Book Reviews

The Insanity Defense. By Abraham S. Goldstein. New Haven, Connecticut and London, England: Yale University Press. 1967. Pp. vii, 289. $6.00 (hard-bound); $1.95 (paper).

This book was suggested, the author advises, by Chief Judge David L. Bazelon of the District of Columbia Circuit. Professor Goldstein acknowledges in his preface indebtedness to the learned judge, undoubtedly the most famous of the current judicial craftsmen of law and practice respecting the "mentally ill". The book professes to owe other debts also, both financial and intellectual: support by the Foundations' Fund for Research in Psychiatry; a grant from the National Institute of Mental Health; a Guggenheim Fellowship; the "intellectual support" of the faculty and students at Yale Law School; and the efforts of several research assistants. The product is a valuable, well-researched, perceptive and analytical study of the insanity defense. The more one studies it, the more impressed one becomes with the depth and breadth of thought and analysis that have gone into it.

A close study of the book persuades the reader that the author is one of our most knowledgeable students in the working of the current bureaucratized, "therapeutic" system of criminal law. The present situation is known to many, but few scholars other than Professors Szasz,[1] Arens[2] and Blumberg[3] have dared to bring the more provoking questions into public discussion. The book is nevertheless very judicious in tone and, under the circumstances, extraordinarily circumspect in the judgments made. In fact, the book enjoys these qualities in such full measure that it really is rather difficult to review.

Anyone who has read Professor Graham Parker's *A Field Guide to Book Reviewing,*[4] knows how the job is to be done,[5] or at least has fair warning of eleven common approaches which should be avoided. A typical reviewer, "the nit-picker extraordinary," "wants everyone to know that he has read the book but he certainly does

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[1] Thomas S. Szasz, *Law, Liberty, and Psychiatry,* (New York, 1963); *Psychiatric Justice,* (New York, 1965).

[2] Arens, *Due Process and the Rights of the Mentally Ill,* (1964), 13 Cath. U. L. Rev. 1.

[3] A. Blumberg, *Criminal Justice,* (Chicago, 1967).

[4] (1967), 20 J. Leg. Ed. 169.

not intend to stick his neck out and make any value judgments on the contents."[6] The *Reader's Digest* variety of review, on the other hand, is of value only to the reader who never reads books. With Professor Parker's map as our guide, it should now be possible to avoid such worthless methods.

The Goldstein book is about the insanity defense. Though discussion of the question of criminal responsibility has long been dominated by arguments concerning the respective merits of the *M'Naghten*[7] and *Durham*[8] rules and various refinements of each, Professor Goldstein justly commences the discussion with the assertion that "the insanity defense... arises too rarely to deserve a place at the center of the stage."[9] In the future it is highly likely that the "more elastic the concept of mental illness becomes and the greater the faith of the public in the medical approach to deviant behavior,"[10] just so much less frequently will the defense be asserted by persons accused of crime. Nevertheless, the relationship between psychiatry and law is of ever increasing importance in the administration of criminal justice. One reason is precisely the increasing "faith of the public" in psychiatry. Apart from the rare voluntary assertion of the insanity defense, the accused also confronts the "helping" professions when his competence to stand trial is brought into question,[11] when he pleads guilty (as happens in about 90 per cent of cases) and the question is raised by the court, when the defense is asserted by the tribunal over defendant's objection, and in other situations. The most interesting — and significant[12] — parts

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[5] For an example of how a book review perhaps ought to be written, see Bishop, *Review* of Packard, *The Naked Society*, (1964), 74 Yale L. J. 193.

[6] Parker, *loc. cit.*, at p. 173.

[7] *M'Naghten's Case*, (1843), 10 Cl. & F. 200, 8 E. R. 718.

[8] *Durham* v. *United States*, (1954), 214 F. 2d 862 (D.C. Cir.).

[9] P. 23. See also pp. 167, 188. "[T]he most conspicuous fact about [the defense of] insanity is its last-ditch quality." P. 143.

[10] P. 23.

[11] "Though its function [a finding of incompetence to stand trial] is to remove from the trial process persons who cannot understand the nature of the proceedings against them until such time as their competency is restored ["that time may never come"], it is in practical effect a civil commitment." P. 179. This is obvious, but it is pointed out only very rarely.

[12] While the author concludes that the "new rules which appeared on the scene in the 1950's represented a flight from law," he also suggests that it "is unreasonable to assume that any legal standard, operating within the existing framework of 'blame' and a jury system, can affect the situation [rate of acquittals by reason of insanity] very much." P. 95. The great dispute about the *Durham*, *M'Naghten* and other rules is therefore much ado about almost nothing. This reviewer agrees with both assessments.

of the book, therefore, are not those dealing with the technicalities of the rules concerning the insanity defense as such, although they are handled brilliantly.[13] Turning immediately to more important and suggestive matter, let us examine Professor Goldstein's discussion of "release" and related questions such as the justifiability of indefinite, often life-long, detention of "guiltless", but "irresponsible", persons.

I

Over a century ago, in 1843, Daniel M'Naghten shot and killed Sir Robert Peel's secretary. Six weeks later M'Naghten was tried before Lord Chief Justice Tindal, assisted by Justices Williams and Coleridge, with Albert, the Prince Consort, present as observer. No fewer than nine physicians and surgeons were called, seven by the defense and two by the court, and all agreed that M'Naghten was insane. "There was no contradictory medical testimony in the manner of the 'battle of experts' which has plagued most subsequent insanity trials." Neither was the Solicitor General particularly "overzealous". The Lord Chief Justice came very close to directing the jury to return a verdict of not guilty, on the ground of insanity; such a verdict was returned forthwith and M'Naghten's body was remitted to appropriate authority, "to be confined during Her Majesty's Pleasure."[14] By directing this verdict, the court doubtless saved M'Naghten from the gallows.

Professor Goldstein's book explores the rule laid down in that ancient decision, the demands for "reform" of the rule, and contemporary implications. What Professor Goldstein does not tell us is, what actually happened to M'Naghten? The fact is, he was involuntarily hospitalized and incarcerated for the remaining twenty-two years of his life, in Bethlehem Hospital from 1843 until 1864, then in the newly-opened Broadmoor Institution for the Criminally Insane. What Professor Goldstein *does* tell us, and what is usually glossed over or ignored, is that it is still accepted practice to impose involuntary "hospitalization", often for life, upon persons acquitted on the ground of insanity.[15] The author observes:

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[13] Pp. 45-96.

[14] *R.* v. *M'Naughton,* (1843), 4 How. St. Tr. N.S. 847, at pp. 924-26; A. Morris, *Criminal Insanity,* (1968), 43 Wash. L. Rev. 583, at p. 593; Diamond, *Isaac Ray and the Trial of Daniel M'Naghten,* (1956), 112 Am. J. Psychiat. 651, at pp. 654, 655, 656; Szasz, *Book Review, National Review,* March 12, 1968, p. 247.

[15] See, for example, p. 146.

> The power to detain indefinitely is unquestionably the most important issue associated with the insanity defense. Yet it has received remarkably little consideration.[16]

The prevailing psychiatric and judicial opinion appears to be that the detention is "therapeutic" (if "punitive" it would of course have to be of delimited term). Since punishment is not involved, but only a rehabilitative effort by society, there is supposedly no need to fear excesses or abuses from a medical disposition.

> Moreover, the very fact of indeterminacy is regarded as an incentive to patients to improve more quickly so that they can be released sooner.[17]

There are several practical and theoretical defects in the prevailing theory. First of all, the desired situation avowedly is "that the patient will receive good medical treatment... followed up with continuing solicitude for his freedom, and... release... as soon as his welfare and that of the community allow."[18] The fact is, however, that such a patient generally does not receive good medical treatment.[19] Thus, there are "cases in which a patient is placed in a ward housing 1,000 patients and which provides two psychiatrists for their care and treatment."[20] There is, moreover, all too frequently little if any solicitude for the inmate's freedom and the securing of a release in the face of opposition on the part of the hospital administration is akin to the labors of a Tantalus or Sisyphus.[21] Was not this situation predictable? Thoughtful students of human nature would expect that the designation of compulsory restrictions on liberty under the name of "treatment" would in actual practice

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[16] P. 154.

[17] Pp. 154-55. Compare Boslow and Kohlmeyer, *The Maryland Defective Delinquent Law: An Eight Year Follow-Up*, (1963), 120 Am. J. Psychiat. 118, at p. 121:

> many patients... are unable to acknowledge any disturbance or need for change in their behavior. The idea of an indeterminate sentence quickly jolts some of these out of their complacency, and they become amenable for treatment. Thus it is a powerful motivating force for change.

[18] Report of the Association of the Bar of the City of New York, *Mental Illness and Due Process*, (Ithaca, N.Y., 1962), p. 243.

[19] See, *e.g.*, *Cullen* v. *Grove Press, Inc.*, (1967), 276 F. Supp. 727 (S.D.N.Y.).

[20] Arens, *The Durham Rule in Action*, (1967), 1 Law and Soc. Rev. 41, at p. 55. See also Usdin, in *The Clinical Evaluation of the Dangerousness of the Mentally Ill*, ed. by J. Rappeport, (Springfield, Ill., 1967), p. 63; Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, (1958), 115 Am. J. Psychiat. 1, at p. 7; N. Ridenour, *Mental Health in the United States*, (Cambridge, Mass., 1961), p. 134.

