Reviews

The Technostructure, Forty-Six Years Later

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The New Industrial State. By John Kenneth Galbraith. *Boston: Houghton Mifflin Company, 1967. Pp. vii-xi, 427. $6.95.*

In evaluating contributions to social thought and scientific achievement there is a strong tendency to overrate originality and novelty and underrate superior salesmanship. Which had the greater impact on world events, *Das Capital* or *The Communist Manifesto*? Did Gobineau, Nietzsche and Chamberlain, or Adolph Hitler generate greater enthusiasm for racism? Did Christ or Saint Paul have the greater influence on the course of world history? And so, when I claim that the major themes of Galbraith's *The New Industrial State* lack originality, I do not thereby impugn the importance of Galbraith's work. Galbraith's great strength is his ability to rally popular support for ideas not now popular. He is a salesman par excellence. *The New Industrial State* shows no signs of a failure in his powers to persuade or his ability to coin a phrase.

That Galbraith's work cannot lay great claim to freshness and novelty of thought is readily apparent. Economic determinism as strong as that offered by Galbraith is old hat. The munition maker, cast by Galbraith in the role of the technologist, plays the part assigned to him by Nineteenth Century novelists. Government as the handmaiden of industry dates back at least to Marx or, although Galbraith might wish to disavow this predecessor, Adam Smith. Chapters 16 and 17, in which the role of prices in the industrial system is discussed, reflect strongly the impact of Schumpeter. And there is a marked resemblance between the treatments given the capitalist, entrepreneur, and technostructure by Galbraith and those accorded to them by Veblen.

In 1921, Thorstein Veblen, in his *The Engineers and the Price System,* wrote:

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> . . . the growth and conduct of this industrial system presents this singular outcome. The technology . . . which takes effect in this mechanical industry is in an eminent sense a joint stock of knowledge. . . . It requires the use of trained and instructed workmen—born, bred, trained, and instructed at the cost of the people at large. So also it requires . . . a corps of highly trained and specially gifted experts . . . . These expert men, technologists, engineers, or whatever name may best suit them, make up the indispensable General Staff of the industrial system; and without their immediate and unremitting guidance . . . the industrial system will not work. . . . To do their work as it should be done these men of the industrial general staff must have a free hand, unhampered by commercial considerations . . . nor are they in any degree benefited by any supervision or interference from the side of the owners.[1]

In 1967, John K. Galbraith, in *The New Industrial State*, writes:

> The modern large corporation is adapted to the needs of advanced technology and the large amounts of capital and comprehensive planning which this requires. It reflects the need of its technostructure for freedom from outside interference. It wins this freedom in various ways including the provision to itself of its own supply of capital.[2]
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> . . . .
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> Qualified manpower is decisive for the success of the industrial system. The education on which it depends is provided mostly in the public sector of the economy.[3]

The similarity between these two works goes yet deeper. The roles of ownership and entrepreneurship in modern society and the nature of factors of production, in particular, are viewed in highly similar ways.[4]

1. T. VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM 68-70 (1921).
2. J. K. GALBRAITH, THE NEW INDUSTRIAL STATE 86 (1967).
3. *Id.* at 296.
4. T. VEBLEN, *supra* note 1, at 27-28, 79:
Seen in the light of later events this threefold plan of coordinate factors in production [land, labor, and capital] is notable for what it omits. It assigns no productive effect to the industrial arts. . . . The state of industrial art is a joint stock of knowledge.
. . . .
[O]wing to the peculiar technological character of this industrial system, with its specialized, standardized, mechanical, and highly technical interlocking process of production, there has gradually come into being this corps of technological production specialists into whose keeping the due function of the industrial system has now drifted by force of circumstance.
J. K. GALBRAITH, *supra* note 2, at 58-59, 77:
Power has, in fact, passed to what anyone in search of novelty might be justified in calling a new factor of production. This is the association of men of diverse technical knowledge, experience or other talent which modern industrial technology and planning require.
. . . .
In part this [shift in power] has been accomplished by the simple attrition of the stockholder's power. . . .

But where Veblen sees the imperatives of technology as relatively new and potential, Galbraith sees them upon us in full force. The coming change held great promise to Veblen, for in his view, since the technologists were not motivated by profits, they could be expected to eliminate waste through an expansion of output. For Galbraith, the technostructure also is motivated by considerations other than profit, but in his view the result is waste in the form of overproduction.

If *The New Industrial State*, however, is judged by the persuasiveness of Galbraith's treatment rather than by its originality, there is little doubt that the typical reader, who will read it through once, will be convinced that his $6.95 was a good investment in acquiring knowledge about his society. Yet if each chapter is reread with an eye to the completeness of the argument and the evidence upon which it is based, a reader must feel increasing doubt and dissatisfaction, as I did, and, finally, must become aware of serious deficiencies in Galbraith's arguments. I shall consider some of these now, deferring until later a discussion of the major outline of *The New Industrial State*.

The first defects one notices are minor—the author's penchant for overstatement and the frequency of error in the few facts he provides to the reader. In this vein, the reader will note the following: Galbraith would have us all believe that giant corporations produce half of all goods and services; one-fourth is closer to the truth. He asserts that corporations have no need to resort to outside financing; in fact considerable sums are raised through capital markets by corporations (approximately one-third of all corporate financing). Interest rates tend to be stable, according to Galbraith; interest rates on Treasury bills plunged from over 5.5 per cent in the summer of 1966 to below 3.5 per cent in the spring of 1967, and they now stand over 5 per cent; and long-term rates have more than doubled since World War II.

The reader will next note Galbraith's unwillingness to state his propositions tightly and to scrutinize them for possible inconsistencies.

> It will now be clear what accords power to a factor of production or to those who own or control it. Power goes to the factor which is hardest to obtain or hardest to replace. In precise language it adheres to the one that has the greatest inelasticity of supply at the margin. This inelasticity may be the result of a natural shortage, or an effective control over supply by some human agency, or both.[5]

Galbraith claims preciseness, but surely he cannot mean what he says.

5. J. K. GALBRAITH, *supra* note 2, at 56.

It is exceedingly difficult to acquire high grade diamonds but that fact in itself conveys no great power to diamond owners. We thus have one exception to his proposition. Factors that are unimportant in the total expenditure pattern of society do not convey power to their owners even though these factors are inelastic in supply. Secondly, if the supply of an important factor is not controlled monopolistically, ownership conveys no economic power. Thirdly, the logical and factual jump from economic to broader social and political power covers no small distance. Lest the reader think that I am being hypercritical, let him attempt to reconcile the above principle with Galbraith's contention that:

> The eminence of capital is a relatively recent matter; until about two centuries ago no perceptive man would have doubted that power was decisively associated with land.[6]

Presumably capital was more scarce and possibly more inelastic in supply than was land, at least earlier than two centuries ago; according to the principle offered to us, it would seem that capital ownership and not land ownership would have led to power. Yet, in the above quotation, Galbraith claims that any perceptive man can see that power rested in land ownership. The real difficulty with Galbraith's principle is that it is completely nonoperational; *i.e.*, it is difficult to conceive of a state of the world which would lead most observers either to accept or reject the principle.

Similar looseness and inconsistency can be found in Galbraith's treatment of the behavior of the technostructure. One strand of this treatment is Professor William J. Baumol's belief that corporate managements, after earning a minimum necessary profit rate, proceed to give up or trade off higher rates in order to expand dollar sales. This can be rationalized by a belief that shareholders would have received the larger profits and not management. Management, therefore, is prepared to trade these profits for the nonpecuniary advantages that it sees accruing to itself from a larger sales volume.

I shall not pause to criticize this hypothesis. Instead, I wish to call attention to an unnoticed major inconsistency introduced by Galbraith when he adds a second strand to his description of corporate management. The second strand asserts that corporate management, through its unrestricted use of retained earnings, has escaped the discipline of the capital markets. If this second assertion is correct, it is no longer true that larger profits need to be paid to shareholders, and it is no

6. *Id.* 51.

longer clear why management should forego the use of these profits in furthering the growth of the firm into new product lines and research endeavors. Galbraith should resolve this inconsistency but he does not seem to have noticed it. Profit maximizing behavior in the absence of payouts to shareholders will maximize the resources over which management has command.

