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Honesty and Competition

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BOOK REVIEWS

Honesty and Competition. GEORGE J. ALEXANDER. Syracuse, N.Y.: Syracuse University Press. 1967. Pp. xv, 302. $10.00.

One of our more popular political games of the moment is certainly "consumerism," and, apparently, any number can play. Professor Alexander's book is a compendium of the past, current, and possible future rules of the game, and its subtitle—"False-Advertising Law and Policy under FTC Administration"—marks the boundaries around a fertile field of play.

The veteran professional team is, of course, the Federal Trade Commission, coached since 1961 by one of the game's more spritely innovators, Chairman Paul Rand Dixon, a playing manager who hits for both average and distance. Recent Congressional entries (whose several stadia have been the scene of some of the game's most colorful contests) have a record of sustained victory streaks only slightly tempered by the fact that committee chairmen often serve simultaneously as team captain and referee.

Other federal agencies play an exhibition schedule of at least Triple-A calibre.[1] Sideline entertainment has been provided by Ralph Nader, perhaps the first freelance cheerleader to gain national recognition, and, more lately, Betty Furness, current White House champion. Lively minor league action has been and will be seen in a score or more of our state legislative arenas,[2] while Canadian and British

1 For instance, one recalls that, quite apart from its statutory responsibilities, (*e.g.*, Spear & Staff, Inc., CCH FED. SEC. L. REP. ¶ 77,216 (1965)), the Securities and Exchange Commission has taken occasion to publicize its concern at the placement in particular media of financial advertising opposite stock market reports. Along similar lines, recent anti-tobacco edicts of the Federal Communications Commission look to a balancing of the "editorial content" of broadcast advertising of cigarettes.

2 State enactments dealing generally with false or deceptive commercial practices have been more or less incited by, or modelled in some degree upon, various proposals for such legislation sponsored by the FTC, the Council of State Governments, and the National Conference of Commissioners on Uniform State Laws, whetted perhaps by the Reports of the House Committee on Government Operations. *See, e.g.*, H.R. REP. No. 445, 88th Cong., 1st Sess. (1963); H.R. REP. No. 921, 88th Cong., 1st Sess. (1963). For representative acts, see ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1956); HAWAII REV. LAWS §§ 205-1 to -13 (1955); ILL. ANN. STAT. ch. 121½, §§ 261-72 (Smith-Hurd Supp. 1967); VT. STAT. ANN. tit. 9, §§ 2451-62 (Supp. 1967); WASH. REV. CODE ANN. §§ 19.86.010-.920 (Supp. 1967). For a current proposal discussing various relevant considerations, see NEW YORK STATE BAR ASS'N, REPORT OF THE COMMITTEE ON NEW YORK STATE ANTITRUST LAW (1967). For a study of the Uniform Act, see Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967). For common law developments, see Dole, *Merchant and Consumer Protection: The New York Approach to the Regulation of Deceptive Trade Practices*, 53 CORNELL L. REV. 749 (1968).

portents[3] indicate that the game may soon become as international as soccer.

With the sport booming so, Professor Alexander's rulebook arrives none too soon for combatants planning the next game, spectators devoted to video replay, and old-fashioned Monday morning quarterbacks.

The book begins with a quick survey of the standards evolved by the FTC to limit deception in the offering of goods and services, and follows with a chronicling of virtually all the errors of omission and commission of the hard-running, guileful ball handlers who have challenged consumer credulity in the past. According to Professor Alexander, the Commission's decisions reflect simply a determination to identify and proscribe deception for deception's sake, without pinpointing the public interest being protected or revealing much Commission awareness of its potential function in clearing the channels of communication for the transmission of meaningful product information. Many would agree that this is valid criticism. It may well follow that such forensic tools as "false and misleading" and "public health and safety," invoked in the name and interest of the "credulous" and "trusting" consumer, of "wayfaring men, though fools," and even of "Mortimer Snerds,"[4] have sped the demise of that old hero of the common law, *caveat emptor*, without markedly realigning advertising objectives. Pointing to the diverse views of the Commission's role, which some years ago split the District of Columbia Circuit in *Alberty v. FTC*,[5] and the countervailing, if sporadic, affinity of the Commission for requiring affirmative disclosures—often of a quite particularized nature—in advertising, Professor Alexander comes down foursquare for a positive FTC policy "to encourage the informative function of advertising."[6]

The bulk of the text comprises an imaginative and thorough analysis of the particular sins of those who have sought unfair commercial advantage in the trumpeting of their wares. Product names are often misleading, suggesting nonexistent attributes and differences from competitive offerings. Similar difficulties are encountered in promoting

[3] The Canadian Parliament is currently considering a bill to make false advertising a misdemeanor. C-195, Sec. 102 (1967). British champions of consumers have advocated overall limitations on corporate advertising expenditures, seemingly more a noise abatement (and antimonopoly) scheme than an effort to compel honest advertising.