[21] See, *e.g.*, Beaver, *The "Mentally Ill" and the Law: Sisyphus and Zeus*, [1968] Utah L. Rev. 1.

increase rather than decrease the risks of unjust punishments and worse. The evidence accumulates that the much lauded "treatment" has all too frequently turned out to be nothing but warehousing at best. Thus, in 1966, the Court of Appeals for the District of Columbia declared that persons automatically immured in St. Elizabeths Hospital by virtue of an acquittal on the ground of insanity, have a "right to treatment."[22] But in Professor Arens' inimitable phrase:

> The decision ... provides no indication as to whether St. Elizabeths physicians will succeed in establishing the adequacy of their treatment facilities by testifying that what they administer is "environmental" or "milieu" therapy, i.e.,... that the privilege of breathing in the air of St. Elizabeths Hospital is treatment enough.[23]

An idea as to the answer to be given this question appears in a later case, where the same court observes:

> Under some circumstances custodial care, standing alone, is a form of therapy for some conditions; the terms... such as "environmental therapy" or "milieu therapy" are simply psychiatric descriptions of a form of treatment consisting of custody in an appropriate... atmosphere from which departure is not permitted.[24]

In another recent case in the District,[25] one Alexander was civilly committed because he had a "history of antisocial behavior," although "the psychiatrists... were reluctant [!] to label [his] illness a psychosis, or in fact to attempt to fit it specifically into any... [class] ... of mental illness recognized by the American Psychiatric Association..."[26] The psychiatric "reluctance" should not, however, upset the court because:

> [T]reatment will be available... at St. Elizabeths. The staff psychiatrist from St. Elizabeths testified that the hospital offered custodial care and a controlled environment, and that this would include "treatment, guidance, and therapy."[27]

All of this language-corrupting rationalization ignores the fact, which should be obvious to any lay citizen, and which apparently enjoys the support of some responsible psychiatric opinion, including perhaps most non-institutional psychiatrists, that "the treatment of many psychiatric disorders can best be accomplished outside of a

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[22] *Rouse* v. *Cameron*, (1966), 373 F. 2d 451 (D.C. Cir.); see also same case, (1967), 387 F. 2d 241 (D.C.Cir.).

[23] Arens, *The Durham Rule in Action, loc. cit.*, at p. 57, n. 38.

[24] *Collins* v. *Cameron*, (1967), 377 F. 2d 945, at p. 947 (D.C. Cir.).

[25] *In re Alexander*, (1967), 372 F. 2d 925 (D.C. Circ.).

[26] *Ibid.*, at p. 927.

[27] *Ibid.*, at p. 928.

hospital," while release should in any case be "as rapid as possible to prevent the debilitating effects of institutionalization."[28]

The best solution would, of course, be to "cure" the inmate and release him. Apparently, however, society produces neither the wit nor the will to accomplish his rehabilitation and release. The talk about "therapeutics" would seem to boil down to "aspirin" — a soporific for the modern, gentle, "liberal" men and women of the Twentieth Century; they want to gratify their altruistic impulses by sparing life and avoiding condemnation, but they do not want their consciences assailed by knowledge of what transpires behind the walls of the "helping" institutions. In the case of Daniel M'Naghten, it is arguable — at least subjectively — that a more generous "treatment" of the assassin would have been to hang him.[29]

II

Professor Goldstein makes a brilliant analysis[30] of the difficulty posed when a person is acquitted on the ground of insanity and is detained indefinitely — often far in excess of the term of punishment which would have ensued if he had been convicted and sentenced — even though he cannot be "treated" at all by virtue of current limitations of the psychiatric art and/or deficiencies in societal resources.[31] Such an untreatable inmate will be unable to satisfy

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[28] Letter, Dr. R. Prince to Prof. R. Arens, quoted in Arens, *The Durham Rule in Action, loc. cit.*, at p. 57, n. 38. In accord is the testimony of Dr. Bunge, referred to in *Rouse* v. *Cameron*, (1967), 387 F. 2d 241, at p. 246 (D.C. Cir.) (dissenting opinion of Danaher, J.): "Dr. Bunge felt further hospitalization would 'stifle his [Rouse's] future development.'" See also Rappeport, Lassen and Gruenwald, *Evaluation of Hospital Patients Who Had Sanity Hearings*, in Rappeport, *op. cit.*, 81, at p. 91:

> Finally, there is the tendency of the hospital to look upon a poor adjustment as an indicator of a poor extra-hospital adjustment. That this may not be so is exemplified by those patients who eloped after being remanded. For them it might have been that the hospital environment was, so to speak, ego dystonic while the community at large, or at least avoidance of being hospitalized, was "integrating".

[29] But see Albert Camus' magnificent essay, *Reflections on the Guillotine*, in *Resistance, Rebellion, and Death*, (New York, 1960), p. 131.

[30] Pp. 154 *et seq.*

[31] Good recent examples include *Rouse* v. *Cameron*, (1967), 387 F. 2d 241 (D.C. Cir.); *Overholser* v. *Lynch*, (1961), 288 F. 2d 388 (D.C. Cir.), rev'd *sub nomine United States* v. *Lynch*, (1962), 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed. 2d 211, discussed in Arens, *Due Process and the Rights of the Mentally Ill, loc. cit.*, and in T. Szasz, *Psychiatric Justice*, ch. 7. *Cf. In re Gault*, (1967), 387 U.S. 1, at p. 29 (Arizona: six years as juvenile vs. two months if adult); *Brisco* v. *United States*, (1965), 246 F. Supp. 818 (D. Del.), aff'd (1966), 368 F. 2d 214 (3d Cir.) (six year commitment under *Youth Correction Act* when

any objective criterion for release. If sanity is the key, it will be impossible (Goldstein says "difficult") to say he has been restored. The author does not spell out why, but it is obvious. A jury or judge has found him insane, a conclusive adjudication has ensued and his condition has not improved — it has almost certainly worsened. Such an inmate therefore cannot reasonably be pronounced sane by administrative fiat. If danger is the key, the same danger present when the jury (or judge) considered the matter will usually continue in the case of the "untreatable" patient. If the insanity defense is expanded to include psychopaths, alcoholics and addicts, although they may be quite capable of functioning in society, they may also be less curable than other categories of inmates. The conclusion of Professor Goldstein seems inescapable:

> Broadening the insanity defense may... not be the humane gesture many reformers have in mind. Instead, it may become a device for luring offenders to forego the relative security of a sentence of limited duration for a potentially unlimited one.[32]

In fact, it appeared for a time that it was not a question of "luring", but of coercing, when the insanity defense was allowed to be interposed over the violent objection of defendants desiring to plead guilty to minor misdemeanor charges.[33]

Detention beyond the term fixed in the Criminal Code, which presumably embodies society's political and legislative judgment as to the requirements of prevailing notions, be they vengeance, deterrence, rehabilitation, or a mixture of these, "can be justified only if such detention will serve the patient's welfare or that of society."[34] Some scholars, including this reviewer, would question whether *either* basis justifies such continued detention. When the penal term expires, the basis for interference by the state should end. If the individual remains an imminent threat to the lives of others, or if he otherwise satisfies the ridiculously broad and amorphous standards

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maximum penalty for substantive offense six months); *New York* v. *Follette*, (1966), 254 F. Supp. 887 (S.D.N.Y.) (Weinfeld, J.) (five year detention under *N.Y. Correction Law* when maximum term 2½ years under *N.Y. Penal Law*).

[32] P. 155.

[33] See *Overholser* v. *Lynch*, (1961), 288 F. 2d 388 (D.C. Cir.). But such "coercion" is not apparently permitted teday in the District of Columbia, under the interpretation of *United States* v. *Lynch*, (1962), 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed. 2d 211, just adopted in advance sheets received by this reviewer March 11, 1968: *Cameron* v. *Mullen*, (1967), 387 F. 2d 193 (D.C. Cir.); *Rouse* v. *Cameron*, (1967), 387 F. 2d 241 (D.C. Cir.). Professor Goldstein reports at p. 109 that "the trend of the cases is that the defense may not be raised over defendant's objection." It is to be hoped that the author is correct.

[34] P. 156.

for civil commitment prevailing in most jurisdictions,[35] he can be civilly committed. In the words of Morris and Howard:

> *Power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes.* Let the maximum of his punishment be never greater than that which would be justified by other aims of our system of criminal justice.[36]

Thus, some scholars would not concede — as Professor Goldstein does — that detention beyond the limits fixed by the Penal Code can be "justified" by *any* consideration, let alone the "welfare" of the patient or the "welfare" of society.

The author continues, however, very ably to urge that continued detention does involve "serious questions",[37] even given the premises stated. First of all, he suggests that the "model upon which the law builds"[38] (what he means is, the mental hospital bureaucracy, not "law"[39]) is "the stereotypical madman of public imagination" who "must be restrained at all costs." The stereotype, of course, totally corrupts the typical actuality. Sixty-five per cent of such persons are offenders against property, "at worst burglars."[40] Indeed, Frederick Lynch,[41] to mention one specific example, was merely the utteror of two $50.00 bad checks. Some such persons should be released, Goldstein argues, even if one could confidently predict that they would commit similar offenses in the future. The "cost and consequences of indefinite detention" and the fact that "insurance... may be available to mitigate the loss"[42] should be weighed in the scales.

Even as to the "untreatable man of violence," serious questions intrude. How certain are the predictions? Although the author does not raise the point, at least one statistical study by psychiatrists reveals that psychiatrists are less successful than judges in this

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35 Professor Goldstein recognizes this difficulty. *E.g.*, p. 160.

36 N. Morris and C. Howard, *Studies in Criminal Law*, (London, 1964), pp. 175-176 (their emphasis). See also N. Morris, *Impediments to Penal Reform*, (1966), 33 U. Chi. L. Rev. 627, at pp. 638 *et seq.*

37 P. 157.

38 P. 156.

39 See, *e.g.*, Judge Burger's concurring opinion in *Blocker* v. *United States*, (1961), 288 F. 2d 853, at pp. 857-62 (D.C. Cir.), and his dissenting opinion in *Campbell* v. *United States*, (1962), 307 F. 2d 597, at pp. 603 and 608 (D.C. Cir.). See also *Mims* v. *United States*, (1967), 375 F. 2d 135, at pp. 141-42, n. 6 (5th Cir.).