The reader's attention might next be drawn to the general absence of evidence. In Chapter 30, for example, Galbraith argues that art and aesthetics are slighted in modern industrial society. This is, in large part, a matter of statistical evidence, although tastes undoubtedly play a role. No evidence is provided the reader, yet much is available. In 1960, there were fewer than a half dozen important civic arts centers in major U.S. cities. Six years later, the number had increased 100 per cent, and some 30 new centers were reported to be in the planning or construction stages in cities of various sizes. Museums in the U.S. recorded more than 300 million admissions during 1965, an increase of about 150 per cent over the last decade. Record sales have tripled during the last ten years. I cite these facts merely to show the abundance of evidence and not necessarily to argue that Galbraith is wrong, although art in this country probably occupies a position of prominence today that is unequalled in the past. However, it must be noted for later reference that recent studies have shown that audiences for theater, opera, music, and dance are drawn primarily from narrow segments of the American population, mainly from professional persons.

Galbraith's discussion of art again reveals his failure to note evidence that is inconsistent with his assertions. The industrial system, Galbraith argues, generally ignores or holds unimportant the services of the state which are not closely related to the system's needs. Included among these are the artistic and aesthetic qualities of life. These are neglected by the state in deference to those things, such as highways and technical education, that are needed by the technostructure. More confidence could be placed in Galbraith's views if he attempted to reconcile them with easily obtained evidence that many European governments, especially in nations where the technostructure is highly developed, grant considerable subsidies to the arts.

Galbraith's evidence is so exclusively by way of example that the reader will find it difficult to accept the offhanded way in which Galbraith rejects counter examples. For example, in arguing that the technostructure accomplishes highly successful planning, Galbraith admonishes critics that to cite a failure of plans, as in the case of the Edsel automobile, is not to disprove his argument. By the same token, Gal-

braith cannot expect his readers to believe that he has proved his case merely be citing an example or two of his own. In fact, Galbraith takes no notice of many other product failures in the automobile industry, including the "pregnant" Buick, the Corvair, and the De Soto, not to mention the Kaiser.

These criticisms so far skirt the main battle lines drawn by Galbraith. But as Galbraith avows several times that truth is not aided by exaggeration, it must also be pointed out that neither is error. The accumulated impact of the defects that have been noted is to generate doubts about the efficacy of his entire thesis. These doubts are verified by an examination, to which we now turn, of the broader outlines of his discussion.

The primary goals of the technostructure of a firm are to survive and to grow. Survival is achieved by earning that minimum of profits required to keep stockholders contented and to eliminate the necessity for going into the capital markets to finance growth. This objective, once achieved, allows the technostructure of a firm to enjoy the autonomy of control that Galbraith identifies with survival. Beyond this, the technostructure of a firm is interested in growth (measured in sales).

In achieving this growth, the technostructure is able to plan the prices and quantities of its output without interference from free-willed consumers. This is accomplished primarily by Madison Avenue. The path is thus cleared for Galbraith to claim that there is built into the system an overemphasis on industrial growth arising from the desire for growth in sales coupled with the ability of the technostructure to convince buyers to purchase more. The abrogation of consumer sovereignty in the industrial sector leads to the neglect of important needs, primarily of an aesthetic sort. These are neglected because they do not fit well the technology or growth requirements that dictate the technostructure's needs. Art and beauty are in short supply and toil is in excess supply. The first line of attack in Galbraith's thesis, then, is the demise of consumer sovereignty and the creation of an imbalance in modern life unfavorable to leisure and art.

The second line of attack emphasizes the role of government. When aggregate demand proves insufficient, the government must step in to aid the growth plans of the technostructure. The maintenance of aggregate demand, in Galbraith's view, requires that the government always spend large sums, allowing fluctuations in tax receipts to modify the net impact of this spending on the economy. In high employment periods, high tax receipts will offset the inflationary pressures brought about by large government spending. In low employment periods, tax revenues

will fall, thus encouraging private spending, while large government spending continues.

After discussing the need for large government spending, Galbraith wishes to convince the reader that this spending, which he considers necessary to maintain employment, should be redirected toward improving the aesthetic qualities of life. That these qualities are neglected follows from Galbraith's earlier discussions of the demise of the marketplace and the overemphasis given to the output of the industrial system. But a convincing demonstration of the need for redirecting government spending requires the construction of one more breastwork: the purposelessness of cold war military expenditures. The procedure for constructing this redoubt follows the pattern already set. In the view of the new economic determinism, cold war expenditures, in large part, exist to serve the needs of the technostructure, and the cold war itself is in significant degree a fantasy image maintained subtly by the technostructure.

The needs of the technostructure are best served by military expenditures because these require more complicated planning than other types of expenditures, and, therefore, they lend themselves well to the talent of the technostructure; as a result, the technostructure will play an active role in the decisions made by the Department of Defense. This further eases the planning problems of the technostructure and leads to a preference by the technostructure for military spending. Galbraith then concludes by appealing to the "educational and scientific estate" to join in a political crusade to end the cold war and redirect government spending toward furthering the aesthetic qualities of life.

In Galbraith's logical structure, virtually no attention is given to the problems created for his schema by the rivalry among firms, all of which seek to maximize growth, for the consumer's dollar. One industry must compete with another, and so must firms within an industry. Even if we assume for the sake of argument, as Galbraith does, the absence of price competition within an industry, we cannot also grant that there is no rivalry in advertising and product development or interindustry price behavior.

Galbraith writes as though the business world is single-minded in its desire to increase the output of goods. But it is extremely heterogeneous in objective. Banks and other savings institutions, some of them very large corporations, promote thrift in their rivalry for savings. Even the federal government joins this rivalry with promotional campaigns to sell its debt instruments. This diversity of interest, when combined with rivalry in the marketplace, must yield doubts about the alleged

overemphasis on purchasing goods. There are numerous and powerful economic forces that compete with attempts to get consumers to buy more goods out of their incomes.

Once Galbraith's view of a monolithic business world is challenged, it becomes apparent that considerable market forces also exist to further leisure and the aesthetic qualities of life. Who can claim that the promotional campaigns of travel agencies, hotels, airlines, and makers of boats and camping equipment have not whetted his appetite for more leisure time? And the large record companies and the art and book clubs surely promote aesthetics.

Firms must meet the test of rivalry in the marketplace. Not all can grow as rapidly as their separate technostructure would desire. And, in this rivalry, savings, art, and leisure, to which large industries cater, are not neglected.

Galbraith's attack on economics for taking consumer wants as given reveals his belief that market-oriented wants should be discredited. In economics, according to Galbraith:

> since an individual's satisfaction from his various opportunities for expenditure is his own, there must be no interference with this equalizing process. Dictation from any second person on how to distribute income, however meritorious, will not reflect the peculiar enjoyment pattern of the person in question. . . .
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> Such is the established doctrine. And if the individual's wants are subject to management this is interference. . . .
>
> It is true that the consumer may still imagine that his actions respond to his own view of his satisfactions. But this is superficial and proximate, the result of illusions created in connection with the management of his wants. Only those wishing to evade the reality will be satisfied with such a simplistic explanation. . . .[7]

There are two senses in which economists take individual wants as given. As economists they make no value judgments about these wants. They do not, as scientists, question the "goodness" or "badness" of wants any more than a physicist questions the goodness or badness of friction. It is impossible to conduct scientific analysis if wants are not treated thus. Secondly, neither economists nor behavioral scientists nor yet Galbraith has developed a usable general theory of wants. Until such a theory is developed, economists must take wants as unexplained givens. If and when a theory of wants is developed, they will be fair game for inclusion in scientific work as variables to be explained.

7. *Id.* 214-15.

But even with such a theory, an economist will not be able to moralize. Wants still will remain beyond the pale of a scientific evaluation of their goodness or badness. The inability of science to make such value judgments is an attribute of science and not of the phenomena with which science deals.

