Private Vice and Public Virtue

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People are supposed to be vain about themselves or their children, but I think they are really much more vain about the importance and difficulty of the times in which they live. Never before, we confidently assume, has there been a period in which problems so grave, so numerous, and so urgent have been thrust upon a nation. We are engulfed in issues that do not permit of a leisurely or piecemeal solution. When it is not the survival of civilization, it is the welfare of sorely distressed people or badly deteriorated real estate, the salvage of irreplaceable talents of our young people, the placing of an American taxpayer in orbit, or some equally pressing goal.

I personally think it would be a great advance in our political and social life if a quota of only one urgent problem were allowed each year or two. The solution of problems would proceed as rapidly as at present—this indeed is a cheap claim. And we could throw off the persecution mania we now have against history.

But of course the proposal is idle; it would take many years of self-discipline to achieve any real casual attitude toward life; probably we should have to abolish newspapers, radio, television, and politicians under the age of 70. So we are going to live in an urgent age, and the question I shall discuss is: on whom can we rely to deal with it?

My discussion will be limited to economic problems, although in this age that is not as much of a limitation as I would wish it to be. Whom can we trust to solve the routine as well as the urgent economic problems of our time? There are only three candidates: the great private economic organizations, big business and labor unions; the individual citizen; and the state. Let us consider them in turn, to determine which are trustworthy and efficient instruments to conduct our economic affairs.

1. The Organized Blocs

BIG BUSINESS

That anyone has ever liked big business is almost beyond belief—how can anyone like something which is intrinsically impersonal? One can admire its achievements or denounce its failures, respect or despise its leaders, but never like the system itself.

But since colonial times Americans have not merely failed to like big business, they have distrusted it. There have been ebbs and flows in the growth of this dislike:
a muck-raking, trust-busting pre-World War I decade; a complaisant era in the 'twenties; a violent hostility in the 'thirties; a measure of tolerance in the post-war decade. But always there has been suspicion, and at the end of every decade big business finds itself subject to a wider range of governmental controls.

The distrust continues to wax. The lobbying activities of certain natural gas producers displayed old-fashioned rapacity, guided by a caveman intelligence. The era of the quiz program scandals "showed" that even the corruption of professors and clergymen would be undertaken if lipstick sales were helped. The conflicts of interest which Chrysler Corporation has publicized "showed" that the profits weren't even shared with the stockholders. And now comes the General Electric-Westinghouse-etc. case, in which vulgar intrigue permeates a vast industry.

This distrust of big business penetrates every part of our social life. Almost the only secular belief shared by all the major religions is the dislike of capitalism. The organization man has become the butt of sociological humor. Perhaps as telling a sign as any is that, where once property was a requirement for full citizenship, it has now become a disqualification for public office.

**LABOR UNIONS**

There was a time—a mere generation ago—when the word "labor" connoted a sturdy, hardworking group of men, callously oppressed by big business, bravely fighting through "organized labor" for decent treatment. This romantic picture has been replaced by one less romantic and also less flattering.

The workers are no longer in overalls and carrying lunch pails on the 6 A.M. street car—it didn't take statistics to change this picture. The union leaders resemble well-fed, well-manicured politicians more closely than they resemble hungry martyrs.

Prosperity and publicity are to blame for the change in the stereotype. When organized labor means extortionate airline pilots or ruthless New York Harbor tugboat employees, public sympathies must be diluted. When unions number hundreds of thousands of members and industry-wide bargaining is the fashion, the dignity of the individual worker is as likely to be suppressed as protected by organized labor. When strategic economic power is in the hands of a man no more widely admired than Mr. Hoffa, a fear of irresponsible private power cannot be suppressed.

The big purpose of unions can hardly be said to be protection of the worker from gross exploitation—when the wage rates are what they are now—or prevention of exhausting labors—when featherbedding during a 40 hour week has become an important issue in so many labor disputes. In the popular image unions still do some "good" things such as protect older workers from arbitrary discharge, but unions are no longer equated to things a warm-hearted man endorses.