[4] *See, e.g.*, FTC v. Standard Educ. Soc., 302 U.S. 112, 116 (1937); General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941). *Cf.* Independent Directory Corp., 47 F.T.C. 13, 31 (1950) (dissenting opinion), *aff'd*, 188 F.2d 468 (2d Cir. 1951).

[5] 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950).

[6] The words are from Judge Bazelon's dissent in *Alberty*. *Id.* at 45.

product capabilities and functions and in accurately and fairly transmitting price information at both pre-trial ("list" pricing and preticketing) and retail (value and cost claims, "free" goods, and special sales) levels. The pace picks up somewhat as we tour through the sections on false indicators (trademarks and other trade symbols), testimonial advertising, and some of the more hardcore promotional gimmicks, such as the essentially fraudulent and uniformly condemned "bait-and-switch" lures and unsolicited deliveries.

The catalog finally pays considerable attention to gambling promotions and lotteries, areas to which practitioners have long been alert, but which, as the author suggests, might be worth a second and deeper look. From the standpoint of their legality, Professor Alexander would pass filling station award games (since only fungible gasoline is at stake), but would veto similar games in food markets because the gaming promotion "might help to reinforce irrationality" in the housewife's choice of one store over another. It might be noted, however, that there are always irrational elements in a consumer's decision, induced or augmented by any number of trade features—parking, baby tending, Muzak, decor, and even pleasant sales personnel—that lie well beyond FTC jurisdiction. More interesting is Professor Alexander's suggestion that the FTC's almost congenital opposition to the sale of products by any scheme that smacks of gambling should be reexamined in light of the general social—and, of course, political—reassessment of gambling as a factor in American life.

These considerations, however tangential they may appear, lead back to the principal thesis of the book—that *caveat emptor* is dead and, inferentially, consumerism is king. Professor Alexander, and others,[7] would now concentrate on giving the consumer accurate and meaningful information on which to base his individual and collective decisions.

Professor Alexander also urges that the Commission become more experimental in its procedures and techniques, that it concern itself more with broader policy concepts than its judicial processes adduce, and that it "give adequate consideration to important aspects of national interest." Refinement of so broad a proposal is clearly in order, but the author pretty much lets it go at that. Professor Alexander leaves us poised at the threshold and, to some, this will be the signal failure of his book. But we have much independent evidence that the suggestion

[7] For instance, since taking charge of the Antitrust Division, Harvard's Donald Turner has repeatedly called for new sources and, perhaps, transmittal systems of product information.

has been grasped and implemented, whether from this or other sources, instinctively or full-blown from Jove's forehead. In any event, experimentation—the search for certainty, for ultimate truth—is on. Indeed, consumerism may not long be a game, but simply a foxhunt with little or no play left for the competitive aspects of "creative" advertising (whatever the connotation).

Two principal developments have occurred recently bearing on the plea for a more positive policy approach. First, the Commission has launched rulemaking proceedings designed to foreshorten, if not obviate, evidentiary proceedings in prescribed product advertising,[8] thereby running through the red flag raised by at least one court against "the procedural impropriety of the Commission's use of official notice as a substitute for proof . . . ."[9] It is widely believed that, if adopted, these rules will be legislative or substantive in character and therefore virtually self-executing. If so, they will stand in marked contrast to the interpretative Guides and Trade Regnlation Rules heretofore issued (and set out *in toto* as the book's appendices). Had this development been anticipated and discussed, the book would have been enhanced.

Second, the Commission has directly entered the civil rights arena, an obviously important aspect of national interest, by charging deception to landlords ostensibly offering rental housing to all, without revealing that the apartments are not, in fact, available to Negroes.[10] One need hardly qualify as a bigot or racist to question either the FTC's function or its potentiality for meaningful accomplishment here.