Galbraith's attack on economics creates confusion between the scientific sense in which wants are taken as given (it makes no difference whatsoever whether we know that these wants stem from hidden persuaders, hunger, or mother's breast) and the normative sense, in which wants are judged to be moral or immoral. What economist, in his role as scientist, ever said that wants are natural and inborn? As an economist, he couldn't care less. What anthropologist supports Galbraith's naive view that in less affluent societies wants are natural and inborn?

The formation of wants is a complex process. No doubt wants are modified by Madison Avenue. They also are modified by Washington, by university faculties, and by churches. And it is not at all clear to this reviewer that Madison Avenue has the advantage when it comes to false claims and exaggeration.

The Administration in Washington is immune to legal attack for promotional distortions when it asserts that this program or that tax measure is indispensable to the welfare, security, and progress of this country. And academic freedom protects large numbers of professorial promoters in the nation's educational institutions; how often in the classroom have we asserted or heard asserted, without any evidence and with precious little thought, that this theory and these positions yield those public policies which in turn will surely improve the lot of the common man.

Imagine business firms and peddlers promoting an elixir guaranteed to exorcise the devil and to give to its user eternal life. The FTC surely would tar and feather the poor fellows, even if they truly believed in their product; the FTC undoubtedly would be joined, perhaps blessed, in this crusade by the various churches throughout the land, who, protected by the laws of the land, promote their own formulas for salvation at least once each week.

No, it is not at all clear that our social system discriminates in favor of promotion in the marketplace. Indeed, a correction of the present legal discrimination would seem to require that Washington, city hall, the university, and the church should be subjected to the same censorship as the business community or, alternatively, that the burden of censorship should be removed from the business community. It might even be argued that this legal discrimination results in an imbalance in

this nation's output of goods and services that unduly favors much too large an outpouring of goods and services from the public and religious sectors.

Now to the role of government in Galbraith's analysis. He cannot reasonably be criticized in these times for being so conventional in his acceptance of the Keynesian view. This view of government's role in maintaining aggregate demand has the support of many economists, and perhaps Galbraith should not be required to present to the reader a strong dissenting view on these issues. But it is necessary for a reviewer to point out the existence of such dissent. Not all economists are devotees of Keynes; and even many who are doubt the efficacy and necessity of assigning to government a Keynesian role. The alternative offered by these economists is intelligent control over the nation's money supply, and some argue that fiscal measures are largely impotent unless they reflect changes in the money supply. In their view, the nexus between full employment and government spending is elastic and unreliable.

That firms aid and persuade the Defense Department cannot be disputed. But this is not peculiar to the defense industries. Any seller of goods attempts to persuade (which does not mean defraud) buyers. And I am fairly sure that I know of at least one professor and several universities who will be actively engaged in just such activities when the government turns to improving the aesthetic side of life. After all, what does the government know about aesthetics? No doubt, these advisors to the government will be organized into some group, such as Americans for Democratic Aesthetics; when they hold their first victory party, the last and most important toast should surely be to the poor. For it is they who will have been coerced into paying the taxes for the beauty and leisure which will be enjoyed, in the main, by Galbraith's Educational and Scientific Estate. Just as the poor contribute taxes for providing higher public education that are out of proportion to the small use they make of state colleges and universities, so they will purchase aesthetics for their more wealthy fellow citizens. But no matter. The poor would otherwise have been persuaded to "waste" their earnings in the marketplace.

From persuasion and aid in defense decision-making to improving the planning capability of the technostructure is, at best, an uncertain step. It simply is untrue, Galbraith notwithstanding, that firms cannot suffer losses or have plans frustrated when they do business with the Defense Department. Again Galbraith ignores the importance of rivalry. Not all firms seeking to win contracts in fact manage to win them. Not all firms win acceptance of the weapon system they propose. The air-

craft industry was bitterly disappointed by the decision to forego manned bombers for missiles. The struggle over that decision continues to this day. Boeing's plans hardly were furthered, its costs hardly were covered, by McNamara's decision to award the TFX contract to General Dynamics. The decision to bypass additional nuclear carriers in favor of conventional types certainly displeased some of the Navy's suppliers. The decision to do without an anti-missile missile system (recently modified slightly as a result of Russia's decision to install such a system) was not calculated to further the plans of the technostructure.

Just as a decision to build more beauty into highways and public buildings will disappoint those who would like to see more subsidization of local theater, there can be no decision of the Defense Department that does not impair the planning of some contestant in the rivalry for defense business. Not only is there rivalry among suppliers to the Department of Defense, but these firms must compete with those who cater to other governmental programs. And this competition is not insignificant. These other programs have used more federal funds than have defense expenditures in every year since 1960.

There is much wishful thinking and little depth of thought in Galbraith's discussion of cold war problems. He is inclined to believe that although the cold war has "historic" origins in the Stalin era, it persists primarily because of imagery on both sides inculcated largely by the technostructure of the U.S. and the U.S.S.R. The China problem and the Russian refusal to agree to inspection he shunts aside, leaving the former to a footnote and omitting the latter. And he leans heavily toward the view that the risks of a nuclear accident outweigh the risks of disarmament, which he equates with the risk that Russia might trick us. The problem of disarmament is treated in such cavalier fashion that one doubts he has really given it much thought. His discussion points to the mutual interest that arises on both sides because the arms race largely cancels out and may, if not ended, result in a catastrophic accident.

Many of us are overly optimistic about the ease with which the cold war can be ended and disarmament pursued. The nuclear deterrent is viewed, by way of accident or escalation, as the prime threat to civilization, and trickery is considered the main risk of disarmament. We forget to ask how likely is a third world war if the deterrent is destroyed and how soon that war would escalate into a nuclear affair. Galbraith shares the conventional view about nuclear arms. They are evil and should be destroyed quickly:

It is not clear why agreements can be negotiated in good faith with

> the Communists on all subjects except disarmament. To eliminate civilized life for all time in response to a short-run calculation that liberty might otherwise be endangered is also irrational.[8]
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> . . . .
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> The path to salvation for the two great industrial systems is now clear. Whether it will be followed is less certain. There must be agreement on arresting and eliminating the competition in lethal technology. On this, the survival of both the industrial and the nonindustrial populations of the world plausibly depends. It is of prime importance to this effort that it be realized how much of past action has been based not on reality but on imagery and the sources of the latter. . . . Discussion of disarmament must now result in action. It can no longer serve, as now, as the surrogate for action.[9]

I cannot be so optimistic about the possibilities for disarmament and an end to the cold war. More convincing and thoughtful arguments are called for than those that have been offered by Galbraith and by others.

The rapidity with which wishful thinking is converted to conviction is truly amazing. Many intellectuals, especially the young, believe that the desire for peaceful coexistence is a fact. Should these issues be judged on the basis of this year's press releases and crop of visiting scholars? Is a distorted view of the truth conveyed by going back 20 years to the ancient history of Eastern Europe's incorporation into the Russian Empire? If so, the invasion of Korea took place only 17 years ago. The attempt to convert Cuba into a missile base occurred only four years ago. How easily we forget the Russian violation of the moratorium on above-ground nuclear testing. Many thoughtful people feel that Viet Nam marks another episode in the exuberant messianic psychology of Communism (or of Capitalism). The "historic" origins of the cold war, it seems to me, are current events. And the hairbreadth legal distinction employed by the Russians in claiming that their recently announced FOBS is within the letter of our agreement to ban nuclear satellite systems should not go unnoticed.

Everyone of sane mind wishes that cold war problems did not exist. Those who desire a general reduction in our government's size and operations, and I include myself in this group, would be doubly pleased if the cold war did not exist. The most likely first step in this direction, in the view of many intellectuals, including Galbraith, is disarmament. However, if we are to consider disarmament, let us be serious and avoid

8. *Id.* 333.
9. *Id.* 342.

wishful thinking. Realism requires that we recognize Russia's fear of China and Germany. It is virtually impossible for Russia to disarm its nuclear forces in the face of what it feels are serious threats, for it is in this category of military force that Russia holds a clear advantage over her neighbors.