So much for the character assassination on the great private economic organizations. I believe the increasing public hostility toward both big business and big unions is not justified by any increases in their power. The amount of power possessed by a big business or a big union is usually very small, so that even with the worst will in the world it could do only a very modest amount of damage to the community.

But I also believe that there is no likelihood of any increase in public confidence or affection toward these groups. We are not going to turn over the big economic problems of our time to great organized groups of employers and employees, and quite frankly, I don't think we should. So let us turn to those ill-matched rivals, the citizen and the state.

**2. THE PRIVATE CITIZEN**

There was a time when, at least in our formal protestations, virtue reposed in the average man. In its less romantic versions, the democratic philosophy conceded that every town would have its share of fools and all too seldom its saint: yet the average man had at least strong common sense, plain decency, and honorable ambition. Alas, he too is losing his admirers.

Frontal attacks on the competence of the individual citizen have been few and far between in our profoundly democratic society. Indeed we have the interesting paradox that those intelligentia who are doing most to undermine confidence in the individual, are usually most vociferous in demanding wider suffrage in Mississippi, Angora, and Indonesia. But one can attack a ruling philosophy much more effectively by indirect than direct attack.

The attack on the competence of the individual has been the basic creed of reformers for three-quarters of a century. Let me give just four instances:

1. Compulsory school attendance laws.
   Such laws obviously assume that the individual family will often fail to give its children an adequate education, unless compelled to do so.

2. Industrial safety provisions.
   These laws obviously assume that the individual workman will not demand the installation of safety devices on industrial machinery, and the state must do so.

3. False advertising.
   The prohibition on false advertising clearly reflects the belief that the individual consumer cannot detect fraudulent claims and promises.

4. The regulation of occupations.
   A hundred occupations are now widely licensed in this country. These licenses are demanded of practitioners because it is believed that individuals either could not detect incompetent physicians, lawyers, barbers, and wrestlers, or because the individual would not insist upon a high enough level of competence.
I have chosen examples which I believe are representative of the great variety of reforms designed to protect the individual from his own incompetence. Sometimes the limitations of the individual's ability to cope with a problem were genuine, sometimes nonsensical. But in every case the allegation of incompetence was clear.

This implicit criticism of the individual has recently undergone a radical extension, at the hands of J. K. Galbraith, Vance Packard, and others. One part of the extension is in a sense familiar: Packard in particular argues that the consumer is incompetent to buy most things—that he is a dupe of contrived obsolescence of automobiles and television sets, and does not have the ability to judge the social consequences of consumption of our natural resources. This extension is not original: it was done by Stuart Chase in the 1930's, and indeed done far better than in Packard's shockingly incompetent book.1

Ambassador Galbraith's extension is more radical: it is essentially that the economic system is so constructed that a rational use of our resources is impossible. I shall discuss it in some detail because its impact upon the public at large and the present administration have been substantial.

The criticism of private luxury is an ancient theme: for centuries men have argued that most wants are artificial and economic activity is unimportant. I am fond of quoting a passage that was written somewhat over 200 years ago about a man "whom Heaven in its anger has visited with ambition":

He finds the cottage of his father too small for his accommodation, and fancies he should be lodged more at his ease in a palace. He is displeased with being obliged to walk afoot... [He] judges that a numerous retinue of servants would save him from a great trouble... [He] devotes himself for ever to the pursuit of wealth and greatness... [He] submits in the first year, may in the first month of his application, to more fatigue of body, and more unfitness of mind, than he could have suffered through the whole of his life from the want of them... Through the whole of his life he pursues the idea of a certain artificial and elegant repose which he may never arrive at, for which he sacrifices a real tranquility that is at all times in his power, and which, if in the extremity of old age he should at last attain to it, he will find to be in no respect preferable to that humble security and contentment which he had abandoned for it. It is then, in the last dregs of life, his body wasted with toil and diseases, his mind galloped and ruffled by the memory of a thousand injuries and disappointments which he imagines he has met with from the injustice of his enemies, or from the perjury and ingratitude of his friends, that he begins at last to find that wealth and greatness are mere trinkets of frivolous utility... 2

The author of this ascetic passage, oddly enough, was (young) Adam Smith, the patron saint of private enterprise.