Whether or not the Commission can really do the job of reconciling the clear-cut need for honesty with the insistent demands of a supposedly free, competitive economy is, therefore, a very real question. That the Commission has stumbled in the past and even taken a few inglorious pratfalls in the course of its case-by-case articulation of not only unlawful but also unsound advertising practices[11] is not necessarily—or even, some would say, arguably—sufficient reason to delegate the functions of broad policy formulation to the Commission. Given all that sound administrative expertise entails, we might still prefer that the consumer, as king, ultimately rule himself rather than be screened

8 Perhaps the most provocative proceeding initiated since Professor Alexander published relates to advertising of systemic analgesic drugs. Proposed Trade Regulation, 32 Fed. Reg. 9843, 17601 (1967). If promulgated, the Commission promises henceforth to "rely upon the Rule to resolve" relevant issues in adjudicative proceedings.

9 Dayco Corp. v. FTC, 362 F.2d 180, 187 (6th Cir. 1966).

10 First Buckingham Community, Inc., FTC Docket 8750, 3 TRADE REG. REP. ¶ 18,122 (1967).

11 *See, e.g.*, FTC v. Sterling Drug, Inc., 215 F. Supp. 327 (S.D.N.Y.), *aff'd*, 317 F.2d 669 (2d Cir. 1963).

from the life of the market by a regulatory regency. There is, after all, still something to be said for free choice, however erratic, irrational, or even irresponsible. To the extent that Professor Alexander inveighs against decisional nit-picking, he does us the service of reminding us that administrators cannot be made infallible by Congressional fiat, but will always function in the realm of human frailty, again not necessarily an unhealthy thing. As I read Professor Alexander, the message is, simply, "protect the consumer, sure, but don't patronize him." In the long run, the consumer's role in the competitive order contributes significantly to keeping the competitors honest and, for that reason alone and without reference to *caveat emptor*, is worthy of retention.

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Dollars, Delay and the Automobile Victim. Studies in Reparation for Highway Injuries and Related Court Problems. WALTER E. MEYER RESEARCH INSTITUTE OF LAW. Indianapolis: The Bobbs-Merrill Company. 1968. Pp. xvii, 486. $9.50.

Last September, my students were led into the thicket of tort law via a heretofore winding and incomplete path—liability insurance. There were recent reports of a bold, new program to construct a superhighway, broad and straight, through the thorniest part of the thicket. Our travels uncovered numerous surveyor's stakes along the path, but it seemed that scarcely a spade of earth had been turned. Perhaps I would have been better able to convince my students that appearances are deceiving, had the present volume of readings been at hand as a guide.

The text gathers studies conducted over the past decade by scholars under grants from the Walter E. Meyer Research Institute of Law.[1] As described by Professor Maurice Rosenberg in his Foreword, these and other investigations not yet completed "constitute a near-monopoly of the findings and writings produced in this generation on the actual operation of present systems for compensating traffic victims."[2] With the number of traffic injuries climbing into the tens of millions and direct costs soaring to billions of dollars, no problem in tort law commands higher priority for research and resolution.

The contributing authors range over a spectrum of interrelated problems organized under three major heads: "Dimensions of the Economic and the Delay Problems," "Proposed Remedies for Congested Courts," and "Theories and Proposals for Improved Reparation Systems." The compilation opens with samples of field work and statistical analyses that lay bare the shortcomings of common law tort liability and accident compensation,[3] and concludes with observations drawn in part from the Michigan survey of automobile accidents.[4] It is interesting to correlate the conclusions reached by some or all of the

1 Accordingly, the text does not include some of the major contributions in this area, such as W. BLUM & H. KALVEN, PUBLIC PERSPECTIVES ON A PRIVATE LAW PROBLEM (1965); A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM—A VOLUNTARY COMPENSATION PLAN (1954), appearing also in 43 CALIF. L. REV. 1 (1955); 1 F. HARPER & F. JAMES, TORTS, ch. XI (1956); COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

2 P. iv.

3 Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

4 A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964).

authors: Where the victim retains an attorney, the incidence and amount of recovery are significantly greater; recoveries are, for the most part, modest—but severe injuries are generally undercompensated while minor injuries often are overcompensated; many injuries go totally uncompensated; large settlements are not reached at the earlier stages of a claim, and the pressure for settlement usually operates oppressively upon the low-income victim. A concensus emerges that the individualized procedure of tort litigation and the multifarious sources of reparation (jury awards, health insurance, social security, workmen's compensation, accident insurance, and automobile liability insurance) do not achieve an equitable and efficient solution.