Moreover, disarmament is a misnomer. It really means a return to nonnuclear military forces. Vast conventional forces of this type, especially in the U.S.S.R. and China because of the need to police the empire and each other, cannot practically be included in any general disarmament agreement. It is important to recognize that a move to conventional forces, accompanied by a general withdrawal of United States forces from Europe, does not leave the balance of deterrence unaffected. Should negotiation accomplish such an arrangement, we must, I think, revise upward the probability that Germany, at least, will be unified within the Soviet empire. Who would or could stop a quick military move by the Communists? Will France and England have the will to resist quickly? Will the United States, once extricated, be willing and able to move fast enough to prevent such an occurrence? And even if the Western world does move quickly, might it not be the beginning of World War III? Once engaged militarily on a large scale, no one can count on his enemy foregoing the construction and deployment of nuclear forces.

Will the Communist world refuse to give serious consideration to the absorption of West Germany? General disarmament and withdrawal puts us back approximately to the immediate post-World War II period. At that time Russia did not hesitate to move westward even though the United States possessed a monopoly of atomic weapons.

The problem raised by disarmament is not merely the choice between accidental nuclear war and Russian trickery. It is a choice between a misinterpreted accident in the maintenance of a nuclear deterrent and an increased probability of a third conventional global war that might escalate into a nuclear holocaust.

Let us now take an overview of *The New Industrial State*—an economy in which firms are able to circumvent the market by virtue of their control over consumers, the overemphasis of industrial output that results, the necessity for large government expenditures to be military. The pattern is complete and purposeful. But the tapestry is thin and dreamlike in quality. The embroidery is clever prose, not careful thinking or patient gathering of evidence. The design is to persuade people who have not seriously thought about these problems. For those who have, the book holds few surprises.

But we miss the mark if we fix our attention only on the many logical leaps, the many errors of omission, the looseness of the entire structure, and the lack of systematic evidence. The more fundamental aim of the book is to persuade the reader to accept a view of political philosophy. That view is the desirability of an expansion of control by government over the voluntary arrangements made by its citizens. The rationale for such an expansion of control is the alleged manufacture of needless wants by the technostructure. In Galbraith's political philosophy, these wants should be discounted. If we are to understand the wider political issue, it is necessary to perceive a subtle but important idea that pervades Galbraith's work though it is never discussed explicitly: the impossibility of meaningful freedom.

The persuaders of the industrial structure are so successful, in Galbraith's view, that significant decisions by consumers and legislatures are determined by the economic requirements of the technostructure. These in turn are determined by the methods of modern production. Freedom has little meaning in this view of the world. It is a legacy from a bygone age, from a time when technology was simpler and people hungrier. It is out of place in a world captured by the technology of the modern affluent society. This theme runs through the entire work. Wants are not inborn, natural, or indigenous to men living in the modern industrial state. Men are persuaded of their wants, both in their individual behavior and in the collective behavior of their government. In Galbraith's political philosophy such men can hardly claim they are free.

What is freedom? Surely it is not the right to exercise only inborn, natural wants. It cannot mean that we are limited in our options to select between breathing, crying, and dirtying diapers. Surely few can doubt that most of men's wants and beliefs are learned. Freedom must involve the right to choose between the offerings of those who wish us to learn one thing and those who wish us to accept alternatives. The free society keeps open the avenues of persuasion, and it invites its citizens to walk along these paths in an attempt to influence their lives and those of their children. What is to be feared most by the free society is the blocking of avenues of persuasion, and, especially, monopolization of persuasion by the state.

Because wants are learned, Galbraith claims they should not be accorded any great weight; the desire to purchase in the marketplace should not be tolerated because it is learned and not natural or inborn. But those wants to which Galbraith wishes us to give more attention, aesthetic desires and leisure, are just as learned. On what grounds do

we credit Galbraith with superior knowledge of our needs? Beware the intellectual who seeks power over our decisions and over the persuasion to which we can respond, especially when he seeks this power to prevent us from doing what *he* thinks we should not desire to do.

Galbraith would have us believe that we are persuaded against our self-interests to buy in the marketplace. He divines our more urgent needs to be ballet and pretty buildings. He would have us assign to government the task of insuring that we do not spend in the marketplace as much as we now choose to spend. We are to be taxed in the name of aesthetics.

Let us consider the marketplace. In it we are exposed to a very large variety of persuaders. Hawkers call our attention to the benefits of saving, to those of spending, to the purchase of art, comforts, education, and appliances. The theaters beckon us. And the government is given free press coverage to present its case. It is in the marketplace that we find Galbraith's book. If we have no confidence in the responsibleness of our decisions when this great variety of options is revealed for our consideration, then how can we be confident of our decisions when we are adorned with blinders? The institutional arrangement that we call the government confines us to fewer options and offers only greater concentration of control over persuasion. If we doubt our abilities to decide in the marketplace, we must distrust ourselves even more in the polling place where the options confronting us are fewer and more controlled. It is in the polling place that we coerce the minority of voters to abide by those persuasions that the majority finds acceptable. It is in this sense that the meaningfulness of freedom is denied by the extreme economic determinism of Galbraith, but it is we who will destroy freedom if we concur.

There are, without doubt, many activities that for practical purposes can be performed best in Washington. Some coercion is inevitable and even desirable. Always, the political problem that must be faced when consideration is given to extending government power, or, hopefully, to reducing government power, is whether the gain is worth the cost. This question is difficult to answer in many cases. Should we resort to the draft to man our armed forces or should we rely on voluntary recruitment? Should the policing power of the government be increased or should we rely more exclusively on self-protection? Should the government build highways or should we rely on tolls? Should the government produce education or merely subsidize the attendance of children in private schools? But is the question difficult to answer in Galbraith's case? Are we to resort to coercion because the marketplace cannot per-

suade us to share fully Galbraith's taste for ballet? I cannot reply any better than by quoting Alexis de Tocqueville:

> Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications, and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks on the contrary to keep them in perpetual childhood: it is well content that the people should rejoice, provided they think of nothing but rejoicing. For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness: it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances—what remains, but to spare them all care of thinking and all the trouble of living?[10]

Psycholanalysis, Psychiatry and Law. By *Jay Katz, Joseph Goldstein & Alan M. Dershowitz.* New York: The Free Press, 1967, Pp. xxiii, 822. $17.50.

"The law" in Anglo-American thinking is a restricted concept. In Civil Law systems, legal commentators mark the reach of this subject-matter by all the legislation currently in force. Our tradition, however, because of our reliance on case digests and advance sheets, creates new categories and classifications only when there is appellate litigation. And appellate litigation arises for the most part only when there are clients financially able to litigate. As a result, judges, lawyers, and law schools are blind to much of what is functionally law.

New areas become visible as "law" only as litigation increases, which in turn occurs most frequently today when government underwrites the expense of litigation, thus paradoxically subsidizing attacks on its own processes. This evolution is notably evident in three fields: criminal law, family law, and the law of the mentally ill. The first two areas have been the object of seminal teaching materials produced primarily at Yale Law School;[1] *Psychoanalysis, Psychiatry and Law* pioneers the third field.

10. 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 338-39 (4th ed. H. Reeve transl. 1841).

1. R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW (1962); J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965).

Litigation is certainly no new arrival in the field of substantive criminal law, since most criminal standards took shape in the judge-made common law. But criminal procedure until recently was a stepchild to the substantive law, sketchily discussed in marginal books on local practice and in afterthought sections of criminal law casebooks. It was only when the Supreme Court demanded counsel for indigents[2] and when OEO and other organizations subsidized legal assistance, that any substantial body of "law" emerged, and, incidentally, that law schools began to recognize criminal procedure as a "glamor" subject. The union of procedural law with the older substantive criminal law is just beginning to spur challenges in areas that a decade ago were totally beyond the ken of the digesters—the sentencing process, probation and parole revocation, prison discipline, and the punishment of alcoholics and drug addicts.[3]

Family law is undergoing a similar expansion. There is a substantial body of case law, but it concerns for the most part either the property and contract aspects of marriage, or the custody of children whose sundered parents can afford the luxury of litigating a child's future. With the advent of neighborhood legal centers and other sources of legal assistance for the poor, however, the picture has begun to change. A significant part of a typical legal aid bureau's civil business is matrimonial and family litigation. As these cases move into court, moreover, the policies and practices of governmental and quasi-governmental organizations administering public welfare funds have for the first time begun to engage the attention of the courts. The result is an emerging field of welfare law, comprehending matters like the administrative powers of agency workers over their clients,[4] the relation between public welfare schedules and support payments after divorce or judicial separation, the rights and obligations of welfare tenants in public and "slumlord" housing, and the legal protection of lower income consumers.

