North Dakota Law Review

Volume 42 | Number 4 Article 9

1966

Book Reviews

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BOOK REVIEWS

THE OMBUDSMAN; CITIZEN'S DEFENDER. Edited by Donald C. Rowat. Toronto: University of Toronto Press, 1965. Pp. 348, $8.25.

It is a truism that the legal process, as a part of the larger social process, consists of a dynamic unfolding of claims and counterclaims put forward by the various participants in consequence of changes in events. These claims and counterclaims in turn evoke responses from the relevant decision-makers, those who enjoy both formal authority and sufficient effective control to make their decisions consequential.[1]

Today we are approaching more and more closely to the year 1984. Fortunately the forebodings with which Orwell looked to that date do not appear to be materializing, at least in full. Nonetheless there has been, especially since 1945, an unprecedented growth of what some have termed the "welfare—warfare" state. Indeed, it was President Eisenhower, that child of a more tranquil age, who in his farewell address to the Nation warned us of the need for checking and combatting the growing dominance of the "military-industrial complex." (Perhaps he was not fully aware of its growth during his own tenure of office.)

Lawyers, like others, have been confronted with new intellectual tasks in consequence of these developments. It is no exaggeration to say that the most baffling of these, with the exception of International Law, has been to cope with the change that has occurred in internal public law as the old simplicities of nineteenth century parliamentary government in Britain and Western Europe and of federalism and the separation of powers in countries like the United States, have given way to the burgeoning growth of the new field of Administrative Law. Stone[2] has reminded us that;

> "[T]he basic historical context of the rise of the administrative arm is precisely the expansion of the range of legal intervention in complex economically organized societies. To accomplish these new tasks for which the capacity of legislative and judicial institutions fell short . . . power was thrust into the administrator's hand. In this context, then, the powers which fell to administration must be seen as residual, arising from the functional and institu-

1. This view is expounded generally in McDougal and associates, STUDIES IN WORLD PUBLIC ORDER (1960).

2. *The Twentieth Century Administrative Explosion and After* (Fourth annual Walter Perry Johnson Lecture on Law and Public Affairs, University of California, Berkeley, April 11, 1964) 52 Calif. L. Rev. 513, 516 *et seq.*

> tional limitations of traditional legislative, judicial and executive organs. . . .
>
> It now seems clear that modern administrative power . . . must be viewed as a distinct and largely new constellation of functions. . . . [u]nless we see and treat administration as a function distinct from the traditional executive, the task of building rational safeguards against arbitrary use of its power will remain mostly out of reach."

In many continental countries, the prime example being France, the main safeguard hitherto relied upon has been the special system of *droit administratif*, administered by distinctive administrative courts and designed to protect the citizen against *exces de pouvoir* and *detournement de pouvoir*. Though it is clear that these instrumentalities have undoubted value, and it would be presumptuous for a common lawyer to undertake to criticize them, that they are not without shortcomings is clearly pointed out by Judge Kurt Homgren in the essay he contributes to the book under review.[3]

In Britain (and one may presume in other Commonwealth countries also) dissatisfaction has long been felt with the old, and partly fictional, standbys of "parliamentary supremacy" and "ministrial responsibility". This dissastisfaction centered on a focal point a little over ten years ago when the notorious Crichel Down Affair (where the obduracy of the administrative machine in mishandling the affairs of a private citizen led to the resignation of the Minister of Agriculture and Fisheries)[4] and since then there have been governmental[5] as well as private[6] investigations on what might be done to ameliorate the situation.

In America, Professor K. C. Davis[7] has summarized the protections against the improper use of governmental power as being the provision of administrative personnel of high quality (he admits this to being aspiration rather than fact), the development of procedural safeguards and the principle of check. It is certainly true that judicial review of administrative action, where the latter transgresses the fundamental freedoms enshrined in the Bill of Rights, has been an important bulwark of individual liberty—whether we are thinking of administrative attempts to censor books[8] or to deny passports.[9] But Professor Davis is surely too optimistic when he speaks generally of "the principle of check." Have we forgotten so soon the revelations of Professor Bernard Schwartz, who, in the

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3. Holmgren, *The Need for an Ombudsman Too*, in THE OMBUDSMAN, 225, 227-8 (Rowat ed. 1965).
4. A good account is given in J.A.G. Griffith, *Tha Crichel Down Affair*, 18 Modern L. Rev. 557 (1955).
5. Report of the Franks Committee, Cmd.No. 218 (1957).
6. The "Justice" (British Section of the International Commission of Jurists) Whyatt Report.
7. Davis, *Ombudsmen in America*, 109 PA. L. REV. 1057, 1061 (1961).
8. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1962).
9. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker *et al* v. Secretary of State, 378 U.S. 500 (1963).