Having raised these complex issues, documented by actual case studies, the symposium proceeds to the procedural problems of accident litigation. The guiding hand of Professor Rosenberg is evident throughout the finely drawn analyses of special procedures designed to reverse the pattern of congested calendars and to reduce the hardships attendant upon delay in the courts. Again, there are findings based upon empirical studies; conclusions may be at least tentatively drawn evaluating the efficacy of techniques initiated in some jurisdictions—auditors, split trials, arbitration. All these selections serve to enlighten the student of procedure as well as the student of torts.

The last part of the text presents excerpts from the famous study of Professors Keeton and O'Connell,[5] a brain-stretching sally into economic theory by Professor Calabresi,[6] and a comprehensive overview with recommendations by Professor Conard.[7] The details of the Keeton and O'Connell "Motor Vehicle Basic Protection Insurance Act" are summarized,[8] including the major proposal for benefits up to ten thousand dollars for personal injury without proof of fault. Pain and suffering and property damage are excluded from basic protection benefits. A scheme of compulsory private insurance is recommended, but no proposal is advanced for an agency, such as a workmen's compensation board, to handle claims. The program includes an assigued claims plan, the net loss principle to eliminate overlapping benefits, supplementary coverage, periodic rather than lump sum reimbursements, and many other features.

Of course, the Keeton and O'Connell plan must be read in full

5 R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

6 Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965).

7 Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964).

8 Pp. 341-66.

to appreciate its craftsmanship and foundations. The particular provisions noted above exemplify its scope and tenor. It is significant that the authors agree with earlier suggestions that economic loss (work loss) must receive prompt, if minimal, compensation outside the framework of tort liability concepts, and that pain and suffering damages must be retrieved through extra insurance coverage or a negligence trial. The creative suggestions of Professors Ehrenzweig,[9] James,[10] and Morris[11] are in accord with some of the fundamental propositions upon which the plan has been built. It has been a long time since the *Columbia Report* of 1932,[12] and many a good idea has been dropped in the hopper. Now, finally, a plan has issued forth that is so complete it has been introduced into the New York legislature without any modification of substance.[13]

Since not only the legal activist, but also the prospective lawyer and legislator, should be apprised of the surge of the law in a long-awaited direction, I recommend that students be directed toward this symposium and encouraged to sample its contents. It offers a rich selection of theoretical, empirical, substantive, and procedural studies, at a level of integration that many students would not encounter until a seminar in their final year. In probing the problems of accident reparation, the student touches the reality of the world in which he must function.

*Josephine Y. King**

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9 *Supra* note 1.

10 *Supra* note 1.

11 *Supra* note 3.

12 *Supra* note 1.

13 (1968) Sen. Int. No. 3055 (Mr. Bronston), (1968) Assem. Int. No. 4772 (Mr. Kretchmer) ("An Act to amend the vehicle and traffic law, in relation to establishing the motor vehicle basic protection insurance act").

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Presidential Elections. (2d ed.). NELSON W. POLSBY AND AARON B. WILDAVSKY. New York: Charles Scribner's Sons. 1968. Pp. xv, 304. $4.95. ($2.50 Paperbound).

Springboard to the White House. JAMES W. DAVIS. New York: Thomas Y. Crowell Company. 1967. Pp. xii, 324. $5.95.

The Republican Establishment. STEPHEN HESS AND DAVID S. BRODER. New York: Harper & Row. 1967. Pp. vi, 440. $7.95.

In every presidential election year the reader faces a deluge of books that claim to offer special insight into the coming election. Such volumes fall into several categories: campaign biographies (authorized or not), collections of past speeches designed to portray the candidate favorably, arguments in favor of certain election strategies, and more serious studies in presidential politics released in time for the greatest market impact. This review will consider several recent books purportedly in the last category.

I

One's first goal should be to understand the framework of presidential politics. Professors Polsby and Wildavsky's revised edition of *Presidential Elections* is an excellent piece with which to begin that task. Their thesis is: "The strategies of participants in a Presidential election make sense, once we understand the web of circumstances in which they operate."[1] The campaign can be visualized as a giant chess game. Each player seeks to capitalize on his board strength and attract a majority of the electorate within the following strategic environment:

(*1*) Most people do not care about most things most of the time.

(*2*) They therefore vote out of party habit rather than in response to policy appeals.

(*3*) People tend to vote only when prodded by groups of activists (parties), though Republicans generally need less prodding.

(*4*) Parties exist to win elections.

(*5*) Either party has a reasonable chance to win most national elections:

(*a*) the Democrats because they are in the majority, and

(*b*) the Republicans because they are more likely to vote, have better access to money, and are favored by the press.

[1] POLSBY & WILDAVSKY at 3.