Such criticisms of the pursuit of luxury always encounter one serious difficulty: the separation of that which is sensible and convenient from that which is ostentatious and useless. Let me quote another 18th century philosopher, this time Mandeville:

If every thing is to be Luxury (as in strictness it ought) that is not immediately necessary to make Man subsist as he is a living Creature, there is nothing else to be found in the World, no not even among the naked Savages; of which it is not probable that there are any but what by this time have made some Improvements upon their former manner of Living; and either in the Preparation of their Eatables, the ordering of their Huts, or otherwise, added something to what once sufficed them. This Definition everybody will say is too rigorous; I am of the same Opinion; but if we are to abate one Inch of this Severity, I am afraid we shan't know where to stop. When People tell us they only desire to keep themselves sweet and clean, there is no understanding what they would be at; if they made use of these Words in their genuine proper literal Sense, they might soon be satisfied without much cost or trouble; if they did not want Water: But these two little Adjectives are so comprehensive, especially in the Dialect of some Ladies, that no body can guess how far they may be stretched. The Comforts of Life are likewise so various and extensive, that nobody can tell what People mean by them, except he knows what sort of Life they lead. The same obscurity I observe in the words Decency and Conveniency, and I never understand them unless I am acquainted with the Quality of the Persons that make use of them. People may go to Church together, and be all of one Mind as much as they please, I am apt to believe that when they pray for their daily Bread, the Bishop includes several things in that Petition which the Sexton does not think on.3

Galbraith is of course aware that the naked parading of a Harvard professor's tastes would not seem very persuasive to the American public (although the dislike of plebeian luxury is not restricted to Harvard professors). So he contrived two arguments that our present social system encourages private waste at the cost of inadequate public services.

The first argument is that we neglect public needs for private waste because private desires are synthesized and artificially stimulated by massive, skillful advertising. I may quote a passage or two to indicate his position.

If the individual's wants are to be urgent they must be original with himself. They cannot be urgent if they must be contrived for him. And above all they must not be contrived by the process of production by which they are satisfied. For this means that the whole case for the urgency of production, based on the urgency of wants, falls to the ground. One cannot defend production as satisfying wants if that production creates the wants.

And he goes on to say:

The fact that wants can be synthesized by advertising, catalyzed by salesmanship, and shaped by the discreet manipulations of the persuaders shows that they are not very urgent.4

On the other hand, the public wants, the wants for public provision of services, are not synthesized or created artificially.

I find this a most unconvincing and peculiar distinction. On the one hand I would have thought that all private and public wants or if you wish, tastes, were at all times synthesized—that a man is not born into the world with a particular set of literary and gastronomic
tastes. In good part our tastes have been a traditional cultural heritage, developing largely by imitation of the upper classes by the lower classes. Perhaps the most striking phenomenon of modern times in this respect is that the formation of tastes instead of being traditional and in a certain sense dictatorial (one is born into a stable society and abides by it) has become competitive. Anyone in our society who sees prospects for gain can attempt to change tastes in any direction. And advertising is no monolithic force: indeed much advertising takes the form of cancelling itself out: the automobile manufacturers attempting to get people to buy automobiles, the steamship or airplane people wishing that they would travel instead by their media, the banks meanwhile urging people to do neither but to put their money in a savings account.