course of his official investigation some eight years ago discovered some appalling malfeasances, not only on the part of federal administrators, *but on the part of the very legislative and executive personnel who were expected to exercise supervision and checking?*[10] The enormous wealth of some of the private interests subject to administrative regulation in America and the consequent pressures they are able to bring to bear on the administration should prompt us constantly to ask ourselves: *quis custodiet ipsos custodes?*

This is not to deny that painstaking and laudable efforts have been made in this country to see what may be done to improve the workings of the federal bureaucracy. These range from the Attorney General's Committee on Administrative Procedure, which reported in 1941, to the establishment of an Administrative Conference of the United States by Presidents Kennedy and Johnson in 1961-1964.[11]

Nonetheless, the basic problems continue to confound us here as in other countries. Perhaps it is this fact which has caused a new interest in and increasing attention to be paid to the Scandinavian institution of the Ombudsman[12] since about 1960.[13] Hence the present volume of essays,[14] edited by Professor Donald C. Rowat of Carleton University, Ottawa.

This is an excellent compilation, for it provides us not only with comprehensive accounts of the history and present operation of the institution in Scandinavia (and a few other countries which have adopted it more recently), but also with cogently argued pleas for and against its adoption in such countries as Britain, France, the United States and Canada.

Professor Rowat's book consists of twenty-nine essays written by contributors from thirteen different nations. Each of the writers is an acknowledged authority in the field and writes with especial competence of the running of affairs in his own country.

Part I of the book deals with existing Ombudsman systems. The first four essays are, fittingly, by Swedish contributors, since Sweden is the originator of the Ombudsman and it is only in that country that the institution is more than fifty years old. Undoubtedly those who, in the eighteenth and early nineteenth centuries, introduced the offices of Chancellor of Justice and *Justitieombudsman* in the course of the jockeying for position between the King and the various Estates in the Swedish monarchy would be astonished at the spectacle of an Ombudsman now operating in the egalitarian democracy of New

10. See generally, Schwartz, *The Professor and the Commissions* (Knopf 1959). See also *in re* Applications of WKAT *et al.*, 17 Pike Fischer Radio Regulation 1001 (1959).
11. Administrative Conference Act, 78 Stat. 615, 5 U.S.C. 1045-1045C (1964); (The list is recounted by David, Supra note 7, 1066-1070).
12. Briefly, the Ombudsman is a public officer who enjoys entire independence. His duty is to receive citizens' complaints, to exercise supervision over the entire range of administrative activity, to take corrective action against maladministration where possible, and to issue public reports of his activities.
13. Geoffrey Marshall finds the recent interest in Great Britain so intense that he aptly dubs it "ombudsmania". *The Ombudsman: Citizen's Defender* (1965).
14. *The Ombudsmans; Citizen's Defender* (1965) (hereinafter cited as P._____).

Zealand on the opposite side of the globe. Yet even a phenomenon such as this is not without precedent in legal history. The late medieval Lord Chancellors of England, who evolved the use and the trust might now be able to contemplate with satisfaction that this arrangement for the holding of property has not merely spread throughout the common law world, but can be found in such civil law countries as Mexico.

It should also be noted that a Swedish ordinance of as early as 1766 accorded to citizens a fundamental liberty which could scarcely be more relevant today—and which contrasts favorably indeed with American and British notions of "executive privilege" and "Crown privilege". This provided that:

> all documents from which government officials make their decisions are public. They are available not only to the parties concerned but also to any other citizen who wishes to consult them. This privilege allows anyone to check whether the administrative rulings have been made on sufficient grounds."[15]

One facet of the Swedish Ombudsman's activity that should not be overlooked is that he does not confine himself to the correction of cases of maladministration. He also makes public his rejection of unwarranted complaints, and thereby contributes to the strengthening of public confidence in the authorities. Since 1915, Sweden has also had a Military Ombudsman with the duty of correcting abuses of power on the part of the defense authorities towards private soldiers, officers and civilians.