40 Pp. 156, 157.

41 See *Overholser* v. *Lynch*, (1961), 288 F. 2d 388 (D.C. Cir.), and other discussions of the *Lynch* case cited at note 31, *supra*.

42 P. 157.

respect.[43] The author poses other pertinent questions, for example, "will he be successful . . . ? Will the police intervene?" The patient's "freedom", moreover, must be weighed in "moral" and also in "pragmatic" terms. "For example, should his economic contribution during each day he is *not* likely to be violent be weighed against the harm he may do on the days when he will be?"[44] Indeed, it is conceivable that events after release may effectuate his "cure" in ways unanticipated by his therapists, if any, who after all are not omniscient. Professor Goldstein concludes this discussion with three admirable sentences:

> A system of indefinite detention tries to act "as if" it is possible to eliminate risk, to give the appearance of scientific precision to judgments which are all too human and too fallible. The unhappy fact is that a system of indefinite detention can be justified only if we are confident we can achieve cure or predict the degree and frequency of danger. Until we do so, such a system invites the timid, the punitive, or the unconcerned to sacrifice individual liberty at the altar of security.[45]

There are two proposals for determination of the mental condition of an accused found not guilty by reason of insanity: (1) termination of detention upon expiration of the maximum possible sentence for the crime with which defendant had been charged, with an option in the State to bring civil commitment proceedings (which it would have in any case); and (2) regarding defendant as "acquitted" when the jury verdict or finding of insanity at time of crime is made, but with a duty in the State to initiate civil commitment proceedings.

> Both proposals are built on the assumption that the civil commitment process has developed standards which would protect the rights of the patient and rescue the issue from the ambiguity found on the criminal side.

The assumption is "only partly warranted." At present, "the special virtue of civil commitment lies more in its procedure than its substance."[46] Certainly the "substantive" rights reduce to invisibility under civil commitment statutes which permit involuntary hospitalization of a person who, while not a danger to others or even to himself, is "in need of care or treatment in a mental hospital, and because of his illness, lacks sufficient insight to make application therefor."[47] One readily agrees with the author that there is little,

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[43] See Rappeport *et al., loc. cit.*, at pp. 88, 89.

[44] P. 157 (emphasis in original).

[45] P. 159.

[46] P. 160.

[47] *A Draft Act Governing Hospitalization of the Mentally Ill*, sec. 6, Public Health Service Publ. No. 51 (Federal Security Agency, 1951). See also the valuable resumés of state legislation in *The Mentally Disabled and the Law*,

if any, "special virtue" in the "substance" of that provision. Does the "procedure" stand in better case?

The "procedures" which Professor Goldstein considers have "special virtue" are ephemeral on paper and non-existent, typically, in actual practice.[48] Let us examine, very briefly, the efficient civil commitment "procedure" in Seattle, Washington, as it actually operates.[49] The allegedly mentally ill person is taken to the psychiatric ward (fifth floor) of King County Hospital for detention and treatment pending hearing. The hospital attendants take notes on the conduct of the person, which are admissible at the hearing, but no actual psychiatric examination is made until that all-important moment. The hearing is held in a room adjacent to the psychiatric ward. The presiding judge has instructed the hospital staff not to administer sedation if at all possible within 24 hours of the hearing, and 90 per cent of the persons brought before the court are not drugged. (Hence ten per cent *are* insensible.) A record of medication given the patient and in fact a complete dossier, including hearsay observations of the nursing staff and others, is put before the court. The psychiatric examination itself is conducted *at the hearing* by two psychiatrists (in practice, always the same two). They are paid $12.00 per case and conduct virtually all the examinations because "they specialize in quick diagnosis." The diagnoses have got to be "quick" because court is held only once a week (on Tuesday morning)[50] and 8 to 12 cases are handled at each hearing.[51] The psychiatric examination is "joint" and consists of reading the dossier, listening to the witness or witnesses who initiated the proceeding, and conducting a brief verbal exchange with the allegedly "mentally ill" person. After this interchange, the subject is led away and the psychiatrists render their opinion. Most of the subjects are found commitable[52] and are on their way to Western State Hospital by 1:00 P.M. the same day.

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ed. by Lindman and McIntyre, (Chicago and London, 1961), which also reprints the draft Act at pp. 397 *et seq.*

[48] See, *e.g.*, Beaver, *loc. cit.*; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, (1966), 44 Texas L. Rev. 424; Kutner, *The Illusion of Due Process in Commitment Proceedings*, (1963), 57 Nw. U. L. Rev. 383.

[49] Based on interviews and attendance at hearings by Mr. Richard Fallon in 1967 and by Mr. Donald A. Mallett in 1967-68, both third-year law students at University of Washington School of Law at the time of their respective studies.

[50] Formerly the hearings were held twice a week.

[51] At one hearing attended by Mr. Mallett, twelve cases were heard.

[52] At the last hearing attended by Mr. Mallett, 11 of the 12 subjects were found "mentally ill"; no case took more than 15 minutes.

This outrageous "procedure" is apparently relatively enlightened by contrast to the practice prevailing in certain other jurisdictions.[53] Indeed, the patient is frequently denied opportunity to appear at the hearing at all on account of the asserted "medical" and "therapeutic" requirements of the patient's "well-being".[54] The therapeutic ideal is that the proceedings should be informal, "congenial", and contention-avoiding. There is no conflict between the social aspirations of the collectivity and the interests of the individual patient:

> [P]roceedings [should be] initiated at the request of... responsible individuals... The patient is then examined by one or two doctors... If the doctors feel that the appearance of the patient in court may be detrimental to his health, this appearance may be waived in many states. In fact, court approval is usually given as a matter of *routine* on the basis of the *considered* opinions of *properly* qualified physicians.[55]

In this situation, the psychiatric experts, the court, the hospital custodians and, in the criminal context, the prosecutor, all represent the State. To use Professor Goldstein's words:

> In an effort to patch and mend the tearing social fabric, the state is playing an increasingly paternal role, trying to help as many as possible to realize their expectations and to soothe and heal those who cannot.[56]

Given this situation, the insanity defense is desirable, he continues, because it serves, in its "emphasis on whether an offender is sick or bad," in "reinforcing the sense of obligation or responsibility."[57] This is highly debatable; the idea that "the concept of 'blame' may be necessary" to "the almost forgotten drama of individual respon-

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[53] See, *e.g.*, *Hackin* v. *Arizona*, (1967), 88 S.Ct. 325, at p. 331 (Douglas, J., dissenting upon dismissal of appeal) (Texas: "by one report 66 seconds are given to a case, the lawyer usually not even knowing his client and earning a nice fee for passive participation"); Kutner, *loc. cit.*, at p. 385. (Illinois: "examinations are made on an assembly-line basis, often being completed in two or three minutes, and never taking more than ten minutes"); J. Robitscher, *Pursuit of Agreement Psychiatry and the Law*, (Philadelphia and Toronto, 1966), p. 127 (1.6 minutes per commitment "sometimes cutting off the patient in the middle of a sentence"); Comment, *Liberty and Required Mental Health Treatment*, (1966), 114 U. Pa. L. Rev. 1067, at p. 1069 (5 minutes).

[54] See, *e.g.*, *Arco* v. *Ciccone*, (1966), 359 F. 2d 796, at p. 798 (8th Cir.) ("from the nature of the situation, whether the defendant shall be called upon... to testify at the hearing is necessarily a matter for the discretion of the court").

[55] L. Linn, *A Handbook of Hospital Psychiatry*, (New York, 1955), p. 422 (emphasis added). Compare Professor Goldstein at p. 36: "Behavior which is... nonconforming may make a man seem mentally ill to... psychiatrists who are inexperienced or unsophisticated or *simply intolerant*." (Emphasis added.)

[56] P. 224.

[57] *Ibid.*

sibility"[58] is well-taken, but the insanity defense has little to do with it.

Two possible systems of criminal justice can be supposed. One involves objective rules, equal application of constitutional and other principles, impartial and assiduous ascertainment of fact questions in an adversary setting, due process, the trial of crimes instead of men — in short, the "rule of law". The other system of criminal justice is the inquisitorial, administrative, bureaucratic monstrosity which our society has actually institutionalized. Professor Goldstein's point of view seems in some (but not all) parts of the book to be that of the rule-enforcer, seeking the efficient system "which will enable us to move the individual toward conformity or to a reasonable non-conformity."[59] The dangers of paternalism are recognized, but the conception of the state as helpful protector seems to have the author's approval. Another viewpoint is that of the individual, victimized and robbed of the opportunity to defend himself against an opponent, the state, which has neither the decency nor the moral strength to acknowledge the conflict of interest.

III

Another difficulty with indeterminate detention, however benign may be its purpose, is "the ease with which it may become the instrument for abuse of power by those who refuse to accept the insanity defense as dispositive of the issue of blame and punishment..."[60] Presumably the author is here very elliptically suggesting the possibility that sadistic or otherwise abusive mental hospital supervisors and attendants may exist. There is substantial evidence that this is the case; if persuaded, Professor Goldstein ought to state the fact directly without beating around the bush.[61] A punitive attitude was evinced by the then Superintendent of St. Elizabeths Hospital, one of the largest mental institutions, Dr. Winfred Overholser, when he testified: "We try to see to it that a verdict

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[58] *Ibid.*

[59] *Ibid.*

[60] P. 155. See also p. 186 ("punishment may be found in the hospital as well as in the prison").