In contrast, the law of the mentally ill is almost virgin territory. This is not to say that there is nothing on which to construct a body of legal doctrine. Legislation is found in every state, most of it more than two

2. Long v. District Court, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

3. Robinson v. California, 370 U.S. 660 (1962) (addiction); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (alcoholism); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (alcoholism). The Supreme Court has noted probable jurisdiction in an alcoholic case, Powell v. Texas, 389 U.S. 810 (1967).

4. *Cf.* the administrative search cases, Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. Seattle, 387 U.S. 541 (1967).

generations old, delineating the power of the state to segregate those whose mental condition is viewed as sufficiently aberrant to make them "dangerous."[5] There is also scattered case law, though until recently it related primarily to two problems: the constitutionality of such legislation, and the property rights and liabilities of those characterized as mentally ill. The first line of cases uncritically upheld the legislation under the *parens patriae* power of the state; the latter affected only the handful of mental hospital inmates with enough property to attract claimants. The subterranean rumblings, however, suggest that the eruptions in criminal procedure, family law and welfare administration will soon be duplicated in the law of the mentally ill.

Two recent decisions signal this trend. *Baxstrom v. Herold*[6] held that, when judicial action is required for other civil commitments, a convict cannot be civilly committed by administrative fiat at the expiration of his maximum term without denying him equal protection of the laws. The second is *In re Gault*,[7] which imposed for the first time due process requirements on juvenile proceedings "which may result in commitment to an institution in which the juvenile's freedom is curtailed."[8]

The Supreme Court noted in *Gault* that due process had taken an extended holiday from the juvenile courts because the substantive law applied was viewed as an exercise of the *parens patriae* power to help, not punish, the child, thereby justifying informal civil procedures rather than the safeguards of a criminal trial. But the Court placed reality over promise and concluded that the rehabilitative ideal has not been achieved in fact. The rate of recidivism is high. Nor is a juvenile protected during his adult life by not having been called a "criminal"; the term "delinquent" carries a similar stigma and produces the same sort of job and social discrimination as the label "criminal." In short, "[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact, and unfortunate prescriptions of remedy."[9]

5. State legislation is summarized in AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 15-106 (F. Lindman & D. McIntyre eds. 1961) [hereinafter cited as LINDMAN & MCINTYRE].

6. 383 U.S. 107 (1966). The case and its forerunners and its aftermath are covered at pp. 694-707 of KATZ, GOLDSTEIN, & DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY, AND LAW (1967) [hereinafter cited as PSYCHOANALYSIS, PSYCHIATRY AND LAW].

7. 387 U.S. 1 (1967).

8. *Id.* at 41.

9. *Id.* at 19-20.

The Court therefore laid down new requirements: advance written notice of charges to permit adequate preparation; the right to counsel, including assigned counsel; the right to confront and cross-examine witnesses; observance of the privilege against self-incrimination at all stages of the process.

Gault will produce sweeping changes in juvenile court practice. The Court's pointed warning that at some time and in some court a record must be reconstructed of what happened during the delinquency hearings will inevitably force juvenile courts to keep transcripts. If state procedures do not offer adequate review of juvenile court actions, federal district courts will quickly determine that there are no state remedies to be exhausted, and review through habeas corpus. Juvenile codes will have to be rewritten to distinguish clearly among preliminary hearings, waiver hearings to transfer the juvenile to an adult criminal court, adjudication, and disposition. The right to counsel will spill over into all these areas, and some day may reach juvenile court proceedings in neglect and custody cases. The notice requirements will bring into immediate focus the vague and indefinite statutory language defining delinquency or authorizing juvenile court intervention in family affairs. This is but a sampling of the questions certain to be litigated as a result of *Gault*'s deceptively simple due process requirements.

Chapter II of *Psychoanalysis, Psychiatry and Law* shows that the practices condemned in *Gault* exist, if anything in exaggerated form, under legislation authorizing compulsory commitment of the mentally ill. Take, for example, the matter of legislative standards for commitment. Statutes in the great majority of states require the existence of mental illness, mental deficiency or epilepsy. These terms, however, are rarely defined; where yesterday's legislature has tried to follow the medical "forms of action," the statutory language no longer corresponds to modern usage.[10] There must be something more than illness, however, to justify commitment. The usual standard is danger to the person or property of others or danger to the safety of the person to be committed. This combined purpose to protect the community from harmful acts and to safeguard the person himself from self-inflicted harm, has generally sufficed to rebuff constitutional attacks on commitment statutes.[11] But many laws also turn on the fact that the person is in need of treatment. While this aspect of the statutes has also usually been

10. *Cf.* MICH. STAT. ANN. § 14.844 (Supp. 1965).
11. Authorities are gathered at PSYCHOANALYSIS, PSYCHIATRY AND LAW 536-66.

sustained, though reluctantly,[12] there is no clear explanation why detention should be possible where it benefits the detainee but not the community, since in other contexts the protection of the community has been viewed as the only adequate constitutional justification.[13] In sum, involuntary civil commitment is an ill-defined and essentially uncircumscribed invocation of the *parens patriae* power comparable to that in juvenile codes.

The fruit of this vague legislation is indeterminate detention often imposed without the due process of law that *Gault* now demands for juvenile delinquency proceedings. This is made clear in the records of three cases that the authors, following the felicitous precedent of the earlier volumes on criminal and family law, present under the pseudonyms of *Bertha Radek*,[14] *Bong Yol Yang*[15] and *Tony Savarese*.[16] Notice of the proceedings may be withheld from the person to be committed, on the ground that it would be detrimental to his health or disruptive of treatment.[17] When given, notice is generally in the conclusory terms of the statute itself. No state prohibits representation by counsel, but in only a third is appointment of counsel for an indigent required, and compensation for the attorney is seldom specifically authorized.[18] As a result most respondents are unrepresented, and the lucky few receive for the most part only perfunctory advocacy—worse, if that is possible, than that provided indigent criminal defendants under a system of randomly assigned, uncompensated counsel. The only means to obtain data about the indigent respondent's mental condition is a diagnostic commitment for observation,[19] but this is not under the control of respondent's counsel and there is in general no requirement that the state underwrite independent mental examinations by private psychiatrists. A hearing must usually be held, but in only a minority of states does the committee have the statutory right to be present.[20] The hearing itself is brief and the evidence is largely hearsay; the respondent himself may well be examined by the court if he attends. Appeal is possible in the abstract, but is often in the form of a de novo

12. *See* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), 331 F.2d 771 (D.C. Cir. 1964), in PSYCHOANALYSIS, PSYCHIATRY AND LAW 552-54, 710-13.
13. *See In re* Brooks Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), PSYCHOANALYSIS, PSYCHIATRY AND LAW 558-60.
14. PSYCHOANALYSIS, PSYCHIATRY AND LAW 423-59.
15. *Id.* at 493-99.
16. *Id.* at 634-50. This is an incompetency to stand trial case, but the due process issues it raises are substantially identical to those in regular civil commitments.
17. *See* LINDMAN & MCINTYRE 25.
18. *Id.* 29, 100-03.
19. *Id.* 37.
20. *Id.* 27.

proceeding in another court of general jurisdiction which duplicates the shortcomings of the first. In short, by the yardstick of *Gault*, the overwhelming majority of civil commitment proceedings lack fundamental due process.