Of the Scandinavian democracies, Finland is the one whose administrative supervisory institutions most closely resemble those of Sweden. This is scarcely surprising when one remembers that the two countries were under joint administration for many years prior to 1809, when Finland became an autonomous Duchy of the Russian Empire. Mr. Kastari's essay shows how, during this latter period, the position of the Finnish Chancellor of Justice (procurator) was actually enhanced by the role he played as a focal point for Finnish nationalism. Upon the break-up of the Czarist Empire, Finland obtained independence and in its constitution of 1919 followed Sweden in establishing the office of Ombudsman side by side with that of Chancellor of Justice.

The western part of the Scandinavian peninsula, Norway, presents a striking contrast in that no office of Ombudsman was established until very recently. A Military Ombudsman, described by Arthur Ruud, was established in 1952, while an Ombudsman for

15. P.23 (Bexelius' essay, *The Ombudsman for Civil Affairs*).

civil affairs, as Audvar Os shows, was not set up until 1962. In taking this step Norway was influenced partly by Sweden but more so by the Danish example.

Indeed, it appears that of all Nordic institutions of this type, it has been that of Denmark (which was constitutionally provided for in 1953) which has exerted most influence and aroused most interest abroad. In part, this may be due to the brilliance, eloquence, and prolific writing of its incumbent, Professor Stephan Hurwitz, who has held the office continuously since the first election in 1955. But even in the present book, the reader will find the Danish writer, Judge (Miss) I. M. Pedersen, to be the most systematic, attractive and convincing expounder of the constitutional position of the Ombudsman in the countries where the institution now exists. Her analysis of its jurisdiction and procedure, matters dealt with and remedies available, could scarcely be clearer or more enjoyable to read.

New Zealand has been the first, and thus far the only British Parliamentary democracy to adopt an Ombudsman or "Parliamentary Commissioner." This was done by statute in 1962. It is perhaps hardly surprising that this should have been the case. New Zealand, like the Scandinavian countries, has a comparatively small and homogenous population and an institution which has worked well in the latter might also be expected to do so in the former. The exigencies of New Zealand's parliamentary system made it seem advisable to enact certain modifications of the Ombudsman's powers and functions there. Professor J. F. Northey describes these very ably, after first giving us a general description of the functioning of the New Zealand Constitution. It is to be noted that most of the statutory administrative tribunals, as well as local authorities, are excluded from the New Zealand Ombudsman's jurisdiction.[16] Nonetheless, and although some other adjustments were added to cater to the sensitivity of cabinet ministers and members of parliament,[17] the experience already had has demonstrated that the scheme can work in a Commonwealth parliamentary system. Readers will share Professor Northey's hope that "if it [the Ombudsman] can succeed in a relatively small common-law country, it may be capable of being adapted to the needs of larger ones."[18]

Egon Lohse's essay on West Germany's Military Ombudsman,[19] which is modeled on the analogous Swedish institution, is of interest in showing the ernestly democratic auspices under which the *Bundeswehr* has been set up. Almost simultaneously with German Re-armament the provision for the Military Ombudsman was inserted into the constitution as an amendment in 1956. As Lohse points out,[20]

16. P.135 (Northey's essay).
17. P.137 (Id.).
18. P.143 (Id.).
19. P. 119.
20. P. 119.

there has been "a strengthening of parliamentary control in the military field such as never existed before in German constitutional history." It is interesting, too, that the German MO's duties include not only the protection of the basic rights of the soldier but also "to take care that the officers observe proper principles of leadership and character guidance or moulding *innere Fuhrung*."[21] In 1964 the then MO, *Vizeadmiral* Heye, published what was undoubtedly an exaggerated and ill-judged series of articles claiming that a trend towards a "state without a state" was on foot in the *Bundeswehr*. Shortly after this error of judgment he resigned, and more rational counsels have prevailed since. As the *Bundeswehr* now occupies training areas ranging from Crete to Portugal and from Britain to Manitoba, it is possible to hope that its MO practices might perform an important educational function amongst other peoples.

The second section of the book contains material on "related institutions", these being the U. S. Army Inspector General, the Philippine Presidental Complaints and Action Committee, and the European Commission of Human Rights. The last of these is by far the most important, hopeful and worthwhile of the three institutions and its growing acceptance among the states of Western Europe augurs well both for developing European unity and for the promotion of fundamental freedoms in the region as a whole.

On the other hand, it is difficult to see why Professor Rowat chose to include the material on the other two topics, save, perhaps, as a cautionary tale.