(6) Interest groups (every voter belongs to several) can be activated by policy commitments and promises of access to government decision-making.

(7) Each national party is a loose coalition of interest groups and state and local parties.

(8) The electoral college favors voters in large, two-party states.[2]

This information is familiar to political scientists, but not to amateur analysts who believe in a policy-oriented, independent electorate. The authors believe this system to be remarkably stable;[3] even in 1964, when the Republicans seemingly ignored conventional doctrines, the election proved the validity of the above-stated principles.[4] Yet, it might be difficult to convince the ardent supporters of Senators Goldwater and McCarthy, who so highly value ideological purity. Has the post-Sputnik educational revolution created a better informed and more policy-oriented electorate? Do the "rules" operate when there is a single overriding issue such as extremism or war? Perhaps these questions follow the tendency of the political scientist to convert statistical patterns into immutable rules.

The book's greatest weakness is its failure to consider how voters form party and policy preferences. The authors do discuss Republican ownership of newspapers, but their conclusions are based on studies more than ten years old.[5] This emphasis hides an important fact: since 1956, television has become the most significant source of voter information.[6] If control over dissemination of political information is a major political asset, we should examine the corporate structure of networks rather than newspapers. Whoever prepares the fifteen-second stories on elections has far more influence than the newspaper publishers in shaping the public's view of issues and personalities.

II

How does an aspirant win his party's nomination for President? One obvious path toward that goal is the presidential primary election. In *Springboard to the White House,* Professor Davis has com-

2 For an interesting statistical proof of this fact, see Banzhaf, *One Man, 3 312 Votes: A Mathematical Analysis of the Electoral College,* 13 VILL. L. REV. 304 (1968).

3 POLSBY & WILDAVSKY at 56.

4 *Id.* at 169-70.

5 *Id.* at 43-51. They concede that the working press is strongly Democratic.

6 V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 345-51 (1961).

piled an interesting array of statistics concerning primaries since 1912. He has not, however, put the raw data into a workable analytical framework. Consequently, his book is an unhappy compromise between journalistic and academic styles. It neither explores the thought process of political decision-makers nor explains what political analysts hope to learn from primary results. Furthermore, Davis tends to stretch the facts to establish his "firm conviction" that the John F. Kennedy school of winning presidential nominations by proving vote-getting ability in the primaries is in accord with United States political reality.[7] In fact, no presidential candidate has yet created his nomination coalition out of the primaries. This is not to assert that primaries have no meaning. They are a means to an end, but not an end in themselves. The primaries are both a dramatic assertion of a segment of public opinion and a vehicle serving several additional political functions.

Primaries confirm reality. Davis greatly exaggerates their influence when he asserts that Wayne Morse and Margaret Chase Smith were presidential primary knockout victims.[8] These Senators were never in the race, except possibly in their fondest dreams.

Primaries salve consciences. The 1948 Oregon primary merely indicated that Dewey was slightly more popular than Stassen among Beaver State Republicans. Yet, it "proved" to politicians, who had no use for Stassen, that he lacked popularity and political skill.[9] Barry Goldwater's victory in the 1964 California primary gave old-line Taft supporters, yearning to nominate a conservative, an acceptable reason for so voting.[10]

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7 DAVIS at v.

8 *Id.* at 108. Senator Morse lost the 1960 Democratic primary in Oregon, Senator Smith the 1964 Republican primary in Maine.

9 Stassen made several basic errors in strategy. He divided his time between Ohio, where the Taft-Bricker organization was strong, and Oregon, the important battleground. *Id.* at 58-59. Stassen was trapped by his continual insistence on a face-to-face debate with Dewey. Suddenly, the challenge was accepted by Dewey, who proposed ground rules and location strongly in his favor. The radio debate was a disaster for Stassen. He also failed to become more than a regional governor. Stassen moved to Pennsylvania instead of trying for the Senate seat that eventually led Hubert Humphrey to the Vice-Presidency. (This interpretation is derived from a conversation on January 30, 1964, with the late Victor Johnston of the Republican Senatorial Campaign Committee, a former associate of Governor Stassen.)

10 Goldwater received only 51.1% of the vote but all 86 delegates, because California law requires a slate of candidates equal to the total number of delegates. CAL. ELECTIONS CODE § 6052 (West 1961). If the delegates had been elected by Congressional districts, Rockefeller would have been entitled to at least 32 delegates. Los Angeles Times, June 4, 1964, at 17, col. 6. This quirk in the electoral law significantly increased the psychological impact of Goldwater's victory and gave him a solid bloc of delegates, nearly 15%

Primaries kill liabilities (or confirm them). Politicians may hesitate to select a given candidate because of a suspected flaw in his political image. In 1960 Kennedy showed that his Catholicism, youth, and inexperience would not be handicaps in the general election. In 1952 Taft was not given the nomination his party so desired to bestow upon him, because he failed to kill the nagging fear that "Taft can't win."