If the commitment process is loose and constitutionally suspect, the process of return to the community is even more suspect because it is for the most part invisible. Discharge is largely a matter of administrative convenience; the tests applied seldom have any observable relationship to the criteria that the legislature originally established for commitment.[21] Many statutes provide in form for judicial supervision of the process,[22] but this review almost always follows an administrative decision to release; if the court intervenes it is to insist that the inmate be kept in custody. Since release procedures are almost always *ex parte*, however, nobody appears to advocate continued commitment; the court merely rubberstamps the administrative decision. If discharge is denied, habeas corpus is available in theory to test the propriety of continued custody and has in fact been the medium through which most existing case law has been established. But habeas corpus litigation is possible only when the inmate has friends or family willing and able to underwrite the proceedings, or when commitment resulted from a criminal prosecution so that the right to appointed counsel spins off to the habeas proceeding as well. For the most part, indigent patients pass their years and decades of incarceration docilely, unable to secure review on their own initiative and unprotected by any enforced statutory requirement of periodic review by a court or agency outside the hospital walls.

Demands for a measure of due process will meet the same claims advanced against efforts to bring juvenile procedures within the Constitution—that a considerable erosion of the traditional criminal or even civil procedural safeguards is necessary in order to protect the therapeutic goals of the process. *Gault* repudiated this argument in the juvenile delinquency setting. But the Court in *Gault* also expressed doubt that the therapeutic ideal was being achieved—or even vigorously pursued—in any significant way. *Psychoanalysis, Psychiatry and Law* provides ample evidence that, notwithstanding any beneficent aims, mental health procedures have led to a mere warehousing of social misfits. Empirical studies have shown for example that the world of a

21. *See, e.g.*, the transcript of proceedings in *Rouse v. Cameron*, PSYCHOANALYSIS, PSYCHIATRY AND LAW 603-11. The decision concerned release after commitment based on an acquittal by reason of insanity, but release procedure tends to be the same whatever the original legal basis for commitment.

22. LINDMAN & MCINTYRE 128-29.

mental institution inmate differs in no significant way from that of a prison inmate.[23] Indeed, a prison is more often than not superior to a mental hospital in terms of living conditions and opportunity for work and recreation.[24] Moreover, a prison inmate with anything but a mandatory life sentence can look forward to a definite time by which he must be discharged; even a life convict has the near certainty that after some period his case will be laid before the governor for possible commutation or pardon. But a hospital inmate has no such assurance.

Underlying the *parens patriae* approach has been the assumption that patients will receive therapy. In fact, however, there is no treatment in the great majority of public hospitals. Staff strength is inadequate, and salary levels are so low that most state mental health personnel have only marginal professional qualifications. The punitive use of electroshock and insulin shock treatment[25] has given way to tranquilizers, which are of some treatment value, but which may frequently be administered, one suspects, to produce placid but essentially unchanged inmates. Many inmates are elderly persons cast off by families and society alike, kept in hospitals and asylums simply because American society, in unfortunate contrast to a majority of cultures, refuses to shoulder responsibility for the old. In short, procedures essentially uncontrolled by due process of law have consigned hundreds of thousands of Americans to a bleak incarceration terminated only by death. And if by chance release occurs while an inmate is still capable of leading a productive life, he meets ostracism against him as one who was "insane" that is in many respects more virulent than if he were "criminal" or "delinquent."

The legislative and judicial conscience at work in criminal law and family law will probably begin to function soon in mental health law, despite the widespread popular fear of those who are or appear to be abnormal. We can anticipate constitutional decisions and gradual legislative reform. But new decisions and amended statutes at best provide only an opportunity for reform. True reform is possible only when lawyers and judges know the legal objectives of commitment and instinctively sense what is procedurally fair. *Psychoanalysis, Psychiatry and Law* provides an excellent medium for training law students in a legal specialty about to be born. But this in itself is only a start. For

23. PSYCHOANALYSIS, PSYCHIATRY AND LAW 650-69.

24. See the table prepared by an inmate in support of his application for habeas corpus. *Id.* 700-02.

25. *Id.* 713-15.

"law" is only a third of the book's title, and statute and case law is only partially controlled by lawyers. Unless doctors and hospital administrators understand the scope and function of mental health legislation and are trained in their roles in mental health administration, reforms will quickly come to naught.

The State of Michigan offers a laboratory model of the problem. In 1966 the Michigan Legislature enacted several statutes affecting the mentally ill involved in criminal proceedings. It revamped in a unique manner the statutes governing commitment of those incompetent to stand trial.[26] Under the new law, upon a showing sufficient to raise incompetence to stand trial at the due process level,[27] the trial court must commit the defendant to a newly established center for forensic psychiatry, which reports his mental condition to the court. The court then holds a hearing on the issue of competency, with emphasis not on diagnostic categories but on symptomatology that suggests non-triability. If the defendant is found incompetent, he is committed for an initial 18-month period as a regular civil committee. If by then he has not improved to the degree that he can be tried, notice to that effect and a detailed psychiatric report go to the probate court, which must hold the equivalent of a regular civil commitment proceeding. If the probate court refuses to commit, the case goes back to the original trial court, which holds its own hearing to determine whether the defendant is competent. If it finds he is, he is tried; if it concludes he is not, this finding in effect reverses the probate court's denial of commitment, and the defendant is committed as a regular mental health inmate and furloughed or discharged on that basis. Some protection against delayed prosecution and punishment is provided by allowing the statute of limitations to run throughout the period of institutionalization and by crediting all time spent in the hospital against any sentence of imprisonment ultimately imposed. In short, the new law is intended to end the Michigan practices that were previously exactly like those desbribed in the *Tony Savarese* case in *Psychoanalysis, Psychiatry and Law*.[28]

But substantial progress will require hard work. A series of judicial conferences has helped to explain the functioning of the statute to

26. MICH. STAT. ANN. § 28.966(11) (Supp. 1967), MICH. COMP. LAWS § 767.27a, MICH. PUB. & LOCAL ACTS OF 1966, PUB. ACT No. 266. The legislation is described in detail in George, *Michigan's New Mental Health Legislation for Criminal Cases*, 46 MICH. ST. B.J., Feb., 1967, at 13. *See also* PSYCHOANALYSIS, PSYCHIATRY AND LAW 566-93.

27. *See* Pate v. Robinson, 383 U.S. 375 (1966).

28. PSYCHOANALYSIS, PSYCHIATRY AND LAW 634-49.

trial judges, and some attorneys are beginning to practice comfortably under the new statute. The chief difficulty, however, is to train competent medical personnel to serve as diagnosticians and witnesses. Staff doctors in mental hospitals have long emphasized diagnostic classification of mental cases over a functional analysis in terms of symptoms, and have tended to play the game of equating, for example, "schizophrenia," but not "sociopathic personality," with "insanity" or "mental disease or defect." *Psychoanalysis, Psychiatry and Law* provides many depressing examples[29] of what occurs with discouraging frequency in every state. Despite efforts to insist on diagnostic reports that describe the patient's condition in detail, leaving it to the court to decide whether this condition suggests non-triability, the same old patterns of diagnosis and testimony continue to appear in the reports to and testimony before Michigan courts.