[61] The author does mention the punishment routines which are useful in keeping patients "in line" in the day-to-day administration of mental hospitals (pp. 27-28):

> Suspension of privileges, ridicule, corporal punishment, isolation, electro-shock treatment, assignment to bad wards or unpleasant jobs all served as effective punishments... "For most patients the threat of being put on the shock list had an instant effect in bringing their conduct into line."

of not guilty by reason of insanity is not a reward."[62] An attorney witness has sworn that he has a client who served time in road gangs in the South of the United States and asserted "dead seriously that he would rather serve a year in any of them than six months" in St. Elizabeths.[63]

Perhaps more significant than any physical brutality on the part of attendants and other hospital personnel, is the general dehumanizing and hopeless atmosphere of the total institution, which is apparently well depicted by Frederick Wiseman's film, *The Titicut Follies,* filmed in Massachusetts' Bridgewater State Hospital for the Criminally Insane.[64] The description of the film by District Judge Mansfield, who viewed it in determining whether its showing in New York City should be enjoined[65] upon the motion for preliminary injuction of four Massachusetts Correction Officers, is graphic:

> I am satisfied that the picture does not knowingly or recklessly falsify or misrepresent... conditions or the conduct of the plaintiffs... [A] chronicle of it must to some extent be gruesome and depressing in character, and in this case the picture fulfills such anticipation. The loudly vocal antics, haunting stares and grim behavior of many immates, are photographed against the starkly depressing background of a bare, prison-type hospital. The film shows detailed closeups of such episodes as... the explosive reaction of an inmate to repeated taunting by Correction Officers about his failure to keep his cell clean;... and the unhappy protests of a young, articulate schizophrenic to the effect that after one and a half years as an inmate he is being driven insane by the surroundings and by the poor treatment or lack of treatment by the staff.
>
> The foregoing scenes may well create an impression of hopelessness and inadequacy, an insensitivity on the part of both Correction Officers and staff doctors toward inmates under their care, a failure to accord to the inmates the minimum dignity due to human beings, and an atmosphere

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[62] *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 1st Sess., 19 at p. 36 (1961).

[63] *Ibid.,* at p. 659. See also, *e.g.,* A. Deutsch, *The Shame of the States,* (New York, 1948), pp. 44, 58, 81-82, 86 and *passim*; E. Goffman, *Asylums,* 2nd ed., (Chicago, 1962), pp. 17-18, 21, 27-28, 33, 41, 150, 155, 385 and *passim*; *Redding* v. *State,* (1957), 165 Neb. 307, 85 N.W. 2d 647, at p. 650; *Cong. Rec.* (daily ed.), Sept. 17, 1965, pp. A 5271-3 (for the situation in New York).

[64] See Coles' review of the film, *The New Republic,* January 20, 1968, at pp. 18, 28-30.

[65] Apparently showing of the film has been enjoined in the Commonwealth of Massachusetts. *Ibid.,* at p. 28.

> of stygian purgatory where they are relegated to the slow process of waiting for death.[66]

Is it not obvious that the "rehabilitative" justification for indeterminate incarceration is rankest hypocrisy, mockery and language-debauching? This is the case if the situation in Massachusetts, New York and the District, three of the assertedly most "enlightened" jurisdictions in the United States, typifies the situation in hospitals elsewhere. In the context of the insanity defense, the jurors may be led to believe that the question is whether defendant "is to be condemned as a criminal or regarded compassionately as insane." Actually, as Professor Goldstein justly observes, "the consequences of condemnation and compassion may not be so very different . . ."[67] One can in fact go further than that: "Perhaps one who prefers confinement in an institution for the criminally insane to imprisonment in a regular penitentiary really is deranged."[68]

IV

Professor Goldstein advises us that "mental hospitals do not want [*sic*] to receive 'criminal' types, principally because psychiatry is usually unable to treat them . . ."[69] But elsewhere he observes that "the psychiatric literature . . . urg[es] the expansion of the insanity defense, so that more offenders might be brought into the mental hospitals;"[70] in any case, "the 'helping' professions tend to think they can help even when they cannot . . ."[71] The author also suggests that the psychiatric literature has ignored the "gnawing

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[66] *Cullen* v. *Grove Press, Inc.*, (1967), 276 F. Supp. 727, at p. 730 (S.D.N.Y.). This reviewer has excised some of the more graphic material to be found in the original.

> [T]here has never been anything like it in the world, and I want to forget it, force it never to have been, for fear of cursing my country, the mother who gave me birth . . .

V. Tarsis, *Ward 7*, trans. by Katya Brown, (London and Glasgow, 1965), p. 157.

[67] P. 3.

[68] *State* v. *Dodd*, (1967), 70 Wash. Adv. Dec. 2d 491, at p. 492, 424 P. 2d 302, at p. 303 (*dictum*). Since psychiatrists are better acquainted with the situation than any one else, the continued "psychiatric . . . deep hostility . . . to the imposition of criminal liability" (p. 102) seems curious, to say the least.

[69] P. 215. It is a very fine point, but it is psychiatrists, not "psychiatry", who attempt to treat men, and it is the personnel of the mental hospitals, not mental hospitals, who have desires in the matter. The personification of organizations and institutions is an increasing phenomenon in the language-usage of our time. There is probably at least one example within the four corners of this book review.

[70] P. 159.

[71] P. 223.

[*sic*] question of what should be done with those who cannot be treated successfully." Finally, he concludes that it is "difficult to avoid the impression" — he apparently would avoid it if he could[72] — that "psychiatrists, and mental health professionals generally, are so anxious to treat the curable ones that they are willing to sacrifice the incurable by promising society greater protection from them than may be necessary."[73]

There is some evidence that institutional psychiatrists indeed do want to keep the institutions filled to the brim. For example, Professor Arens reports:

> Whatever misgivings may arise on this score vis-à-vis government psychiatrists are fully matched by similar misgivings vis-à-vis significant numbers of private psychiatrists engaged in legal-psychiatric work and observed in the District of Columbia. The interviewing of private psychiatrists in the nation's capital to determine their attitudes toward the insanity defense conducted by project staff members between 1959 and 1960 revealed a startling frequency in "custodial" and punitive orientation. Observation of such psychiatrists in court-work further revealed an equally startling appearance of indifference to the fate of the defendant... There were, of course, conspicuous exceptions.[74]

When millions of dollars are spent in the quest for "mental health", psychiatrists and kindred "helping" professionals will naturally discover substantial numbers of "mentally sick" persons. Courts — or at least many of them — will tend over the long run not to call "impartial" experts to testify and will tend not to appoint "experts" to ascertain incompetency to stand trial, who too frequently diagnose the subject as free of mental illness.[75] Such a psychiatrist will tend not to be as popular as colleagues who generally find prospective "patients" incompetent when the issue is raised by persons of power and importance in society. No less a personage than the incumbent Superintendent of St. Elizabeths Hospital, Dr. Dale Cameron, has testified that "only 50% of the patients... hospitalized required hospitalization in a mental institution..."[76] Does inability to treat have anything to do with incarceration? Too often, it is believed, the question of treatability is regarded as utterly irrelevant. Thus, Dr. Duval has observed:

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[72] P. 159. Professor Goldstein is obviously a very *decent, gentle,* albeit *open-eyed,* human being.

[73] P. 159.

[74] Arens, *The Durham Rule in Action, loc. cit.,* at p. 79, n. 85.

[75] See A. Blumberg, *op. cit.,* p. 149: "The disciplines of probation and psychiatry become the willing handmaidens of the court organization, for individual careers are too often wholly dependent upon the wielders of judicial power."

[76] Quoted in *Lake* v. *Cameron,* (1966), 364 F. 2d 657, at p. 660, n. 9 (D.C. Cir.).

> We know that the rate of discharge of patients from public mental hospitals is easily manipulated and controlled and in some places is not directly related to the quantity or quality of symptoms still seen in patients affected...
>
> [W]hy do only seventy-three of 104 patients who ask for court hearings get them? Answers to these questions might be revealing.[77]

The salient reason for acceptance or release of patients appears to be the vested interest, or the supposed interest, of the particular hospital as an institution and of the "helping" profession in question. This is how Dr. Rappeport and his colleagues put the matter:

> The vested interests of the hospital and profession must also be considered. At this particular hospital the superintendent was a leader in the treatment of alcoholism and the hospital had an established treatment program. We would assume that this factor greatly influenced the hospital's reluctance to release an alcoholic when they still believed him to be ill.[78]

The other side of the coin of institutional interest is the extra-hospital pressure, widely varying from inmate to inmate, for or against his continued detention.[79] For example, in the field of civil commitment, detention is "undesirable where the patient occupies an important public position, *e.g.* director of [a] company..."[80] Professor Goldstein also recognizes that "'mental disease' is as much a social concept as a psychiatric one" and that "its content is affected by the ends for which the diagnosis is being made."[81]

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[77] Rappeport, *op. cit.*, at p. 94. There are, of course, yet other anti-release considerations, for example, the possible — albeit highly unlikely — liability of the releasing psychiatrist for negligence. See, *e.g.*, *Underwood* v. *United States*, (1966), 356 F. 2d 92, at p. 98 (5th Cir.).

[78] Rappeport, *et al.*, *loc. cit.*, at pp. 90-91.

> Doctors and nurses were run off their feet: it was the traditionally busy season in all mental hospitals. Thousands of new patients were admitted in the days preceding the October Celebrations. They were the restless and undesirable elements in the city, whose presence threatened the holiday mood — people who might infiltrate the parade for instance, and shout "Down with Communism!"

Tarsis, *op. cit.*, at p. 151.

