting within which further legal change may take place. In the early chapters of the book, the outlook for managerial self-restraint is examined through study of the doctrine and practice of modern personnel managers as revealed through interviews and a review of management literature. A detailed study of labor arbitration decisions illustrates the emergence of a code for the protection of workers against arbitrary action. The collective bargaining contract is seen not as a terminal point, but as a stage of legal evolution establishing the conditions for a more rationalized juridical system. The correlative results of a survey of employees' expectations and beliefs regarding treatment is also included. The end product of this research is the portrayal of an internal, evolutionary logic already present in private government. Selznick suggests that what is required now is a brand of functional jurisprudence, a jural thought which would create a legal order reflecting the emerging inner order of ongoing social groups and associations.

What emerges from this study is a sociology of the law charged not with the creation or interpretation of law but rather with the monitoring

¹⁰ *Id.* at 259.

¹¹ *Id.*

¹² *Id.* at 38.

¹³ *Id.*

and study of incipient law. In this way, sociological investigations become new sources for hypotheses about the law.

Selznick, however, envisions a wider role for the sociology of law, a role infused with moral overtones and visions. Ultimately, sociology should explore the meaning of legality itself and evaluate its potential for creating a society based on justice. The sociology of law views legality as a variable achievement. It recognizes that "legality may degenerate into legalism."¹⁴ It is sympathetic with the position of Howard Zinn who warns that "a system of positive law may at any given time represent congealed injustice."¹⁵ Thus, the assessment of the quality of legality becomes a primary preoccupation of the sociology of law. Sociological jurisprudence, as expounded in this book by one of its most gifted advocates, proposes to subject the principles of positive law to principles of criticism based on validated knowledge concerning actual behavior. Such an approach will achieve results only to the extent that legal science is a permeable discipline, receptive to new ideas and influences.

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1976: *AGENDA FOR TOMORROW*. By Stewart L. Udall. New York: Harcourt, Brace & World, Inc., 1968. Pp. 173. \$3.75.

At a time of national self-doubt, Stewart Udall's proposals for grappling with the problems of the nation come as a breath of fresh hope. He lays down a challenge and a program for the coming decade that covers the spectrum from the plight of the cities to the blight of the countryside, from freeing the talents of our women to harnessing the energy and idealism of our youth. It is an optimistic approach that redirects one's perspective from the negativism of much current discussion to a positive hopefulness. This review will attempt to reflect some of the flavor and imagination of Mr. Udall's proposals.

After cataloging the gloomy inventory of our past and present environmental mistakes, Mr. Udall takes the offensive with positive proposals. In spite of the environmental crimes, he foresees a promising future "because we will have the resources to achieve an American renaissance."¹ In the coming years the growth of our national economy is likely to defy the imagination of all preceding generations. The gross national

¹⁴ *Id.* at 13.

¹⁵ H. ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 4 (1968).

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¹ S. UDALL, 1976: *AGENDA FOR TOMORROW* 75 (1968) [hereinafter cited as UDALL].

product is projected to rise above the two trillion mark in the next two decades. We will have the means, and if we of this generation fail to make this nation the most livable one in history, then surely the judgment of history upon us will be justifiably severe. All that is needed is the will and the ordering of our priorities. It is always possible that we will fritter away our chance, mankind's opportunity for a place in the sun of history, by dissipating our wealth on doubtful military ventures and crippling arms races. But if we can avoid such disabling pitfalls, it will not be a question of wealth and resources, but "rather, one of a national will and the formation of a common commitment to great civilizing goals."²

Mr. Udall's book challenges our will and establishes these civilizing goals, from making our cities more interesting and more beautiful to the establishment of wilderness trails for repose and escape from the city. He suggests commemorating our 200th anniversary as a nation in 1976 not by a conventional world's fair, as we did in 1876, but by "a temple-building enterprise of our own It could be called 'Project 76,' "³ "a plan that will enlist all segments and cities of America, and become the most exciting national enterprise since the founding of the republic."⁴

The first phase would be "the creation of a vast and viable program that could win and sustain the nation's enthusiasm" and should "involve every community in drafting a master plan to achieve the redesign and renovation of its entire environment no later than the year 2000."⁵ The project-by-project approach, Mr. Udall proposes, should be rejected "in favor of planning addressed to the total environment of entire regions,"⁶ and "immediate priority should be given to the job-creating cleanup work, which could be done by the hard-core unemployed in the worst slums [W]e should launch an urban clean-up corps to roll back blight, reclaim public beauty, and begin the training of the work force required for large-scale blight-removal projects."⁷