The book's third and fourth sections deal with the possible introduction of the Ombudsman idea to other countries, most notably the United Kingdom, the United States and Canada. On the latter country, an excellent essay is contributed by Professor Rowat himself[22] and he points out that the need for a citizen's defender in Canada is perhaps greater than that in the United Kingdom itself, in part because of the antiquated laws on crown liability and in part because "the federal divison of powers means that the provisions protecting the citizen's rights against administrative action are worse in some provinces than in others."[23] Professor Rowat is fully cognizant of the additional complication created by Canada's federal system, which would mean that there would have to be a separate Ombudsman for each province as well as one for the national government. Indeed, he goes further, and suggests that large cities, such as Montreal and Toronto, should each have an Ombudsman of its own. The present reviewer has spent some happy years in Canada and has every reason to be grateful for his treatment by its authorities and citizens alike; yet he cannot refrain from alluding to one or two shocking pieces of

21. P. 121.
22. P. 188 with Henry J. Llambias.
23. Ibid.

maladministration that came to his attention during his sojourn there. Thus he fervently shares Professor Rowat's hope that the scheme will be tried in Canada, in the beginning perhaps on a small scale only. As the author points out,

> [O]ne of the great advantages of the federal system is that an experiment with a new idea or institutional form can be tried on a small scale in one of the states or provinces first. If it is successful there, it will thus spread to the others and can safely be adopted by the central government.[24]

For France, Mme Nicole Questiaux, a member of the French Council of State, contributes a stimulating essay[25] outlining the French system of *droit administratif* and administrative courts which, as she shows, is open to the lowliest citizen to secure redress of grievances against maladministration by any person in official authority, even the President of the Republic. This system is indeed so highly developed that it has largely been adopted as a model for the new courts that have been created to serve the various European communities, such as the Common Market and the Coal and Steel Community. Yet Mme. Questiaux does not succeed in convincing one as she attempts to do, that an Ombudsman is for this reason rendered entirely superfluous. As Miss Pedersen points out in reply,[26] Denmark too has a system of *droit administratif* administered by its courts and yet

> the Ombudsman system offers other advantages than this. It has created methods of dealing with the problem of control that are usually not open to courts, *ordinary or administrative*. . . . [T]he fact that [the Danish Ombudsman's] powers are different from those of the courts has made it possible for him to *supplement* their influence upon administrative matters[27].

For Britain, Geoffrey Marshall[28] and Louis Blom-Cooper[29] contribute essays favoring the introduction of the institution, the latter rather more warmly than the former. The matter has now ceased to be an academic one in that country, as the newly elected Labor government is pledged to introduce a "Parliamentary Commissioner for Aministration." A white Paper was in fact published in October, 1965,[30] setting forth the role which the government envisages for the Commissioner. *Prima facie*, at least, this does not appear to be an

24. P. 191. The same thought is, of course, valid for the United States.
25. Pp. 217 *et seq.*
26. Pp. 231 *et seq.*
27. P. 232 (Author's italics.).
28. P. 173.
29. P. 264.
30. Cmd. No. 2767.

impressive one. The British Ombudsman will act only at the instance of a Member of Parliament. While it is provided that he will cover complaints over "the whole range of relationships between the private person and the central government"[31] he is to be excluded from issues covered by tribunals, from actions of Departments in personnel matters (including the Armed Forces), and from the entire and large sphere of nationalized industry. Moreover, no provision is made for his having access to secrets covered by Crown privilege, nor can he take any action to rectify matters himself. All in all, thus, he appears to be a rather emasculated version of his Scandinavian counterparts. It is of course possible that his powers may be extended in years to come, but the scheme presently envisaged lends support to the strong and cogently argued essays by Professors Mitchell[32] and Abel[33] that the institution is not at all suited to a country of Britain's size, population, or constitution.

Finally, there is the United States. On the federal level, Congressman Reuss and Mr. Munsey[34] contribute an essay in support of the bill[35] proposed by the former for the creation of an "Administrative Counsel of the Congress." The reviewer regrets that he cannot share the Congressman's enthusiasm for this measure. The Administrative Counsel, as here envisaged, is to be given "powers of inquiry comparable to those of Congressional committees."[36] Not only is it difficult to imagine such a person (albeit assisted by staff) coping with powerful bureaucracies such as the F.C.C. or the C.A.B. (not to mention the even more powerful corporate interests subject to their regulation), but the very fact that he will be acting only at the instance of the Congress reminds us of the lamentable discoveries made by Professor Schwartz concerning the "vigilance" of congressional supervision.[37] It is, of course, by no means doubted that Congressman Reuss makes the statement

> in virtually all cases handled by Congressmen, they attempt nothing more than to assure that the constituent obtained his due, after full and fair consideration[38]

in all good faith.