Thus, the strategies of participants in primary elections do make sense. Each candidate attempts to use the primaries to persuade political leaders of certain facts favorable to his election. Could public opinion polls fulfill these functions as well? A sophisticated poll can indicate more precise impressions of the public mood than the yes-no choice of a primary. If so, why an election? Polls reach a representative sample of the people, but the electorate, people concerned enough to vote, is not necessarily representative. Primaries approximate the aura of electoral choice in providing raw data for analysis along with the polls. A national primary would not improve the process. Most practical observers agree that the cost of a national primary would be prohibitive (in the absence of federal subsidies), that it would not be an effective method of narrowing the electoral choice to two candidates, that it would be highly destructive of a stable two party system, and that it would probably decrease the effectiveness of public choice over the nomination.

III

This discussion has assumed that the President is nominated by unequals—people, delegates, and party leaders. There is no one-man, one-vote rule. Who are the mysterious powers-that-be? What motivates them? How do they lead? In *The Republican Establishment,* Hess and Broder have made a valuable journalistic attempt to answer these questions. Their emphasis on the candidates, though it limits the long-term usefulness of the book, is clearly worthwhile because of the depth of their studies into the personality of each candidate and the men behind him. Of course, there are problems in editorial selection—*e.g.,* Nelson Rockefeller was omitted. The *National Review* views this year-old arbitrary decision as proof that Rockefeller is not a significant figure in the coming election.[11] Broder takes re-

of the vote needed to win. These delegates, combined with other committed delegates, made the nomination virtually certain. This provided the Taft wing of the party with another reason to support Goldwater.

11 Bauman, *The GOP Today,* 20 NATIONAL REVIEW 95 (1968).

sponsibility for the choice; he believed that the Republicans, who booed Rockefeller in the Cow Palace only four years ago, could not possibly nominate him. This conclusion may be correct, but it is obvious from the pressure placed on Rockefeller in March to enter the race that many party professionals believe him to be the strongest candidate. Broder has since drawn two lessons from these facts: the political situation can change rapidly, and the press has a very poor record of predicting such changes.[12]

The authors' view of the GOP can be examined in terms of Richard Nixon, the front runner for the presidential nomination. He is a man of experience who fervently hopes to be President. His mission in life is a function of his desires, social background, religion, intellect, and ability to withstand pressure. The other potential candidates have different mixtures of the same qualities; they are working at cross purposes toward a similar goal and within the given power structure. The National Committee is a group of technocrats rather than ideologues; because they desire the satisfaction and power that flows from placing men in office, their goal is to promote winners rather than policies. The congressional leadership represents the Main Street entrepreneur. Since it seeks to assert the greatest possible influence on legislation, given its minority position, it must often form coalitions of opposition. Because people oppose legislation for vastly different reasons, any attempts to form definite alternatives can only weaken the influence of minority party leaders. The governors are not in a minority position; thus, they desire effective solutions to political problems rather than mere influence. Party financiers promote personalities for the same reasons as the technocrats and, in addition, to further ideological purity or the stability in which their economic interests can best be advanced. It is clear that the goals of these major power centers are not entirely consistent. Herein lies the conservative-liberal split in the party.

Hess and Broder did not set out to prove a thesis as did the authors of the other books considered. Yet, they believed their project was useful, because they accepted the observation of Governor Evans of Washington that the 1966 elections gave the Republican Party "the luxury of choice."[13] It appears, however, that the Republicans may follow the same course as in 1960 when Governor Rockefeller believed Vice-President Nixon too powerful within the party organization to be denied the nomination. Both parties are selecting candi-

12 Conversation with David S. Broder, March 11, 1968.

13 HESS & BRODER at 1.

dates to solve today's problems by methods based on obsolete social configurations. The Democratic candidates are attempting to recreate the old Roosevelt, Stevenson, or Kennedy coalitions. Do the parties lag behind the times because of the length of time it takes to achieve leadership? When leaders reach power, have they done so on the basis of social judgments formed many years previously? When both major political parties are substantially dominated by interests unconcerned with or opposed to the basic premises on which the society operates, the situation cannot remain static. There is too great a tendency on the part of the political parties to promulgate dogmatic answers to complex issues by generalizing many partially analogous local problems into one large national problem. The new dominant party will be the one that is first to develop pragmatic solutions, whether based on conservative or liberal premises, to the problems of everyday living created by an industrial society in a world of rapid social change.