The Project 76 proposals for the cities, once underway, could be expected to gain momentum—"[e]ach advance—each new urban university . . . each new library, each park and playground, each beautiful subway . . . each downtown mall or mini-park—would lead to new demands for larger and better solutions. Each humanizing feature of beautification or restoration would make the antihuman features of cities more intolerable."⁸ We are just now beginning to arouse the public consciousness to urban blight. The excitement of a national challenge is badly needed to stimulate action, and the participation of local leadership is needed to harness citizen pride.

² *Id.* at 76.

³ *Id.* at 83.

⁴ *Id.* at 82.

⁵ *Id.* at 84.

⁶ *Id.* at 85.

⁷ *Id.* at 86.

⁸ *Id.* at 90.

Mr. Udall's proposals for saving the countryside are many and varied; he suggests purchasing and stock-piling riparian property so as "to make our shores readily reachable by all who want their solace;"⁹ completing the establishment of our national wilderness system, so that "[a]t least five per cent of the U.S. land mass should ultimately be given permanent wilderness protection;"¹⁰ establishing a new national system of trails, particularly walking and nature trails;¹¹ enlarging hospitable habitats so that "within a decade there should be no more endangered species of fish or wildlife;"¹² protecting all of the coastal marine lands needed to save coastal wildlife;¹³ and then, above all, he concludes that in dealing with our environment, "[r]estraint should be the watchword," because "posterity will honor us more for the roads and dams we do not build in areas having irreplaceable scenic and recreational values than for those we do."¹⁴ It is hard to fault Mr. Udall in this catalogue of civilizing goals; they are all badly needed and aptly emphasized.

The space program has shown us the way in which energy and imagination can be organized and marshalled to achieve a great goal. However, Mr. Udall may be overly optimistic in suggesting that the same effort, energy, and imagination can be coordinated for earthly programs. As Tom Wicker of the *New York Times* recently wrote, "One conclusion that enlightened men might draw from the space program is that if the same concentration of effort and control could be applied to some useful earthly project, a similar success might be obtained. Urban rapid transit, air and water pollution control, just and sensible population planning—any one of these might well yield to a powerful sphere of effort wielded as efficiently as was the space program, and at less or little higher cost." But, Mr. Wicker goes on to declare that such projects would be unworkable because "[m]oney-lenders, union regulations, local building codes, lack of funds, politicians, clichés of free-enterprise—all of these and other difficulties make [such projects] as remote and unlikely as putting men on the moon."¹⁵ The fact is that man has been put on the moon, and even though the politics of improving our environment are much more complex and byzantine than putting a man on the moon, Mr. Udall lays down the challenge and entices us with the exciting prospect of temple-building.

Also, the former Interior Secretary brings a good deal of political pragmatism to bear, and notes that these programs must face political realities. The piecemeal approaches of the past will not suffice. Rent

⁹ *Id.* at 111.

¹⁰ *Id.* at 113.

¹¹ *Id.* at 115.

¹² *Id.*

¹³ *Id.* at 117.

¹⁴ *Id.* at 120-21.

¹⁵ *Int'l Herald-Tribune*, July 23, 1969, at 4, col. 7.

supplements and model city programs have consistently been on too small a scale, and under-funded, because they have been largely aimed at big city problems and have collided with the anti-big city bias of Congress where four-fifths of the members of the House of Representatives represent people who do not live in the 61 cities of 200,000 people or more. Our program for the future thus must not be aimed at only one segment of the population; in order to arouse and involve the nation we must embark on "a strategy to rebuild the entire nation, not simply to redo its blighted parts."¹⁶ He states that programs will continue to be under-supported "unless we have the imagination to attack these ills in the much larger context of expansive aims and goals capable of regenerating the whole nation."¹⁷ It is true that we have enough talent and wealth to enter the "temple-building" stage of our history, but the entire program must be founded on some sound political base, not merely altruism.