[79] Samdelov was a well-known bibliographer. Like several other patients, he had been committed by his relations who needed his "living space" (in view of the acute housing-shortage, this was not an uncommon practice).

Tarsis, *op. cit.*, at p. 17.

[80] D. Henderson and R. Gillespie, *A Text-Book of Psychiatry*, 8th ed., (London, 1956), p. 682. See also Szasz, *Commitment of the Mentally Ill: "Treatment" or Social Restraint*, (1957), 125 J. Nerv. & Ment. Disease 293.

[81] P. 85. Is not this highly analogous to the situation which had developed in National Socialist Germany by about 1940?

> In the field of crime prevention the judge no longer merely administers justice. His... activity approaches that of an administrative official. He

In brief, decision of the detention question tends to become a matter of social, political and economic power weighed together with the institutional demands, and has little to do with "scientific" diagnosis or other assessment of the individual "patient" as an autonomous human being.

The "current ideology"[82] involves not only "the struggle... to civilize the social appetite for retribution and deterrence,"[83] but also the idea that "public mental hospitals, as instrumentalities of the state, may reasonably be expected to send patients back to the community as soon as their condition warrants..."[84] Clearly, when theory and ideology are applied to real life, there are only two alternatives: one is to modify the ideology to make it more compatible with actual experience; the other is to attempt to force reality to fit the ideology. The authoritarian mentality follows the latter course. When a prevailing conception also embodies a long-term, world-historical idea of the desirable, as well as the historically inevitable, scheme of social organization, the effort to mold society to fit the preconception, and concomitant measures to overcome resistance to it, call for such massive deployment of organization and social energies that the result is in fact an authoritarian autocracy — totalitarianism. "Totalitarian rule is the claim transformed into political action that the world and social life are changeable without limit."[85]

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no longer looks for justice alone, but also acts in accordance with *expediency*. Judge and administrator, judiciary and police, often meet... in the pursuit of identical objectives.

T. Maunz, quoted in C. Friedrich and Z. Brzezinski, *Totalitarian Dictatorship & Autocracy*, 2nd ed., (New York and London, 1965), p. 215 (emphasis added).

[82] P. 158.

[83] *Ibid.*

[84] Overholser, in *Hearings*, note 62 *supra*, at p. 21. This ideology, that the interests of individual and state never diverge, is not Professor Goldstein's: "[I]n... the European experience... the state's interest in every aspect of the trial has often led to oppression." P. 138.

[85] H. Buchheim, *Totalitäre Herrschaft — Wesen und Merkmale*, (1962), p. 24, quoted in C. Friedrich and Z. Brzezinski, *op. cit.*, p. 16. Professor Goldstein observes: "Perhaps when there are experts who do know... what really 'causes' crime... the matter can be given over entirely to them..." P. 91. The author probably does not expect such a situation to develop in the foreseeable future; if it does, he will undoubtedly want to reconsider the proposal. His very perceptive discussion of the jury, which he calls "the traditional embodiment of community morality" (*ibid.*), makes this clear.

V

Professor Szasz scores the Goldstein book for its "irresolute stand on the moral issues of this subject,"[86] and indeed cites one of the arguments in the book as "nonsense":

> [E]liminating the insanity defense would remove from the criminal law and the public conscience the vitally important distinction between illness and evil, or would tuck it away in an administrative process.[87]

Is this really "nonsense"? Even if it is, this is not necessarily Professor Goldstein's position; in lawyerlike and scholarly fashion he has marshalled arguments (this is only the third in a series) against abolition of the insanity defense. If very many people agree with the position, moreover, it is an argument which a thorough legal scholar should take into account.

The complaint that the author — like most, perhaps too many, of us lawyers — is difficult to pin down, is well taken. One sympathizes with Professor Szasz. In the words of Albert Camus: "The logic of the rebel is to... insist on plain language so as not to increase the universal falsehood..."[88] The difficulty lies not in what the author has written, which is difficult to fault because it is very thorough and there is something there for everyone, but because of what he has *not* written.

Professor Goldstein is an extraordinarily knowledgeable scholar. He knows that the insanity defense in practice is only a tiny corner of the great social trend of our time to dehumanize "deviants"[89] by application of "a species of administrative law, shifting the defendant from a criminal process to a civil-medical one which explicitly incorporates elements of preventive detention."[90] He knows, moreover, that "the 'liberal' position" has embodied the unrealistic and false "tacit assumption... that a paternal state can put him [the deviant] right by psychotherapy or by judicious social planning, if only the 'helping' professions are provided with the resources to do the

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[86] *National Review*, March 12, 1968, p. 247. See also Szasz, *Book Review*, (1968), 48 B.U.L. Rev. 151. Interestingly, Professor Diamond finds a correlative statement in the book (p. 224) "outrageous". Diamond, *Book Review*, (1968), 56 Cal. L. Rev. 920, at p. 922. With the emotional Diamond review one should contrast the brilliant effort of the Baroness of Abinger. Wootton, *Book Review*, (1968), 77 Yale L.J. 1019.

[87] P. 223.

[88] *The Rebel*, trans. by Bower, Vintage paper ed., (New York, 1956), p. 285.

[89] "[T]he phrase 'mental disease' has begun to look less and less medical, more and more normative..." P. 89.

[90] P. 20.

job."[91] He is well aware that the mental health ideology "has unquestionably captured the imagination of the reformers and has been propagated almost as a faith."[92] He even adverts to the extent to which public attitudes about the subject have been formed by propaganda ("Americans have become sensitized").[93] This reviewer thus formed the strong impression that Goldstein is quite sympathetic to the Szasz position.

Perhaps Professor Goldstein simply chose to write on this occasion about a rather more circumscribed subject and in a judicious, circumspect tone which would not offend his friends in the "helping" professions, or even perhaps some of his colleagues at Yale Law School.[94] Conceivably Professor Goldstein merely shares the common and growing American fear of being called "controversial". But if he were ever to turn his vast talents to a systematic exposition of the "moral" questions Szasz wants him to explore, we might find ourselves confronted one day with a true classic. Professor Szasz would consider — there are some of us who would be tempted to agree with him — that Goldstein has a *duty* to develop his knowledge in another book, perhaps one entitled *The Therapeutic State*. But Professor Dershowitz has similar knowledge. So has Professor Chayet. They have not written that book either, for whatever reason; at least it has not yet come to this reviewer's attention. It is in any case impossible to *force* a man to undertake such a creative task; the impulse can only be generated from within. One can no more drive a Goldstein to write that book than one could coerce a Beethoven to compose the *Diabelli Variations*.

Why does one write a scholarly book or article? There are many possible answers: (1) to advance knowledge, legal scholarship and

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[91] P. 14. The author is also cognizant that psychiatry can hardly yet be designated a "science": "[P]sychiatrists' diagnoses... reflect the... value system, and the tenets of differing schools of psychiatry... What is psychosis to one may be neurosis to another..." P. 134.

[92] P. 14. On a narrower front, "elimination of *M'Naghten* and willingness to adopt one of the newer rules, has been treated as a test of liberal faith." P. 47.

[93] P. 193. *Cf.* pp. 211-212. See also pp. 20-21:

> At the very time when the "mental health" message is winning its place in the popular culture, psychiatrists and other behavioral scientists are questioning the faith... The message of mental health continues to be propagated from public platforms by persons who know full well that the message no longer quite fits the facts.

Perhaps it is fortunate that laymen, at least as jurors, remain "remarkably unwilling to recognize mental illness." P. 42.

[94] Compare E. Rostow, *The Sovereign Prerogative*, (New Haven and London, 1962), p. xv, with Kurland, *Review* of C. Black, *The Occasions of Justice*, (1965), 32 U. Chi. L. Rev. 386, at p. 390, n. 11, and Kurland, *Foreword to the Supreme Court 1963 Term*, (1964), 78 Harv. L. Rev. 143, at p. 145, n. 13.

analysis; (2) to provoke thought and incite legislative or other action or inaction; (3) to seek the Truth and to state the Truth; (4) to work magic and perform with art; (5) to provoke other scholars, debate with them and keep them "honest"; (6) to make a historical record; (7) to stimulate the cross-fertilization of disciplines and growth in diverse fields of scholarly inquiry; (8) to foster the continuing liberal education and the growth of understanding and personal qualities of the author and his readership; (9) to enhance the prestige of the author, his employing institution and his publisher; (10) to evoke foundation, governmental and other grants; (11) to earn a profit for the publisher and royalties for the author; (12) to be read; (13) to publish or perish; (14) to survive spiritually; and (15) to achieve immortality. Doubtless other reasons exist. Some of these functions are conceivably, even probably, inconsistent,[95] but some one or more of them must be in the head of the legal scholar — or purported scholar — when he puts pen to ink.

There is very highly respected scholarly opinion that: "Love for an object of study is pleasant but for a long time has not been considered helpful to analytical work."[96] On the other hand, as Delacroix remarked with profundity: "For realism not to be a word devoid of sense, all must have the same minds and the same way of conceiving things."[97] It is not only unnecessary, but impossible, for academic works to be purely imitative (as Camus asserts they

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[95] Some of these functions are certainly inconsistent with what this reviewer has heard glorified as the "building block" theory of scholarship, under which each contribution to the literature must "build upon" or "advance beyond" what has gone before. Under this view Thomas Szasz does not "fit in". This is a progress-extolling, Hegelian view. For every Georg Hegel there should be a Jacob Burckhardt (see especially the opening chapter of *Weltgeschichtliche Betrachtungen*), but the "building block" ideologues exclude our Burckhardts from their systems by definition.