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The Jury and the Defense of Insanity. RITA JAMES SIMON. Boston: Little, Brown and Company, 1967. Pp. xiv, 269. $10.00

The Jury and the Defense of Insanity is an attempt to study and document a single aspect of Anglo-America's most revered and maligned legal institution, the criminal jury. The institution is exhaustively examined in an attempt to formulate certain conclusions about the manner in which a jury handles or mishandles the legal concept of insanity as a criminal defense. Although Professor Simon approaches the subject primarily as a social scientist, she also displays an awareness of the concern of current legal scholars and jurists for the usefulness of the jury as the ultimate trier of fact, especially in technical and specialized areas involving professional expertise.

How often has the trial lawyer, in defeat, said: "If only I had . . . the result might have been different." By changing the format presented to different juries, Miss Simon is able to provide some insight into this dilemma. The study was conducted as part of the controversial University of Chicago Jury Project. The technique involved using actual jurors drawn from panels in Chicago, Minneapolis, and St. Louis, and submitting to them an edited and taped transcript of an actual trial. The psychiatric testimony was varied in different trials, as was the type of crime charged and instructions on the ultimate issue of sanity. A statistical analysis was compiled of juror types, including the following factors: occupation, income, education, political preference, sex, ethnic background, religion, age, and social status. The percentage of ballots cast for a gnilty verdict by the above types is revealing in light of contemporary sociological and legal rules of thumb used in "voir dire" jury selection. The author's conclusions need not always be accepted for the reader to gain insight into the jury and to affirm or reject personal opinions and preconceptions based only on individual experiences.

The author devotes a chapter to the "Sound of the Jury," which analyzes in detail specific jurors' reactions to certain types of evidence and testimony and the relative weight attached to the variables. One significant conclusion is that jurors clearly lay much greater stress on immediate environmental circumstances than upon "case history" environment, which is so often dwelled upon in psychiatric analysis and testimony. The interplay of individual minds, the art of persuasion among individual jurors—both rational and irrational—provide a unique and fascinating peek at a living human institution attempting to reach a just result under rules of law and disputed sets of facts. To

convey a feeling of what this experiment has sought to capture, the author has included in the appendix a single transcript of one of the juries, including the variables they considered and their individual backgrounds.

This project and its treatment was an ambitious endeavor. It necessarily falls short of assessing the effect of the infinite number of variables that influence a jury in a close case on the facts. It should not be read as a complete and definitive analysis of the workings of a criminal jury. If it is, it will be misleading because of its emphasis on uniformity in presentation. The courtroom will always remain a living stage, a spontaneous drama with different actors and directors, all with unique ideas on what is effective and persuasive with their audience, the jury.

This analytical treatise, however, gives a clearer insight into the jury at work and the effect of several types of psychiatric testimony before various types of jurors under different instructions of law. This was its object, and to the extent that the work confines itself to this limited analysis, it is effective. The book also is of value to those who practice the more subtle and imaginative arts of trial advocacy in an actual courtroom, where the environs are less controlled and therefore the results less predictable.

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The New Industrial State. JOHN KENNETH GALBRAITH. Boston: Houghton Mifflin Company. 1967. Pp. xiv, 427. $6.95.

In *The New Industrial State,* Professor John Kenneth Galbraith picks up right where he left off in his previous work, *The Affluent Society.* Once again, his objective is to clarify our thinking about American political economy and to take on the "conventional wisdoms" that prevail. In this writer's opinion, the author attains these goals.

To begin with, Professor Galbraith describes the importance that economic planning has assumed as a result of technological innovation and concomitant specialized tasks. Technology has impelled business to make judgments that involve planning. But a firm cannot plan if it cannot predict its prices, sales, and labor and capital costs. The market creates uncertainties that the employer seeks to eliminate in different ways: (*1*) by superseding the market through vertical integration; (*2*) by controlling prices by the buyer and/or seller through size and consequent economic power; (*3*) where units are large, by entering into contracts that specify prices for and amounts of products to be sold and bought for substantial periods of time.