On the other hand, the implicit assumption that public wants are not advertised seems to me especially anomalous. In the year 1960 at a very modest estimate at least $200 million of radio and television time was devoted to creating dissatisfaction with the provision of public services in the United States. And indeed the public sector has the valuable boon that its advertising is deemed to be news, and hence escapes both the costs and measurement of other forms of advertising. I happened to have a copy of the New York Times before me when I was preparing this essay, and it contained the following advertisements:

1. At least four full pages whose effect is to argue that we must spend more on Cuban revolts.
2. Three columns advertising the need for increased aid to Laos, one column on the Congo, and one editorial asking for increased aid to South America.
3. Two columns asking for more expenditure on space exploration.
4. A column asking for larger military appropriations.
5. A column of Kefauver Committee hearings, advertising for stricter controls over business.
6. A column on the need for expanding the public rural electrification program.
7. A half column on the need for greater municipal care of neglected and mistreated children.
8. A column requesting 10 new parks.
9. One editorial for a new cabinet level department of Urban Affairs and Housing.

In candor I must add one item on the other side—criticism of a price fixing bill for milk markets—in a letter to the editors!

And the advertising has paid: the immense expansion of public activities is surely one of the best known facts of our time. Even the non-defense activities of governments have doubled their share of national income since 1900 (from 6 to 12 per cent). Only Mr. Galbraith can stand on Pike's Peak and lament his unhappy residence in a monotonously level country.

I shall pause only for a moment to notice Galbraith's other criticism: that we have grossly neglected investment in education. And while this is not spelled out, one is told that this neglect is due to a defect in the market mechanism: somehow the market fails to induce an amount of investment by the society in the education of people which would be economically justifiable. Let me quote him:

Nearly all of the investment in individuals is in the public domain. And virtually all of it is outside the market system. It is the state which, through primary and secondary schools, and through the colleges and universities, makes the largest investment in individuals. And where, as in the case of private colleges and universities, the state is not directly involved, the amount of the investment is not directly related to the eventual pay-out in production. Investment in refineries being higher than in textile mills, the refineries will draw investment funds. But engineers to design the refineries may be even more important—in effect yield a higher return. And the highest return of all may come from the scientist who makes a marked improvement in the refining process. These are not imaginative possibilities but common probabilities. Yet the high return to scientific and technical training does not cause the funds to move from material capital to such investment. There is no likely flow from the building of the refineries to the education of the scientists.

This is a view which has now become quite fashionable, and yet is simply false. On the one hand a great deal of education takes place outside of formal institutions of education. Indeed I once engaged in a little arithmetic to estimate what portion of the economic education of the community (by which I mean the education which leads to increases in the income-earning power of the individual) was performed in formal institutions and what proportion was acquired by experience and instruction within the factory or office. Even for as late a period as 1940 in the United States I found that on the order of something like two-thirds of the effective amount of education in the United States was being provided after one left formal educational institutions and I suspect that in most societies and in most times the amount has been seven-eighths or more. The identification of education, then, simply with the residence in buildings that have the word "school" written on them leads to a very mistaken view of how much we really have invested in this way, and who has done the investing. The second point is that investigations which are under way indicate that at the present time in the United States, going to college yields approximately 12% (before taxes) on investment. This is an over-estimate because no one has yet been able to measure the difference in quality of college graduates and high school graduates. Building a refinery or a machine tool yields about 13% before taxes. So that if one wishes to use the criterion of maximizing the returns on capital outlays of society, we are if anything entering a period of over-investment in education, not that I would consider this a basic criticism of education.

3. The State

It would be at least as easy to write a character assassination of the state as it has been for those who have
directed their criticisms toward private individuals and organizations.

Do we wish instances of fraud and venality?—then the Federal Communications Commission, the Internal Revenue Service, and the administrative staffs of Congressmen will supply them, if we do not wish to look at the state and local level.

Do we wish records of magisterial incompetence in dealing with economic problems? Our farm program is surely an adequate instance of protracted, extravagant failure: if we had bankruptcy for governments as we do for businesses, the Department of Agriculture would go bankrupt every three years. Equally illustrous examples can be found in our maritime program, our water conservation programs and our river and harbor projects. Or consider a local government: during the 1949-50 water shortage in New York City the choice was offered of building a dam at Cannonsville or reducing the leaks in the water mains or metering the users. One could get the additional water from Cannonsville for $1000 per million gallons, or save it by repairing the mains at $1.61 per million gallons, or by metering customers at a cost of $160 per million gallons. Naturally the city chose the Cannonsville project.