[96] Meltzer, *Review* of Ross, *The Government As a Source of Union Power*, (1965), 33 U. Chi. L. Rev. 166, at p. 174. Professor Goldstein thus observes that, while the voluminous literature about the insanity defense has achieved "a remarkable degree of consensus" that the existing rules are inadequate: "Unfortunately the literature has been so polemical that it has not provided the raw materials for [judicious] appraisal of claim and counterclaim." Pp. 4-5. Perhaps the author conceives that the evangelists of the "faith" have found reaction in Professor Szasz, while Professor Goldstein stands — or purports to stand — in the middle ground.

[97] Quoted in A. Camus, *The Rebel*, p. 270, n. 8. It must be very comforting (and "reinforcing") to be a member of a faculty or other aggregation of persons where the views (and "values") of every member are a mirror of the views (and "values") of every other. The beauty and value of each man must be perfectly obvious to all of the rest since each man sees in every colleague only a reflection of himself. It is questionable, however, whether

are[98]); neither is there any living man who can be certain of his own perfect objectivity. In the words of Albert Camus:

> Real mastery consists in refuting the prejudices of the time, initially the deepest and most malignant of them, which would reduce man, after his deliverance from excess, to a barren wisdom.[99]

Thomas Szasz should not attack Goldstein for writing "nonsense" — at least not this particular "nonsense". We scholars who regard ourselves as "hardheaded" offend enough of our colleagues without discerning error where it cannot fairly be found — especially when the victim may be far more sympathetic to the critic than the critic imagines. On the other hand, Professor Goldstein should not have slighted Szasz' magnificent contribution to the literature.[100] There should be room enough and more in *academia* for both types of scholar. The efforts of each man are far too significant to approve their going their several routes like two ships passing in the night.

Thomas Szasz writes with a view to immortality; the impact of his work will be diffused in the minds of men for decades or centuries hence, if at all. In any case, his writings will stand as documentation that at least one man profoundly understood the dehumanizing, collectivizing tendencies of our time. His work most certainly will not persuade, say, B.F. Skinner. Abraham Goldstein, on the other hand, writes with a view to the present and to persuade the reigning elite; and he may do it.[101] The impact of his book will be in the nearer future, and on a less ambitious scale. Nevertheless, it will be read by lawyers, judges, psychiatrists and others for a long time to come — a consummation which this exceedingly fine work richly merits.

James E. BEAVER*

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such a faculty or other group will grow in stature; since each man already knows it all and thinks exactly like every other, each one reinforcing all the rest, the result may be inbred, static and smug.

[98] *Ibid.*, at p. 271.

[99] *Ibid.*, at p. 300.

[100] In a rather careful review of 44 close-typed pages of footnotes, this reviewer was able to uncover only four references to work by Szasz: p. 247, n. 29; p. 253, n. 7; p. 268, n. 21; and p. 273, n. 2. Szasz' contributions would appear slighted. Yet Professor Goldstein is of much too lofty stature to be influenced by *ad hominen* diatribes, *e.g.*, Weihofen, *Review* of Szasz, *Psychiatric Justice*, (1966), 19 J. Leg. Ed. 117 and Diamond, *Review* of Szasz, *Law, Liberty, and Psychiatry*, (1964), 52 Calif. L. Rev. 899. There is not one calumnious aspersion in the entire book; in fact, the author seems hesitant even to report "inconsistency" in other scholars. An example is to be found, however, at pp. 100-101.

[101] See *Time*, March 22, 1968, p. 53.

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Index Gagnon. Edited by Louis-Philippe Gagnon. Montreal: privately published. 1966. Pp. iii, 928. ($135.00).

Practitioners, professors and students alike have long deplored the paucity of legal research aids for Quebec materials. It is one thing to have the assurance that most, if not all, significant cases are reported in the many Quebec publications, but quite another thing to *locate* one of these judgments or, worse still, to find other, later, authorities which either support or reject the holding of the first case. Prof. Brierley, in his useful *Bibliographical Guide to Canadian Legal Materials*,[1] has put the matter this way:

> "Reporting", as T.K. Ramsay wrote in 1865, "is perhaps the most valuable portion of legal literature."[2] But volumes of reports constitute simply a number of documents arranged according to the accident of time — by the month and by the year. The *accessibility* to the contents of reports is therefore an important aspect of legal research. The usefulness of reporting is obviously impaired if there are no reference works which classify, at regular intervals, the subject matters as contained in the reports...

The *Index Gagnon* does not purport to classify the jurisprudential materials which it contains according to subject matter so that one can find, by subject heading, the cases which one seeks; however, having the names of one or more cases in an area, one can readily determine whether those cases have subsequently been cited in later Quebec reports.[3]

Let it be said immediately that the work is an important, even an invaluable, tool to the practitioner, to whom time is measured in dollars, and to the academician, to whom total thoroughness is essential. The work has its limitations though, for it represents thirty years of part-time work in arduous detail by a single man, and one suspects that more hands on a full-time basis would have been most helpful to the author, Louis-Philippe Gagnon, who now sits on the Provincial Court of the Province of Quebec.

Other citators exist in Canada, the United States and the United Kingdom but, needless to say, none of these covers the Quebec reports. At one time, the current *Index of Cases Judicially Noticed in Canadian Reports*[4] purported to deal with the judgments reported

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[1] 2nd ed., (Montreal, 1968), p. 200.

[2] *Digested Index to Reported Cases in Lower Canada*, (Quebec, 1865), p. v.

[3] That is, reports published subsequent to 1923. The citator has not included *all* volumes of all the reports. See the list and discussion of this fact *infra* at p. 780.

[4] Edited by Leonard G. Wrinch in 3 volumes, (Toronto, 1946), to which there have since been two permanent supplements (the first, covering the material from 1946 to 1952, edited by Wrinch, was published in Toronto in 1953; the

in all the Canadian provinces [5] but this is no longer the case. The only significant Quebec citator was Mathieu's *Table Alphabétique des Causes de la Province de Québec* [6] which has the obvious defect, in 1969, of only covering those reports published up to 1899. The other Quebec citators are not as thorough as Mathieu and cover short periods of time. [7]

Any citator has several built-in defects. Obviously, by the nature of the work, it is useless to the researcher who has nothing more than a subject heading under which he hopes to find cases. It also has the deficiency of not drawing to the reader's attention any judgment which cites no authorities. To some, though, its most tiresome characteristic is its *thoroughness,* for a case which has been cited very many times will have what seems to the researcher in a hurry an interminable list of citations. One can only reply to this statement that this aspect of the citator is, in reality, its most positive feature — the reader is secure that he has found all the citations of his original authority. There are ways, however, of making the researcher's job easier. The first is the inclusion, next to each citation, of some indication whether the citation merely refers to the original case, follows or reverses it or affects it in some other of the numerous ways a citation can affect the original decision.[8] The American Shepard citators, with their high degree of efficiency and expertise, employ the second (the only citator to do so, to the reviewer's knowledge); namely, the occasional dismantling of the myriad citations of a judgment dealing with several issues into groups of citations dealing with each of the issues individually. The *Index Gagnon* does not help its user in either way. On the other hand, the *Index* does make a partial contribution in this area by indicating, where it is possible to do so, the page of the original judgment to which reference is made in later citations. While this method does

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second, covering the materials from 1953 to 1957, edited by Wrinch — who died before its publication — and Georgina M. Broad, was published in Toronto in 1958) and a looseleaf supplement, which is kept up to date.

[5] In its earliest edition of the same title, by E.R. Cameron, the then Registrar of the Supreme Court of Canada, (Toronto, 1912). It was represented as "Being a list of Canadian cases dealt with in judgments reported in the official reports of the provincial courts and the Supreme and Exchequer Courts of Canada, as well as of the Judicial Committee of the Privy Council, from the earliest time down to the end of the year 1910 together with a statement of the manner in which each case is judicially noticed."

[6] 2 vol., (Montréal, 1901-1902).

[7] They are set out in tabular form in Brierley, *op. cit.*, p. 213.

[8] The Wrinch work, for example, lists 30 ways; the Shepard United States Supreme Court Citator lists 10.

assist the reader in finding citations to a particular issue (discussed at the page subsequently cited), it does not necessarily lead him to *all* the later references to that issue.

The *Index Gagnon*'s most positive quality is its layout. Printed in a comfortable (and large) style of type on heavy white paper with space on each page and enclosed in a large sturdy binder from which pages are easily removed for photocopying, it has a most pleasing aspect. In addition, unlike the Shepard system, one may make use of the volume with only the name of the plaintiff in hand.[9] Also, because of the method which Gagnon used to compile the work, one can find out if *any case from any jurisdiction* has been referred to in a Quebec case. Thus, one finds numerous American, English and Canadian authorities throughout the work.

The most obvious limitation of the work is the span of the material covered in it. In the first place, the volume only covers materials cited in those reports issued up to and including the end of 1965. (This defect will be remedied as soon as the author is in a position to publish his second edition. One would hope that, thereafter, the readership assured, the additions to the *Index* would be on at least an annual basis). Second, none of the reporting systems has been canvassed in its entirety, not even the most important ones, as the list which follows indicates.

Name of Series	*Years and Volumes Covered*
Court of King's (Queen's) Bench	(1928) 44 — [1965]
Superior Court	(1926) 64 — [1965]
Revue du Barreau	(1941) 1 — (1965) 25
Rapports de Pratique	(1926) 29 — [1965]
Revue Légale	[1947] — [1965]
Revue de Jurisprudence	(1928) 34 — (1939) 45
Supreme Court of Canada	(1921) 62 — [1965]
Exchequer Court of Canada	[1923] — [1965]

Miscellaneous other series are covered in some incomplete way, generally only by the odd few volumes here and there.