But the present writer would strongly agree with Professor Abraham that[39]

> [A]lthough there are considerable doubts that the Ombudsman is feasible at the national level in the United States, the

31. Id. p. 4.
32. P. 273.
33. P. 281.
34. P. 194.
35. H.R.7593, introduced July 16, 1963.
36. P. 196.
37. See Pp. 3-4, hereof *supra*.
38. P. 199.
39. P. 236.

institution would appear to be quite readily adaptable at ment. It richly merits a try.[40]

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LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION. By Joel B. Grossman, University of Wisconsin. New York: John Wiley and Sons, Inc., 1965, Pp. 221, $6.75.

This is a tremendous study and analysis of the appointment system in the federal judiciary. Every lawyer interested in court improvement would find it very interesting, and most laymen would find it equally informative. It deals not only with the process of appointing federal judges, but also gives one a much better understanding of the history and development of the federal court system, and the related political influences. The reader cannot help but be impressed with the vast amount of research reported in this book. My feeling was that the author had concentrated largely upon an effort to present a review of the facts in as readable a manner as possible, without attempting in any appreciable degree to influence the reader toward any particular theory or program.

Some of the most interesting portions of the book are the numerous and intriguing incidents arising out of the many battles fought on the appointment front. A central theme is the story of the struggle by the ABA to make judicial appointments something other than a political reward, and something more than political bargaining material. By the time you have finished the book you will realize sadly that we have made insufficient progress in that direction.

More important, however, the book does prove that advances have been made, and particularly since 1953 the ABA Committee on Federal Judiciary has begun to assert an increasingly valuable role in judicial selection. The Bar Association aim that appointments should be made on merit irrespective of party affiliation has not been accomplished, and more than 90 per cent of the appointments are still determined by the politics of the party in power. But it has become an accepted custom for the office of Attorney General to confer with the ABA Committee before proceeding with the matter of nominations. Regretably "the ABA Committee's success with

40. Much the same point is made by Mr. Ralph Nader, in advocating the introduction of the Ombudsman in state governments. Compare the similar point made by Professor Rowat regarding Canada, p. 10, supra.

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the Attorney General has not been matched by the attainment of similar influence, either with individual senators or with the Senate Judiciary Committee." Most senators still firmly resent any interference by a Bar Association committee on the question of whether the proposed judge is qualified for the position.

This very interesting recital of the unceasing efforts waged by the ABA toward removing judicial appointments from the "spoils system" is very encouraging and stimulating. Not all of the book is complimentary to the American Bar Association, however. The story of its vigorous campaign, many years ago, against means for recall of undesirable judges can hardly stir our admiration.

In reading this work, one cannot help but be almost surprised at some of the haphazard provisions in our federal judicial system. For instance, Congress could vest selection of lower court judges in the "head of a department," or perhaps even in the Chief Justice. It is not even a legal requirement that the judges shall be lawyers or that they shall be residents of the state or district in which they serve. Prior to the Pierce Administration, the matter of appointing federal judges was handled through the office of Secretary of State, and not through the office of Attorney General.

No doubt this work will convince the reader that at least a great many of the impediments to judicial improvement are "built into" our present system. For instance, the familiar situation is recited, of a senator who confessed privately that unless he nominated his state party chairman for a judgeship, his chances of being re-elected were nil.

Nevertheless, after reading the counter-play of numberless influences involved in our present system, the reader may well consider whether the solution lies in permitting an ABA committee, without sanction of any statute, to take over the function of recruiting and obtaining the "best qualified judges and lawyers." Perhaps the most valuable technique for improvement developed so far, is the increasing demand that senatorial candidates pledge in advance not to present any names for nomination until they have conferred with an appropriate Bar Association committee.

Only incidentally does the recital touch upon the system of life tenure itself, but it does quote the position of Lloyd Wright, a former member of the committee and past president of the ABA: "What the ABA ought to do is to exercise its great influence into getting at the root of the evil, to-wit: The method of selection. I have advocated, since 1958, that the ABA propose to Congress a creature of its legislative powers comparable to what we call in the profession The 'Missouri System'." It leads one to wonder why a method which is considered a great improvement for state courts, would not also be a great improvement in the federal system.

For those who desire further insight into the problem of judicial

improvement, this rather short volume will be highly instructive, and in addition, it gives encouragement to the belief that the long battle to take the judiciary out of partisan politics, has made some progress, and will continue to do so.

R. J. BLOEDAU*

OF MEN AND NOT OF LAW. By Lyman A. Garber. New York: The Devin-Adair Company. 1966. Pp. 196. $3.95.