The obvious lesson is that changes in mental health statutes or new interpretive decisions by state or federal courts will mean little as long as doctors and hospital administrators are left free to clothe legal and social judgments in medical or pseudo-medical terms without fear of effective cross-examination. The best antidote is a new generation of lawyers who not only grasp what statutes relating to mental condition are intended to accomplish, but also know enough psychiatric theory to recognize who is a qualified psychiatric examiner and who is not, what is a scientifically valid diagnosis and what is not, and what is expert testimony and what merely legal conclusions disguised as expert opinion. Such lawyers can in effect educate qualified experts in the courtroom roles they are to play. The foundations for this expertise must be laid as a part of undergraduate legal education. Chapter I of *Psychoanalysis, Psychiatry and Law* becomes relevant here. After a brief section suggesting that lawyers and psychiatrists alike rely upon a concept, though not necesarily the same concept, of what and why man is, and that this concept must be inquired into before dialogue is possible, the editors offer basic materials on psychiatric theories of the unconscious, the id, the ego, the superego and the total personality, drawn primarily from Freudian sources. After each body of psychiatric materials, cases and statutes on which psychiatric theory bears are arrayed for discussion and contemplation. To utilize Chapter I to maximum advantage would require joint teaching by a psychiatrist and a lawyer, a point the editors make clear in the preface. However, the materials are selected and arranged carefully enough that if a course

29. *E.g.*, PSYCHOANALYSIS, PSYCHIATRY AND LAW 494-95, 539-40, 575-79, 602, 603-11.

were based on Chapter II ("Law and Psychiatry"), students could derive enough from Chapter I ("Psychoanalysis and Law,") that they should be required to study it on their own initiative. To this extent, a law teacher with at least some theoretical knowledge of psychiatric principles can himself offer a course that goes far toward laying the foundation for an intelligent, effective practice of law involving mental health questions. The availability of *Psychoanalysis, Psychiatry and Law* indeed makes it feasible for the first time for law schools to offer an effective course or seminar on the law of mental health even though they cannot afford the luxuries of interdisciplinary appointments or the preparation of materials to meet local staff interests and needs.

In the final analysis, however, efforts by lawyers, however competent and alert they may be, to educate medical practitioners in the aims of the legal system and a doctor's role in effectuating them will come too late to be of maximum effect. *Psychoanalysis, Psychiatry and Law* ought also to be the basis of a required course in medical schools, replacing the usual lectures on the tort liability of medical practitioners that commonly masquerade as a course on "medical jurisprudence." The impact would be heightened if both law students and medical students attended the same class or seminar, because each group should learn as early as possible how the other group of incipient professionals thinks and reacts. Dr. Andrew Watson, Professor E. Donald Shapiro and I have done this with law and social work students, and we have been pleasantly surprised at the cross-education the students themselves provide. Cross-fertilization is even more important for medicine and law.

In sum, *Psychoanalysis, Psychiatry and Law* completes a trilogy that should set a trend in legal education; it ought also to be promoted as a first step toward coordination and partial integration of medical and legal education.

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The New Draft Law, A Manual for Lawyers and Counselors. By *Ann Fagan Ginger*. Berkeley: The National Lawyers Guild, 1967. Pp. 135. $10.00. Student Ed. $5.00.

The Military Selective Service Act of 1967[1] is one of those rare statutes[2] which is so utterly rotten at its core and in every branch, root and leaf, that the only appropriate remedy is clean extirpation from the law of the land.[3] In such circumstances the literally radical is also the authentically conservative. Unfortunately, our judges are neither bold nor courageous when evil comes full-blown.[4] We will have to put up with the sort of "moderation" which lets the sickness corrupt our constitution further,[5] fearing the temporary pain of a short, sharp shock. The treatment of the Dutch Elm Disease by picking off dead leaves one by one—trimming a dead branch here and shoring up a dying trunk there—this is part of the great heritage "liberalism" has left us; and our judges are, of course, mostly in the "mainstream."[6]

So we shall have to niggle and nibble where the knife is needed. In the last few months, the growing interest in Selective Service lawyering has been striking and encouraging. At Yale, we shall have a Selective

1. 50 App. U.S.C.A. §§ 451-573 (1964), *as amended*, (Supp. 1967).
2. The dismal swamp of the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954 is probably another.
3. This is not the place to probe all the interconnected pockets of corruption—it is enough to suggest a few:
(1) Peacetime conscription is involuntary servitude, an unequal tax, and a taking of property (*i.e.*, the earning power of one's free labor) without just compensation—and it should be remembered that the Supreme Court has never held the contrary. *Cf.* Selective Draft Law Cases, 245 U.S. 366 (1918), *discussed in* Bernstein, *Conscription and the Constitution*, 53 A.B.A.J. 708 (1967).
(2) The system of classification denies equal protection and establishes religion. *Cf.* Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 MAINE L. REV. 143 (1965).
(3) The congressional effort to forestall judicial review (*see* pp. 4-5 *infra*) is unconstitutional. *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 323-25 (1953) (which, however, does not push its analysis of Falbo v. United States, 320 U.S. 549 (1944), and Estep v. United States, 327 U.S. 114 (1946), far enough).
(4) The draft card possession requirement (if authorized by the statute) serves no proper governmental purpose whatsoever, and is an instrument of symbolic repression. *Compare* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
(5) The draft system denies the individual the right to decide not to commit war crimes and crimes against humanity. *Cf.* Mitchell v. United States, 386 U.S. 972 (1967) (Douglas, J., dissenting from the denial of certiorari). *But cf.* NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE 50-51 (1967), which considers this denial of free moral choice a great virtue of the system!
4. *But see* Mora v. McNamara, 36 U.S.L.W. 3189 (U.S. Nov. 6, 1967) (Stewart & Douglas, JJ., dissenting from the denial of certiorari).
5. For example, see the National Commission's suggestion that the draft system be used as a vehicle for universal testing of the male population. NATIONAL ADVISORY COMM'N, *supra* note 3, at 6, 39, 58. The Commission thought, however, that there was a "lack of a constitutional basis in any program of universal compulsory service." *Id.* 61.
6. It is only fair to concede that the bar has done a miserable job of presenting the problem—in fact, it has abdicated any responsibility at all in the area, until recently.

Service research seminar this Spring and similar projects are underway elsewhere. The ACLU recently sponsored an all-day draft law seminar for practitioners. A Selective Service Law Reporter was born just the other day, and—given funding and luck—will be in operation within a few months, combining a loose-leaf service, a treatise, a law review, and a practice manual all in one. The SSLR will meet a desperate need, but so far it is little more than a hope and a promise. For immediate purposes, the draft-law practitioner has to rely on the Government Printing Office[7] for new Regulations and Local Board Memoranda, and on the Central Committee for Conscientious Objectors, the National Lawyers Guild, the ACLU and a few other organizations for memoranda, current information and the like.

Into this hopeless labyrinth—compounded by the currency of rumor, misinformation, and dubious tips—Ann Fagan Ginger[8] has come, promising, like Ariadne, a thread. The conception, the effort, and the speed[9] are certainly to be commended. Such a *Manual for Lawyers and Counselors* is exactly what is needed, at least until the SSLR is on its feet. But I would hate to play Theseus to Ann Fagan Ginger's Ariadne, for what looks like a ball of sturdy yarn turns out to be an old-fashioned string collection: a lot of snippets rolled up together, some of them good pieces, some irredeemably knotted and snarled—not at all the true thread it appears to be.

It is hard to criticize, when the need is so great and the intention so good. Intentions—as often happens—are not enough, and particularly so when men's freedom and even lives depends upon the care and skill with which they are represented. They are entitled to the hard-headedness (if not the cold-heartedness) that Cravath, Swaine & Moore would give to a tax case—and to a lot more imaginativeness on top of that. In this spirit, I think that in all honesty as a reviewer, I am bound to say that I think the *Manual* is almost worse than useless. It could be a positive danger. Any counselor or lawyer who counts on the *Manual* courts disaster.[10]

7. The GPO is fantastically slow. On October 23, 1967, Local Board Memo No. 84—relating to student deferments under the new Act—was issued by Selective Service. Although I have a "continuing subscription" to these Memoranda, I have yet to receive No. 84. (As this was going to press, GPO finally produced. Jan. 26, 1968.)

8. A. GINGER, THE NEW DRAFT LAW, A MANUAL FOR LAWYERS AND COUNSELORS (1967) [hereinafter cited as MANUAL].

9. The *Manual* came out within a few months of the new Act and Regulations.

10. In fairness, the *Manual* does list the "indispensable tools" of counselling on page 2—including the Act, the Regulations, the Local Board Memoranda, and the *Handbook for Conscientious Objectors* (Philadelphia, 1967) put out by the Central Committee for Conscientious Objectors.