Notwithstanding this limitation, the *Index* does cover some 364 volumes of case reports and law reviews,[10] generally in the most

[9] The Shepard system requires one to have the citation of the case — it is organized by series of report and one looks to the volume and page reference in the citator which corresponds to the reporting system where the original case is found.

Most citators employ the system of the *Index Gagnon* and some even go so far as to classify the cases under the name of the defendant as well as the plaintiff.

[10] Actually, the law reviews are barely touched. Only the *Revue du Barreau* and 12 volumes of the *Canadian Bar Review* are included; the University reviews are all omitted.

important period of time from the point of view of the practitioner, above all: about 30-40 years extending almost to date. Furthermore, the author states that:

> Cette liste se projettera dans l'avenir comme dans le passé, dans certains cas, chaque année.[11]

From the point of view of accuracy, the work has much to be said for it. Although the reviewer has not made a spot check, he has put the *Index* to much use in the course of his work and has come across few mistakes. The author has freely admitted in conversation that there are many errors which have come to his attention and which he plans to correct in his next edition but one suspects that when these are weighed against the amount of material in the *Index*, they are but a small percentage. Interestingly, the work itself corrects many errors of citation *in the reports* and thus may occasionally serve as a method of locating cases which one cannot otherwise find because of a false citation.

Despite the usefulness of the *Index Gagnon*, there can be no doubt that its price — $135 — is a deterrent to many potential purchasers. There cannot either be any doubt but that the same work could have been published more cheaply, and that without losing its effectiveness. The quality of the paper, the size of type used (which unquestionably accounts for the large dimensions and the number of pages), the amount of white space and the sturdiness of the binder are all very pleasing qualities, but not necessarily qualities for which one would be willing to pay, *if one had had the choice.* Unfortunately, perhaps, the author has made that choice, at the cost, no doubt, to himself, of many purchasers and, to his subscribers, of more frequent editions (perhaps on a quarterly or at least annual basis) which would keep the legal profession of this province right up to date.

On balance, the *Index Gagnon* remains a very great asset to Quebec legal researchers. It can, however, be improved, primarily by the extension of the materials covered both forward and back in time, at least in the major series of reports and law reviews (which are not covered at all). In fact, as the years slip by, a second edition of the work will become absolutely essential if it is to retain its market at all.

Ronald I. COHEN *

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[11] P. iii.

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Some Thoughts on the Arms Race, Disarmament and Inspection

A Propos: *Disarmament Inspection Under Soviet Law.* By Harold J. Berman and Peter B. Maggs. Dobbs Ferry, New York: Oceana Publications Inc. 1967. Pp. vii, 154. ($7.50)

Try to imagine yourself in the privacy of your home enjoying the thrills of a professional hockey game on your TV screen, or tasting the pleasures of a licit or illicit embrace, when — suddenly — there is a knock on the door. Upon opening the door, you are confronted with three unknown faces, one black, one Asiatic and one white. In uncertain English they proceed to inform you that they are members of the international disarmament inspectorate and have come to search your house for hidden weapons. The scene may today appear incredible, almost too Orwellian to be true, but it is quite within the realm of possibility should agreement one day be reached on "general and complete" disarmament.

The danger of such invasions of our privacy is, however, far from immediate. The road to end the arms race through a comprehensive disarmament with ubiquitous international inspection is a very long one, and as of now only a short distance has been covered.

Since the end of World War II, many official and private proposals have been made for general and complete disarmament and all the major states have, on numerous occasions, expressed their support for ending the global arms race. In the same period, governments and private experts have advanced a number of less ambitious recommendations encompassing a wide range of steps aimed at curbing this or that dimension of the arms race. Accomplishments to date only remotely reflect the effort expended on planning measures of arms limitation and the world is nowhere near the professed ultimate goal of general and complete disarmament.

The catalogue of arms control agreements concluded during the past two decades is anything but encouraging. It was only in 1959 that the first effective step toward controlling the arms race was taken with the signing of the Antarctic Treaty. Though not primarily a disarmament agreement, the Treaty prohibits all military activities on the continent and specifically bans the testing and stationing of nuclear weapons in the region. It should be mentioned, however, that no contracting power, including the Soviet Union and the United States, was, prior to the signing of the Treaty, engaged in

any of the activities now banned by it. In other words, the acceptance of the Treaty did not affect the current arms race.

Of far greater immediate relevance was the Moscow Limited Test Ban Treaty of 1963, which terminated, for the signatory parties, all nuclear tests in the atmosphere, under water and in outer space. The Moscow Treaty does not, however, cover nuclear weapons tests underground and, since its conclusion, both the Soviet Union and the United States have carried out numerous such tests, including some in or near the megaton range. Although more than 100 countries have adhered to this Treaty, two out of the present five nuclear states are still outside its ambit — France and the People's Republic of China — and they continue testing in the environments prohibited by the Treaty.

With the signing of the Outer Space Treaty on January 27, 1967, another dimension of the arms race was partially closed. Parties to the Treaty have agreed "not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." (Art. IV, para. 1). Following the precedent of the Antarctic Treaty, the Outer Space Treaty also bans the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies. (Art. IV, para. 2). It is worth noting, again, that, as far as it is known, these prohibitions did not affect any existing or presently planned military activities in outer space; the agreed ban, as in the case of Antarctica, is future-oriented. Predictably, the Treaty contains no provisions aimed at outlawing or reducing current military uses of outer space such as the employment of artificial satellites for reconnaissance, targeting and communications. Indeed, not long before the conclusion of this Treaty the government of the United States decided to proceed with the development of the so-called Manned Orbiting Laboratory (MOL), an experimental spacecraft designed to carry up to ten astronauts in terrestrial orbit for several weeks for the purpose of investigating the military usefulness of man in outer space. The work on this project was not terminated following the entry into force of the Outer Space Treaty (October 10, 1967) and there are strong indications that the planned Soviet orbital space stations may have the same objectives as the American MOL.

In Mexico City on February 14 of the same year, 14 Latin American countries signed the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco). This regional arms control agreement, designed primarily as a protection against

the present nuclear powers, has not been signed by any of them. The United States did, however, on April 1, 1968, sign Protocol II to the Treaty, which calls upon the states possessing nuclear weapons to respect the regime of denuclearization in Latin America, not to contribute to violations of the basic provisions of the Treaty, and not to use or threaten to use nuclear weapons against nations parties to the Treaty.[1] The Treaty of Tlatelolco, in common with the Antarctic Treaty and Outer Space Treaty, did not result in any degree of *disarmament* nor did its provisions impose any immediate restraints upon the existing military activities of the world's principal powers. Its main objective is the prevention of future nuclearization of Latin America.

The latest in this series of modest measures to control the arms race is the Treaty on Non-proliferation of Nuclear Weapons which was opened for signature on July 1, 1968 in Washington, London and Moscow.[2] The Treaty will enter into force when ratified by the three depositary states — the United States, the United Kingdom and the Soviet Union — and forty other signatory states. As of February 25, 1969, the Treaty had been signed by 87 nations, but ratified by only nine, including the United Kingdom.[3] The basic purpose of the Non-proliferation Treaty is to prevent the spread of nuclear weapons and other nuclear explosive devices to the nations which did not possess them at the time of the signing of the Treaty. The Treaty not only forbids transfers of nuclear weapons to non-nuclear states but it also reinforces the prohibition by barring the latter from receiving such weapons from any source, from manufacturing or otherwise acquiring them, and from seeking or receiving any assistance in their manufacture. Since these undertakings, accompanied by international inspection, present a serious limitation on the sovereignty of non-nuclear signatories, the nuclear powers have, under the Treaty, assumed the obligation to assist the peaceful nuclear development of non-nuclear weapon states at the lowest possible cost and on a non-discriminatory basis. In addition, all parties to the Treaty have undertaken to pursue negotiations, in good faith, first, on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament and, second, on a treaty on general and complete disarmament under strict and effective international control (Article VI). However, this is more an expression of intent than a firm obligation; the Treaty itself contains no explicit commitment on the part of nuclear powers

[1] 58 Dep't State Bull. 555 (April 29, 1968).
[2] For text of the Treaty, see 59 Dep't State Bull. 9 (July 1, 1968).
[3] *New York Times*, Feb. 26, 1969, p. 1, col. 7.

either to stop the manufacture of nuclear weapons or to start reducing their stockpiles.

The above survey clearly illustrates that, even with the implementation of the Non-proliferation Treaty, the sum total of arms control measures agreed upon by states will remain extremely limited, far from the acknowledged target of general and complete disarmament. The extent of progress to date can best be appraised by summarizing the arms limitation obligations assumed by virtue of treaties already in force by some — though not all — of the principal military powers. As of March 1, 1969, these obligations are: (1) not to carry out nuclear tests in the atmosphere, in the oceans, or in outer space; (2) not to place weapons of mass destruction in orbit around the earth, on the moon or any other celestial body, anywhere else in outer space, or in Antarctica; (3) not to conduct in Antarctica any activities of a military nature, such as the establishment of military bases, the carrying out of military maneuvers, or the testing of any kind of weapons. It will be readily noted that these obligations impose no serious limitations on either the traditional fields of arms competition (ground, sea and air armaments) or the modern strategic nuclear-space weapons.[4] The catalogue of arms control measures which, in the opinion of many knowledgeable observers, urgently require agreement is far longer than the list of accomplishments. Such a catalogue would include, in addition to a comprehensive nuclear test ban, a cut-off on the production of fissionable materials for weapons; the halting of the strategic missile arms race (embracing both offensive and defensive missiles); a ban on the production and use of chemical and bacteriological weapons; demilitarization of the ocean floor and subsoil; the curbing of the further militarization of outer space in the vicinity of our planet, and, of course, a gradual reduction in conventional forces.