"OF MEN AND NOT OF LAW" AND OF THEE AND NOT ME I SING

Mr. Garber has written a book:
Our judges deserve a close look,
With the American system in danger,
Can you think of anything stranger,
Than a constitution by its judges forsook?
They've departed from stare decisis,
Which I define to be timeless and priceless;
And have abandoned devision of power,
Freedom's long standing tri-partite tower.
I cite the decision on school integration,
As downright unequalled usurpation.
And I refer to Mapp v. Ohio,
An unwarranted encroachment, that cries so!
Why the threat of the Communist plot,
Our high courts have all but forgot;
Where we used to confine Reds to jail,
Now it's only their Constitutional rights we curtail.
And all of these judicial antics,
Are just so much confusing semantics;
It's simply for saving of face,
That our law has been staying apace.
Judicial Modernism the cause of the trouble,
So we'd better some old ism redouble;
Keep it simple's the thing,
Freedom's got a clear ring.
Let them do what the law commands,

*State's Attorney, Hettinger County, Mott, North Dakota.

Exactly as I say it stands,
And from this line should they diverge,
Then we'll have one great impeachment and purge.

OF MEN AND NOT OF LAW is a first book by Lyman A. Garber, whose credentials are those of "a Beverly Hills lawyer,"[1] which purports to deal with basic constitutive arrangements of the judicial process and with recent trends in judicial decisions affecting those arrangements. Regardless of how profound this subject may or may not be, all that Mr. Garber is prepared to offer regarding it is a simplistic and hackneyed political tract, which in effect propagandizes to a lay audience. As such it is difficult to justify this book's review in a scholarly journal, except for the fact, that the book is written by a lawyer. This fact raises the matter of responsible policy promotion *and* study by those who assume the role of legal expert.

There is, of course, nothing new in objecting to the use of professional privileges as propaganda tools. Legal positivists (by persuasion or in practice), as the dominant force in Anglo-American legal thought, have been calling such thinly veiled value judgments by their proper name and worse for most of this century.[2] Many a pained and bridled book review has been devoted to making this excision. So emphatically has the point been made that few competent scholars *acting as scholars* have remained active in policy arenas. Mr. Garber apparently is unaware of this tradition (he makes no mention of the name or idea); clearly, he is not deterred by it. Yet, why should he be? As it happens Mr. Garber is of the opinion that "the American system has been, and is now, under serious attack by Americans,"[3] and that "many lawyers and judges are now in the attackers' ranks—though the thrust of the attack is toward the eventual destruction of this nation; a nation conceived as one of law, not of men."[4] Mr. Garber belongs to a second camp (is there a third, a fourth?):

> On the opposite side of the semantics of *modernity* are many lawyers and informed laymen who view the Common Law as an invaluable tool of our civilization, and as valuable today as it has proved to be throughout history. They hold that one of the keys of American greatness has been its government form—tripartite and decentralized.
> They believe the near-miracles, accomplished under the check-and-balance of the America of an earlier and simpler day, can be repeated in coming decades on an even vaster

1. Garber, OF MAN AND NOT OF LAW, front inside fold of dust jacket (New York: The Devin-Adair Co., 1966) hereinafter cited as Garber.
2. Arnold Brecht presents a conventional historical sketch of the doctrine's growth in various fields in his work POLITICAL THEORY. *Chapter* VI, especially in point are pages 231-36 (1959).
3. Garber 1.
4. Garber 2.

> scale through the initiative of individual Americans. Their simple wish for all Americans, yet unborn, is that they may be free men and have the opportunity to lead meaningful lives. They view usurpation in America—whether by national government, an executive, a legislature, or a judiciary—as not being modern, but as archaic as the devine right of kings.[5]

Why, indeed, shouldn't Mr. Garber defend these legal arrangements for the sake of "American greatness," "near-miracles," "free men," and "meaningful lives," as he perceives these arrangements and values, not for the sake of these arrangements standing alone? It is clear, too, that Mr. Garber makes no distinction between what he regards as "an invaluable tool of our civilization" and the "Common Law." "Usurpation" is, to him, not a technical departure from certain rules, but "as archaic as the devine right of kings." In short, Mr. Garber very much regards law as oriented toward values.[6] It would not be a sufficient answer to say to Mr. Garber's fears, hopes, demands, and consequent actions regarding law that, *technically*, they are not permitted. The question remains, however, what values decided by whom under what conditions and how? Mr. Garber would answer: "the law," pure and simple. This, however, not only hides his value demands, by making "the law" synonymous with those demands, it completely blocks inquiry oriented toward his values or whatever values "the law" serves. It also short changes study of the operations of legal institutions in order to keep to "the law". If Mr. Garber means that law should not be arbitrary, "Not of Men," then we may agree that criteria for responsible legal decision-making *as well as* responsible policy promotion must be specified.