A very few illustrations will suffice. First, the *Manual* purports to contain the "Military Selective Service Act of 1967: full text."[11] The literal claim is true, but the implied claim—that a usable "full text" of a statute is set forth—is not. Only the 1967 *amendments* are reproduced (*e.g.*, "(3) Section 5(a) (50 App. U.S.C. 455(a)) is amended by inserting '(1)' immediately after 'Sec: 5(a)'; and by adding at the end thereof a new paragraph as follows: . . . ."). These, of course, are utterly useless by themselves. Similarly, the *Manual* sets forth a number of critical Regulations, but gives only the recent amendments.

Second, the *Manual* gives virtually no references to the materials a lawyer or counselor would need. Very few cases are cited,[12] let alone discussed; practically no secondary materials are even cited.

Third, the *Manual* abounds in serious booby-traps.[13] For example, on page 97 it suggests that since the judicially developed technical requirements for exhaustion-of-remedies (prerequisite to raising misclassification as a defense to a criminal charge of refusing induction)—namely, that the registrant *report* for induction but refuse to step forward (*submit*)—was based upon the availability of administrative remedies at the induction center which no longer exist, the technical requirement of reporting could now be challenged. An interesting argument. What it fails to take account of, however, is the fact that the 1967 Act has codified the old judicial rule: "No judicial review shall be made of the classification . . . of any registrant . . . except as a defense to a criminal prosecution . . . *after the registrant has responded either affirmatively or negatively to an order to report for induction* . . . ."[14] Of course this is inartfully written—like the whole rest of the draft law—and is consequently ambiguous. Maybe exhaustion is satisfied by refusing to *report*, not (as in the past) by reporting but refusing to *submit*. The legislative history is to the contrary—congressmen apparently though they were codifying (even tightening) the judiciary's rule.[15] At

11. MANUAL 14-15.

12. An exception: on page 96—as "Points & Authorities" in support of a form "Complaint for Declaratory Judgment, Mandamus, Injunction, Temporary Restraining Order, & Convening of Three-Judge Court"—the *Manual* "[s]uggest[s] using and Shepardizing" four cases.

13. It is also rife with trivial mistakes—perhaps justified by haste.

14. 50 App. U.S.C.A. § 460(b)(3)(1964), *as amended*, (Supp. 1967) (emphasis added).

15. H.R. REP. No. 267, 90th Cong., 1st Sess. 7, 30-31 (1967); *cf.* Note, 81 HARV. L. REV. 685 (1967), which shows that there are serious constitutional problems if Section 10(b)(3) is read to bar suits like Wolff v. Local Bd. No. 16, 322 F.2d 817 (2d Cir. 1967). Since the legislative history reveals—in addition to hostility to *Wolff* (which could be viewed as based upon the factor of pre-exhaustion relief, not the factor of pre-report-for-induction relief)—an intent to codify the existing law, one can certainly argue forcefully that it was codified *with its established exceptions*. *Compare* judicial treatment of

all events, the lawyer who relies on the *Manual*'s theory may be in serious trouble. In another place, the *Manual* suggests that the draft violates the thirteenth amendment (a proposition with which—given appropriate qualification—I think I agree) without mentioning the fact that at least for wartime draft the Supreme Court has held to the contrary.[16]

Fourth, the *Manual* is full of what probably is bad advice—for example, it suggests that a CO applicant interrogate his draft board,[17] asking "each board member individually" if he has read the registrant's CO form and supporting material, asking the board how it has treated other CO applicants and how it decides CO cases, whether it has read the applicable Regulations, whether it is prejudiced against him for racial, personal, or political reasons, and how *it* defines the critical phrases in the definition of a CO. I cannot imagine that this would be welcomed by the average board, though it might, as the *Manual* seems to have in mind, lay the foundation for some kind of litigation.[18] The techniques and prospects of such litigation—and whether the risk is a sensible one —receive no attention.

Fifth, some critical problems are left unmentioned—a form complaint for a federal civil action on page 91, for example, asserts the jurisdictional amount but the *Manual* does not indicate how it could be made out.[19]

Finally, the *Manual* sets forth a variety of very suggestive arguments a practitioner might use, but presents them in so thin and even crude a

28 U.S.C. § 2254, which codified the exhaustion-of-state-remedies requirement in federal habeas corpus, in cases such as Fay v. Noia, 372 U.S. 391 (1963).

Congress seems to be incapable of using words with a technical meaning in selective service law in a manner consistent with that meaning. The same word, "report," which causes the trouble in Section 460(b)(3) also appears in Section 454(a): "any registrant who has failed or refused to *report* for induction shall continue to remain liable . . . ." (emphasis added). Probably what Congress meant to say was "failed or refused to *submit* to induction," and there is no reason to suppose that the person who reports but refuses to step forward was meant to be exempted. But whatever *Congress* may have meant, what the *statute* says is "report." I would argue that, particularly as this is a penal statute, and since Congress has twice used a technical word with an established meaning in the same way (so that neither use, presumably, is a *mistake*), both sections should be read to mean what they clearly say. Therefore Section 460(b)(3) changes the exhaustion rule, no longer requiring that a registrant *report;* and Section 454(a) extends the liability for induction only of those registrants who do not *report.*

16. Selective Draft Law Cases, 245 U.S. 366 (1918).

17. MANUAL 59. Of course, he "should appear to be what he is: ignorant of the law, but curious." *Id.*

18. Elsewhere the *Manual* waxes enthusiastic about the uses of pretrial discovery to find out how a local board treats its cases, without noting that the case upon which this idea is based was—despite its having turned up a lot of juicy information—*lost. Id.* 100. *See* Margolis, *Trying a Case under the Selective Service Law,* 26 GUILD PRACTITIONER 100 (1967).

19. The problem of showing that the amount in controversy exceeds $10,000 is a real one. *See* Wolff v. Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967).

form that—if actually used in such a state—they would serve, I fear, not to persuade but to antagonize most judges. An extreme example makes the point—after quoting the Marshall Commission Report and President Johnson to the effect that Negroes and those who do not go to graduate school are somewhat overrepresented in the armed forces (and omitting to note any of the reasons, inadequate as they may be, that the Commission gave to explain the fact), the *Manual* observes point-blank:

> These facts, taken together, present a clear case of denial of equal protection. This registrant raises this as a defense against his refusal of induction because he contends that his order of induction was based on a rejection of his appeal from a 1-A classification which he would have not received if he had lived an equal life with white registrants.[20]

Immediately after this statement, which apparently is addressed to a judge, the *Manual* sets forth "Defendant's Proposed Jury Instruction No. ____." This reads as follows:

> If you find that the order to report for induction, or defendant's 1-A classification, resulted, directly or indirectly, from (a) defendant's poverty, or (b) poverty due to his race, or (c) his failure to be in school due to poverty, or (d) his failure to remain in school due to poverty, or (e) financial straits of his family, you are instructed to find the defendant not guilty.

Set against the difficulties and subtleties of making out an equal protection claim, the *Manual*'s offering is just plain silly. What the practitioner needs is some detailed advice about how to allege and prove a claim that has some chance to *win*.

The *Manual* is not without usefulness—if treated sceptically, and only as an addition to the essential tools. One could even recommend it to the practitioner who has already subscribed to the Regulations ($5), the Local Board Memoranda ($4), and the Handbook for Conscientious Objectors ($1) . . . except for its price: $10 (this for 139 offset pages glued into a paper cover—the pages being mere reprints of a Supplement to the Guild's *Civil Rights & Liberties Handbook*).[21] At such an extravagant price, its usefulness is so marginal that almost anyone's money would be better spent elsewhere.

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20. MANUAL 77.

21. According to a letter from the Guild, a student edition of the *Manual* is available for $5.

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IN MEMORIAM

Jack Bernard Tate

LL.B. Yale 1926
M.A. Yale 1954

Associate Dean and Professor of Law 1954-1968

With the death of Dean Tate, the Law School has lost an able administrator and a treasured friend. As chairman of the admissions committee, he brought to New Haven an increasingly varied and talented student body; once here, students found him an interested and sympathetic counselor. His sudden passing has underscored the intensity of his devotion to the school and its work.