But all these routes necessitate size. As Galbraith says:

> Size is the general servant of technology, not the special servant of profits. The small firm cannot be restored by breaking the power of the larger ones. It would require, rather, the rejection of the technology which since earliest consciousness we are taught to applaud. It would require that we have simple products made with simple equipment from readily available materials by unspecialized labor. Then the period of production would be short; the market would reliably provide the labor, equipment and materials required for production; there would be neither possibility nor the need for managing the market for the finished product. If the market thus reigned there would be, and could be, no planning. No elaborate organization would be required. The small firm would then, at last, do very well. All that is necessary is to undo nearly everything that, at whatever violence to meaning, has been called progress in the last half century. There must be no thought of supersonic travel, or exploring the moon, and there will not be many automobiles.[1]

The consequences are manifold. For one thing, Professor Galbraith argues that the "technostructure" of corporate specialists who run the firm's affairs are not primarily concerned with maximum profit. Growth and a reasonable flow of earnings—sufficient to satisfy the stockholder whose interest *is* maximum profit—are the main objective. General Motors will not—as it could—drive American Motors out of

[1] P. 33.

business through price cuts.[2] Without feigning altruism, the corporations have goals distingnishable from those of their buccaneering predecessors.

In light of this analysis, it is easy to understand Professor Galbraith's contempt for antitrust legislation. For him, antitrust prosecutions constitute a misgnided attempt to turn back the clock. But one point he does not discuss is the restraining influence that antitrust law may have on the technostructure. Is it not possible that the absence of these restraints might contribute to a resurgence of some degree of profit maximization? On the technostructure's responsiveness to the owner (*i.e.*, stockholder) under these conditions, Professor Galbraith is silent.

There are other weaknesses in *The New Industrial State.* Although the author points out the acceptability to business of Keynesian economics and governmental spending, the fact is that much of this acceptability is premised on space and military contracts. What will be the reaction of the technostructure when these relationships come to an end? The book does not say.

Another weakness is that the role of trade unionism in public employment is relegated to a footnote.[3] This is particularly unfortunate in light of the following conclusion:

> Since World War II, the acceptance of the union by the industrial firm and the emergence thereafter of an era of comparatively peaceful industrial relations have been hailed as the final triumph of trade unionism. On closer examination it is seen to reveal many of the features of Jonah's triumph over the whale.[4]

Events have a way of making the printed word obsolete. Not only is there now a general upswing in industrial disputes, but also the relationship between trade unions and public employers has substantially contributed to the increase in stoppages of the past two or three years. In the public sector, labor-management relations have not reached the age of maturity of which Galbraith speaks. This is because both parties are novices, and, more important, the owners of the enterprise (taxpayers) seem rather reserved about paying the costs of public services.[5] All this deserves more than a footnote.

One of the wisest points in *The New Industrial State*—and one that is not sufficiently understood by Western intellectuals—is, in the

2 *See* Gould, Book Review, COMMONWEAL, June 9, 1967, at 350.

3 P. 276 n.5.

4 P. 281.

5 *See generally* State of New York, Governor's Comm. on Public Employee Relations (March 31, 1966).

author's words, a "digression." I am referring to Galbraith's contention that socialism (or nationalization of basic industry) is irrelevant as a means to achieve effective governmental regulation of the technostructure. Once management and ownership evolved as separate entities, the idea of nationalization became an anachronism.[6] Galbraith puts it this way:

> When the case of democratic socialism began to emerge in the closing decades of the last century, the capitalist entrepreneur was still in authority. The firm was small enough and the state of technology simple enough so that he could wield substantial power of decision. The belief that his power could be exercised instead by a parliament or by a directly responsible agent was not an idle dream. Certainly a public body could supersede his power to set prices and wages and therewith his power to exploit the consumer and the wage-earner.
>
> The misfortune of democratic socialism has been the misfortune of the capitalist. When the latter could no longer control, democratic socialism was no longer an alternative. The technical complexity and planning and associated scale of operations, that took power from the capitalist entrepreneur and lodged it with the technostructure, removed it also from the reach of social control.[7]

Professor Galbraith concludes by prophesying that the growing "educational and scientific estate" will serve as the new counterweight to technostructure policies. He laments the artificial creation of consumer demand through advertising by the technostructure. The educational and scientific estate, having more organizational independence than the technostructure and a disdain for the latter's campaigns to create markets, is increasingly influential. In the author's opinion, it will take the place of the unions and the rest of the New Deal coalition and play a meaningful political role—*i.e.*, restraining technostructure planning that is against the public interest.

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6 *See* C. CROSLAND, THE FUTURE OF SOCIALISM (1956).

7 Pp. 103-04.

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