Before attempting to indicate criteria for responsible policy promotion, some of the notions protecting full assessment of that responsibility need examination. Only a few will be mentioned here. One is Holmes' guarantee that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[7] Some others, quickly, are the popularized view of dialogue or "give and take," the redeeming value of seemingly unconventional or unwarranted ideas, some notion about "equal time" or reciprocity of rights, and so forth. The point is to have something more than the bare assertion of some right of free speech. All of these notions may be put to the work of relaxing the instinct for rat smelling or

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5. Garber 99.
6. Throughout this review extensive use is made of the value oriented approach to law developed by Professors Lasswell and McDougal of Yale Law School. An introduction to this theory of jurisprudence may be had from McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of World Order*, 61 Yale L.J. 915 (1952); Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203 (1943). More explicit attention to methodology is given in Laswell and Kaplan, POWER AND SOCIETY (1950).
7. Abrams v. United States, 250 U.S. 616, 630 (1919).

criticism in a derogatory sense. It is quite easily admitted, if simply put, that free speech is a necessary condition of a free society (even overlooking the truism); it is so for a purpose—ultimately taking home a full market basket of human values (comprehensively conceived). That the market is open is no excuse for peddling trash there. Nor does such trash come to the market accurately tagged as to its actual cost in human values. In the present instance the layman is told that nothing less than "the American system" is at stake. In short, it is not enough for the rash propagandist to insist on his right or the other fellows reason to justify feeding refuse to society.

A closer look at some of the conditions in the "market" is more revealing. Competent legal scholars are not competing with Mr. Garber to get the "opposite view" before a large, lay audience. Mention has already been made of legal positivism (it has been alive in lawyers too long to remain significant only as a philosophical difficulty) as a clog in the flow of scholarly policy communications into the "market." Nor do competent legal scholars often or easily write panaceas either inside or outside of this legal prison yard. *Ad hoc* rebuttals are not much more frequent. There are too many factors militating against this, among others: compartmentalization of legal knowledge, technicalization of such knowledge, a serious lack of the broadly based knowledge and skills necessary to social and political inquiry, rising demands of excellence in scholarly work, lack of the techniques and resources needed for reaching large, lay audiences, concerns over reputation and image (including concerns for conventions evaluating work and personality), career and study priorities and incentives, heavy and increasing work loads and commitments, and so forth.

Supposing, however, the willingness, skills, and resources to engage in policy promotion, there are further difficulties. Access to the most effective channels of communication may be limited as in the instant case, for example, by the publisher's demand for a "provocative book,"[8] a "very timely expose,"[9] an "entirely readable book,"[10] or the like. One audience factor to be reckoned with has already been mentioned, the skill level of a lay audience. Audience pre-conditioning has to be met as well. Again, for example, Mr. Garber's book will likely enjoy great success because it is addressed to easily focused (and does focus) fears in our complex and intense society (the lack of some plausible or expert overview of that society is itself frustrating). His book will provide a simple

8. Garber, front inside fold of dust jacket.
9. Garber, back outside page of dust jacket. (quoted from Lloyd Wright's endorsement).
10. Garber, back outside page of dust jacket (quoted from Frank E. Holman's endorsement).

solution (an "apprehensive set" in psychological value theory)[11] allowing the riddance of those fears, *provided* some action is taken from time to time on the solution. (This would be the pure case.) But competent scholars do not engage in such appeals, it is not the heart or habit of on-going scholarship.

Holmes' market of thought metaphor suggests another snare which very much needs avoiding, the idea that so long as the majority becomes persuaded of the better view all will be well with the world. But, there is no "majority" apart from some vote, some decision, some action by a "majority" for the moment influenced by a "minority" whether on the board of "G.M.," or the board of "P.T.A., P.S. 80," or in whatever context within the social process. Nor should the "minority" be conceded to its own spokesman. What these members of society realize from society and what society realizes both now and later from them is too important for that. In short the market of thought metaphor repeated often enough both obliterates the realities of its own operations and the realizations of human values it operates to achieve. Political prescriptions at the hand or slight of hand of the legal expert are just too important to be tossed off lightly.