Mr. Udall's "agenda for tomorrow" is couched in national terms but, nonetheless, he lays down a challenge to international lawyers—thus joining others in sounding the alarm for the fight against pollution which knows no national boundary. "[T]he new conservation must be global We cannot hope to create an oasis of cleanliness or tranquility or balance in the midst of an ill-managed world. There will be no isolated nations in the world tomorrow."¹⁸ But so far, his is a voice in the wilderness. The innovation of institutions and a marshalling of the will to combat international pollution is eons behind even the most inadequate of our national efforts. When our technology can change the very climate of the world so as to melt glaciers on the other side of the globe as a side effect,¹⁹ when the snows of Sweden can turn black from pollutants originating from unknown sources outside the nation,²⁰ when beaches of coastal states can be desolated by oil slicks discharged far outside their territorial waters,²¹ it is imperative that we develop new patterns of international cooperation and effective enforcement institutions.

Mr. Udall has not provided the answers to international pollution—he, like others, is simply asking the world village in general and its lawyers in particular to answer the call. Paradoxically, at the same time that we must develop global approaches to pollution problems, we must decentralize political power to deal with many environmental problems. Political power must be shifted to the local arena so that cities can take the lead,

¹⁶ UDALL, *supra* note 1, at 80.

¹⁷ *Id.*

¹⁸ *Id.* at 119.

¹⁹ *Id.* at 120.

²⁰ TIME, Feb. 2, 1970, at 60, col. 3; *Pollution As An International Issue*, 47 FOREIGN AFFAIRS 164 (1969).

²¹ Utton, *Protective Measures and the "Torrey Canyon,"* 9 B.C. IND. & COM. L. REV. 613 (1968). See also Note, *The Oil Men and the Sea: The Future of Ocean Resource Development in Light of Santa Barbara—Some Proposals to Rectify Continuing Inadequate Federal Regulation of Offshore Leasing*, 11 ARIZ. L. REV. 677 (1969).

and the local citizenry can be enlisted as excited participants in improving the esthetics of their environment and preserving their countryside.²²

Of special interest to lawyers are Mr. Udall's recommendations on using the power to tax as an incentive to improve the environment. Taxation may well prove to be one of the most powerful tools in the fight against pollution. Certainly means must be used to cause polluting industries to shoulder the responsibility for their activities. One way of doing this would be to tax each industry for each ton or milligram or whatever the appropriate unit of pollutants which it releases into the environment. In this way, industries would be forced to consider pollution costs as a part of the cost of doing business and therefore as a relevant economic consideration in making policy decisions. The economics of pollution could thus be made tangible so as to penalize ugliness and encourage conservation and make the nation and world more livable. "An adage of American politics is that the 'power to tax is the power to destroy.' In our day, the fact is that the power to tax can be the power to create."²³

Mr. Udall issues a passionate challenge to us to take control of our surroundings, rather than allowing the drift toward contamination to continue. "We need to reconsider the belief that the whole spectrum of our life patterns is inevitable. Nothing in society is inevitable any longer. The remaining years of this century hold out almost unlimited possibilities."²⁴ He is audacious enough to suggest that "[w]e can rebuild our cities, reconcile our people, eliminate poverty, achieve population balance, and establish a conservation regimen that will provide a life-giving environment if we have leaders willing to propose the bold but practical steps we need to achieve these goals."²⁵ Mr. Udall is such a leader, and he has proposed the bold steps that need to be taken. He also has made a beginning in suggesting the practical means for achieving them.

The proposals sound Utopian, but as Mr. Udall cogently argues, "[t]here is no other alternative to the fight for a clean country and for an ecological regimen on this closed capsule earth, unless we elect to erect enclosed environments, become dome-dwelling denizens, and convert much of the hinterland into a vast dumping ground for our solid, gaseous, and liquid wastes."²⁶ The means for achieving the Project 76 proposals must be hammered out in the political arena, and one can now only hope that policy makers will build the firm political base necessary to translate Mr. Udall's dreams into a national reality.

²² Mr. Udall aptly notes that in implementing his Project 76, "[i]t will be foolish to devise bold plans unless we also renew our political system, making much bolder leadership possible at the city and county level." UDALL, *supra* note 1, at 96.

²³ *Id.* at 146.

²⁴ *Id.* at 137.

²⁵ *Id.* at 154.

²⁶ *Id.* at 110.

The responsibility of lawyers in this effort is not small; the role that we must play cannot be an insignificant one, or we will have denied our heritage and failed our society and our successors.

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