But it seems both unnecessary and irrelevant to be labor the fallibility of the state in dealing with economic problems. It is unnecessary because we already know it. The public criticism of the federal regulatory bodies, for example, is at an all-time high. The failures of our foreign economic aid program are written in major headlines. In fact I challenge anyone to cite an example of distinguished, continued success in any economic activity by the state.

It is more serious that criticisms of public efficiency are irrelevant. We have accepted the desperate faith that only government can solve our problems. If large organizations are selfish, and individual man is shallow-minded and equally selfish to whom else can we turn? If the government does a thing badly, give it more money, more men, and more power—and more duties. No doubt the government is all too inefficient, we say, but it is all we have to cope with the problems, and with good will we can make it tolerably efficient. This is an attractive position for a politician: he has no rivals, and failure will be punished by larger appropriations.

And this is the position that I wish categorically to dispute. The individual citizen, mortal and imperfect though he be, lacking both omniscience and clairvoyance, is not an oversize infant, who will stumble from folly to catastrophe. The state, acting through men whose characters and wisdom are seldom elevated by the move to Washington, D.C., will do many things worse than even our less enlightened citizens.

Even this is not the real issue: even if the state were always wise and benevolent, it would be tragic to turn over the conduct of our lives to it. Our society is not dedicated to the principle that the good society consists of large herds of well-cared-for people. It is dedicated to the principle that the good society gives each individual the maximum possible responsibility for his life and the maximum possible freedom to meet this responsibility.

4. The Policy Implications

Most people, I believe, will accept the ethical priority of individual freedom and responsibility, and they will accept it more easily and wholeheartedly if it is presented in the broadest terms in 4th of July orations. But I believe it should be a basic operative principle in every decision, and my final remarks are intended to illustrate a few of its applications. I would rather have individualism clearly understood and violently opposed as a basic principle of social policy than have it affectionately embraced as a hollow political cliché.

One act before the present Congress would give federal funds for education to each of the 50 states. In roughly half the states, federal taxes would take more than was given, and in half taxes would take less than was given. So far as the states that would gain go, the logic of the proposal is that New York should help Georgia. For present purposes I shall grant this. So far as the states that would lose go, the logic is that if federal taxes finance federal education expenditures, the schools of New York can get more money than they could get by going directly to local taxpayers. The elimination of local governmental control over schools is deemed a net advantage. But if one wishes the utmost possible freedom and responsibility for individuals, it is a decisive objection that the individual's responsibility and control are much greater in his local school board than in the U.S. Office of Education.

Again, our social security system applies uniformly to rich and poor. One might interpret the act as saying that even a man with an income of $25,000 will make no provision for unemployment, illness, or old age. Or one can interpret the act as saying that it would be an administrative nuisance to distinguish between people who might and might not need compulsory insurance. Whatever one thinks of the basic principle, I believe that the exclusion of well-to-do families from both taxes and benefits would be highly desirable. With all our purported affluence, we should be able to afford some attention to the individuals who have produced it.

Both of these examples were chosen to show that even if one accepts the goals of modern legislation, it would be perfectly possible to give a much larger scope to differences in individual and community differences. The reason we do not give such scope is simply that it is no longer an important goal, certainly not important enough to sacrifice the comfort and ease of bureaucrats.