The question of responsible scholarship in policy promotion and inquiry can quickly grow immense. (Indeed, the truism is that ultimately all knowledge is relevant to the evaluation of such comprehensive scholarship.) To cut the question down it must be seen as performing a function (study and promotion) by a process (the operations involved in such study and promotion) in respect to certain questions (e.g., cure-all to slight and minute adjustment) against inter-related, specified contexts within society toward clearly defined over-all social goals. This cuts the question into meaningful and manageable parts, not to "essentials" or "simple facts." It enables investigation instead of decreeing simplification. Without attempting to be comprehensive or homogeneous, some significant features touching on responsibility appear in the following list of questions:

(1) what relevancy does study and promotion within the area under consideration have in respect to present conditions within the culture;

(2) what human goal values, comprehensively conceived, may be affected and fostered by such study and promotion;

(3) what resources are available and what operations are called for in such study and promotion (e.g., skills, techniques, procedures, approaches, methodology, time, talent, money, etc.);

11. See the basic analytical model offered by Pepper in his work THE SOURCES OF VALUE, Ch. 10 (1958).

(4) what strategic privileges are enjoyed by the scholar which specially commend his work to attention, respect and belief in his intended audience;

(5) what strategies should be employed by the scholar in communicating with his audience;

(6) what specific prescriptions regarding the problems studied should be recommended;

(7) what standards of performance are expected of the scholar by his contemporaries, other experts in related fields, his audience (it is to be noticed that a lay audience may have very vague but exceedingly high expectations regarding scholarship standards);

(8) what commitment to the policies recommended under what circumstances is being made by the scholar, and so forth.

While this list over-laps, it does place emphasis on some of the important questions.

Mr. Garber's work is not addressed to these questions (it is to be noted that no attempt to assign personal blame or imply personal irresponsibility is being made here—the question is what objectively is called for in policy promotion). In passing on Mr. Garber's efforts the question of whether or not he has met the standards of performance expected of scholarly policy promotion (question No. 7, above) need not be belabored. Taking the most narrow technical view of these standards, Mr. Garber utterly fails the test. Stare decisis is defined as "let the decision stand" without further technical elaboration,[12] judicial concern with traditional notions of substantial justice and fair play are said to be efforts to save "judicial face"[13] (the suggestion is that such traditional principles are unwarranted departures from "stare decisis" in the Garberian sense) as one of the principal reasons behind "modern trends"; and something lumped together as "Modernism"[14] and based on "semantics"[15] (neither of which are defined—though the suggestion is clearly emotive) is abroad in the nation and the courts causing "usurpation." Now, there are no insurmountable barriers to acquiring some more informed view of judicial decision-making.

Incidentally,[16] Mr. Garber wants us to know that things have gotten so out of hand that:

> Americans have seen these words, "navigable waters," construed to justify Congress in taxing North Dakota farmers to build flood control dams on dry creeks rising in the mountains of Los Angeles County, and discharging into the Pacific Ocean in Los Angeles County![17]

12. Garber, 89 & 90.
13. Garber, 127-28.
14. Garber, 95.
15. Garber, 94-99.
16. Garber, 91 & 99.
17. Garber, 13.

One might wonder whether or not dry rivers discharge, whether taxes (I suppose income taxes—no case citation is given for the assertion quoted) must be spent within a state only (how?) or whether Mr. Garber has heard of the not-so-dry Red River.

The other listed questions touching on responsible policy promotion by scholars and experts will not be discussed here, except to make brief mention of the first dealing with the need for an assessment of the relevancy of given study and promotion. The question is largely neglected as one of the pertinent tasks of responsible policy scholarship and promotion. (That it may seem all-encompassing is aside from the importance of stressing it.) Unidentified threats ("the American system has been, and now is, under serious attack"[18] — from what?), impending total doom ("Is there danger to America and Americans from the trend to abandon true constitutional government? Unquestionably the great underlying principles of America's sovereignty have been attenuated to a point of hazard. Let us not go to the point of no return."[19]), sweeping accusations ("And to an alarming extent we observe lawyers espousing causes, and courts issuing decisions that display, in common, an enchanted disregard of known human conduct. They even display minimal regard for the security of the United States.")[20], rash cure-alls are not necessarily the product of careful identification of broad social conditions and trends or even of the conditions and trends immediately pertinent to the problem under consideration.

The point is let us have policy study and promotion by legal scholars, but let it be objectively and broadly responsible.

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18. Garber, 1.
19. Garber, 170.
20. Garber, 166.

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