But of course a true individualist would go much fur-
ther, and challenge many of the policies themselves. Our farm program, if anything so disgraceful can be called a program, is designed to support an unnecessarily large agricultural plant by maintaining prices well above the costs of production, and employing extensive output controls to prevent the sinking of the midwest under the weight of corn bins. This generation-old debacle serves no rational purpose, individual or socialistic. I would argue for a program, of say 5 years' duration, of assistance in retraining and moving farmers to urban occupations, with the expenditures under present programs reduced by a fifth each year. Any farmer who wished could remain a farmer and produce as much as he wished of any crop, and of course most would remain; but thereafter they would be self-supporting, independent producers, not the instructed agents of Orville Freeman.

Many people react to such proposals in a fearful manner. Individualism may be good, and it may have great scope today—but it's such a long, hard, politically unpalatable program. I agree that it is difficult, although perhaps less so than some of our other goals such as the elimination of poverty and tyranny throughout the world. I agree that it would be unpalatable to many people, which is another way of saying that individualism is no longer for them a cherished goal. For me, and I hope for most people, it is a cherished goal, worth all the trouble it may cost. In fact I think it would be a splendid bargain even on so-called practical grounds—we would be able to face the outside world with a concept of democracy that amounted to more than friendship for the United States. But cheap or not, practical or not, it has been the great creed of western civilization since the Reformation, and if we are to abandon it now, let us kill it, not leave it to starve to death.

FOOTNOTES
3 B. Mandeville, I The Fable of the Bees 107-08 (F. B. Kaye ed. 1924).
5 Galbraith, op. cit. supra note 4 at 273.

Professor Tefft in California

Sheldon Tefft, the James Parker Hall Professor of Law, has added another title to his collection. Mr. Tefft is spending the Autumn Quarter, 1963, at the Law School of the University of Southern California, where he has been appointed Legion Lex Distinguished Visiting Professor.

The ABA in Chicago

The Eighty-Fourth Annual Meeting of the American Bar Association was held in Chicago in August. As is customary, a number of other important legal organizations met during the week prior to the ABA convention. These gatherings gave the Law School an opportunity to arrange for three special events.

On the evening of August 8, the School was host at a dinner party, held in the Harold J. Green Law Lounge, for the members of the Conference of Chief Justices and of the National Conference of Commissioners on Uniform State Laws and their wives. Dean Neal welcomed the guests, the Honorable James E. Livingstone, Chief Justice of the Supreme Court of Alabama and retiring Chairman of the Conference of Chief Justices, Walter P. Armstrong, Jr., retiring President of the Uniform Commissioners, and special guest Sylvester J. Smith, Jr., retiring President of the American Bar Association, responded. Among the special guests were the Honorable Frank R. Kenison, Chief Justice of the Supreme Court of New Hampshire and incoming Chairman of the Conference of Chief Justices, and a member of the Law School Visiting Committee, Lewis Powell, incoming President of the Uniform Commissioners, and Walter Craig, President-Elect of the American Bar Association. Shortly before the dinner, the American Bar Association held a cocktail party for Chief Justices, Commissioners and Law Faculty across the street from the School at the American Bar Center.

The Law Alumni Association holds a luncheon each year during the annual meeting of the American Bar Association. This year, that luncheon was held at the Law School. (Chicago's weather, famed for stability and predictability, produced a 60-degree day with 25 MPH winds in mid-August, so the luncheon was held in the Green Lounge, rather than outside, around the reflecting pool, as originally planned.) More than 350 alumni and their wives heard Jerome S. Weiss, President of the Association, who presided, Dean Neal, who spoke briefly and introduced the featured speaker, the Honorable Archibald Cox, Solicitor General of the United States.

During all of mid-August, the Green Lounge was turned into an exhibition hall. An extensive display of rare books and manuscripts, drawn from the University's own collection and, through the invaluable help of Louis H. Silver, JD'28, from a number of noted private collections as well, was assembled by Miss Frances Hall, Law Reference Librarian. A collection of prints and drawings, produced by distinguished artists on legal subjects, was assembled for the Law School by Edward A. Maser, Chairman of the University's Department of Art.

Conducted tours of the Law Buildings were provided six times daily during the ten-day period of meetings. Guides were provided by the Law Student Association.