Although they pay frequent lip-service to the goal of disarmament, few governments practise what they preach. Military budgets of most nations, especially those of the United States and the Soviet Union, are steadily increasing rather than decreasing. Furthermore, a number of underdeveloped states have joined the arms race — a luxury they can ill afford — thus compounding the already complex problem of arms control. Whereas the global military expenditures for 1962 were estimated at approximately $120 billion, the estimate

[4] But even these obligations can be done away with, under the Moscow Treaty and the Non-proliferation Treaty, upon three months notice whenever a contracting party decides that extraordinary events related to the subject matter of these treaties have jeopardized its "supreme interests." Moscow Treaty, Article IV; Non-proliferation Treaty, Article X.

for 1967 has risen to 182 billion.[5] Preliminary data for 1968 indicate a continued upswing. In the two decades since the end of World War II, the United States alone has spent about a trillion dollars on defence, and its military budget in 1967 equalled the total GNP of all of Latin America.[6] The futility and wastefulness of the arms race were aptly described by former President L. B. Johnson in his last message to the 18-Nation Committee on Disarmament when he remarked: "Resources continue to be diverted from critical human needs to the acquisition of armaments and the maintenance of military establishments that in themselves feed fears and create insecurity among nations." [6a] While the nuclear powers have succeeded in accumulating the equivalent of thirty thousand pounds of TNT for every man, woman and child in the world, they have somehow forgotten to make available thirty thousand pounds of food or medicines, or of clothes or books for every needy person in the world.

One of the great obstacles to any major arms reduction or arms control scheme has been the problem of inspection, namely, the effective verification of compliance by all the parties with the agreed disarmament measures. For many years now the Soviet Union has been claiming that the West wants inspection without disarmament, while the Western states have been accusing the Soviets of wanting disarmament without inspection. The only area where these powers have thus far been able to agree on an effective inspection system is in the demilitarized Antarctic. Somewhat weaker inspection procedures have been incorporated in the Space Treaty; however, these procedures apply only to activities conducted on celestial bodies (which lie in the indefinite future) and not to activities in the "void" of outer space. The international safeguards provided in the Non-proliferation Treaty, contrary to the wishes of many states, apply neither to the military nor to the peaceful nuclear facilities of the nuclear-weapon states; the obligation to submit to international inspection under this Treaty is limited to the signatories not possessing nuclear weapons. To complete the picture, it should also be mentioned that the principal reason given for the absence of agreement on a total nuclear test ban is the inability of the two superpowers to find mutually acceptable methods of verification.[7]

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[5] *The New Republic*, Feb. 22, 1969, p. 22, quoting from the 1968 annual report of the U.S. Arms Control and Disarmament Agency.

[6] Rusk, *The Political Future of the Family of Man*, 57 Dep't State Bull. 735, at p. 738 (December 4, 1967).

[6a] 59 Dep't of State Bull. 137, at p. 138 (August 5, 1968).

[7] For a recent statement on the outlook for a comprehensive test ban, see Foster, *U.S. Proposes Worldwide Seismic Investigation of Underground Nuclear Explosions*, 60 Dep't State Bull. 58 (January 20, 1969).

While it is quite probable that the inspection issue has on occasion been used to delay agreement on various disarmament proposals, there can be no doubt that a regime of adequate inspection is absolutely vital to any major disarmament scheme. Even the most ardent advocates of disarmament agree on that point. Yet there are tremendous difficulties in devising an inspection system which will provide satisfactory safeguards against clandestine violations of the agreed arms control measures and, at the same time, prove acceptable to all the negotiating parties.

The current arms race has brought about a number of developments which greatly aggravate the task of implementing a viable system of detection. Take, for example, achievements in the efforts to reduce the size of certain lethal instruments of violence. The weapons arsenal of both superpowers today includes many nuclear projectiles capable of being fired from standard artillery pieces. It has been reported that there are even nuclear weapons capable of being carried and fired by a single infantryman. To conceal these weapons would obviously present no great difficulty. Admittedly, two or three such projectiles could not destroy a large city or a major military unit, but a sufficient quantity of hidden small nuclear explosives could, in conditions of disarmament, conceivably be the margin of victory in an otherwise conventionally fought war.

One should also take into account recent developments in bacteriological and chemical weapons which are increasingly regarded by experts as potentially more dangerous than nuclear weapons.[8] Both the Soviet and Western proposals for general and complete disarmament agree that the BC weapons should be subject to international control. But the problem of devising a reasonably effective system of safeguards to insure against their concealment, secret manufacture and use appears virtually insurmountable. First, several nations have already accumulated biological and chemical weapons in sufficient amounts to annihilate all living beings on the earth many times over.[9] Even a minute portion of this arsenal that

[8] See, e.g., U.N. General Assembly resolution 2454 (A) (XXIII) of December 20, 1968, on the "Question of General and Complete Disarmament." The resolution expressed concern over the potential threat to mankind posed by the development and possible use of chemical and bacteriological weapons.

[9] For some years now the defence establishments of major powers have been channeling growing amounts of funds into the development of BC weapons. While the exact expenditures are kept secret, a recent congressional testimony revealed that the U.S. military services were spending around $350 million annually on chemical and biological warfare. *New York Times*, March 5, 1969, p. 1, col. 6.

has escaped detection could provide the violator-state with a winning margin against its adversary. Second, to further compound the problem, the potential user of BC weapons would have at its disposal many effective delivery systems, including the proverbial "man with a briefcase" packing enough toxic bacteria to wipe out every inhabitant of Moscow or New York. Third, BC weapons could easily be manufactured in non-military research laboratories and other facilities normally not associated with arms production. To cope with this possibility, it has been suggested that an effective inspection system would have to provide for "registration of scientific personnel, accounting of materials, fiscal controls, and visits to conceivable production and testing facilities." [10] But even these measures might not guarantee adequate protection against government-inspired or private cheating. Massive intelligence activity, "internationalization of the microbiological profession", and "awards for disclosure of military preparations contrary to international agreement" would possibly have to be made part of the effort.[11]

Then there is the related vexing problem of how to control modern nuclear-space technology that can, with minor modifications, serve both military and non-military purposes. In a statement relating to the Latin-American Denuclearization Treaty, the U.S. government called attention to the "fact that the technology of making nuclear explosive devices for peaceful purposes is indistinguishable from the technology of making nuclear weapons and the fact that nuclear weapons and nuclear explosive devices for peaceful purposes are both capable of releasing nuclear energy in an uncontrolled manner and have the common group characteristics of large amounts of energy generated instantaneously from a compact source." [12] Space technology presents comparable difficulties. There is, for example, the problem of preventing the conversion of non-military space projects into military projects. To assure compliance with the disarmament agreement, a U.S. arms control study group has proposed that the space powers use a single international launch site and that shipment of rocket materials toward any other destinatian be treated as a probable treaty violation.[13]

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[10] C.-G. Hedén, *The Infectious Dust Cloud*, in *Unless Peace Comes*, ed. by N. Calder, (New York, 1968), 147, at p. 162.

[11] *Ibid.*, at p. 163.

[12] 58 Dep't State Bull. 555, at p. 556 (April 29, 1968).

[13] Hawkes, *Public Will Be Unwilling to Buy Costly Arms Inspection System*, 15 Missiles & Rockets 22 (July 13, 1964). The study group was set up at the Jet Propulsion Laboratory to advise NASA and other concerned U.S. government agencies. For an official American view on the verification measures to assure compliance with proposed freeze of strategic nuclear delivery vehicles, see the

Thus, it is fairly certain that the cost of a full-scale international arms control inspection system which would provide states with a reasonable degree of protection against clandestine violations of a comprehensive disarmament agreement might easily rival in cost the present defence establishments.

When nations decide to seriously begin negotiations leading to the setting-up of an inspection system within a major arms reduction plan, they will of necessity have to examine not only their defence establishments but also the whole legal, political and social structure of each participating country. The book by Professors Berman and Maggs on *Disarmament Inspection Under Soviet Law* represents a pioneering effort in that direction.[14] Their work illustrates what international arms inspectors could and could not do under conditions existing at the time of writing. The original contribution of the book is divided, like ancient Gaul, into three parts. The first and the shortest part provides the reader with information regarding certain basic aspects of Soviet legal and political milieus of particular importance to arms inspection. The second part of the volume, entitled "Privileges and Immunities of the Inspectorate", canvasses the relevant Soviet regulations applicable to foreigners and Soviet citizens. Not surprisingly, the writers conclude that the immunities and privileges essential to the inspectors would have to be significantly greater than those currently enjoyed in the USSR by foreign diplomats, let alone Soviet nationals.

The third and most interesting part of the book focuses upon the variety of legal problems which would likely be encountered by arms inspectors in the performance of their functions on Soviet territory. The range of problems discussed in this part can best be illustrated by quoting from the authors' own introduction: "would Soviet law compel the [Soviet] official [suspected of possessing information relevant to the purpose of inspection] to answer questions? What are the penalties under Soviet law for refusal to answer? Could the inspectors go to the official's house and tear it apart to find secret documents? Could they give him a lie detector test, or question him at night under a bright light? ...Could the inspectors dig up a graveyard to find out if atomic weapons are hidden under it? ...Suppose they [inspectors] accidentally came

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statement by Ambassador Clare H. Timberlake in 51 Dep't State Bull. 413 (September 21, 1964).

[14] Almost a decade earlier, Professor Louis Henkin published a comparable study on the problems that would be encountered by international inspectors under American law. *Arms Control and Inspection in American Law*, (New York, 1958).

across classified information having no bearing on arms control or disarmament: could they divulge such information without violating Soviet criminal law?" [15]

The Berman-Maggs analysis stimulates speculation about the practical problems that would face the Soviet Union and the United States should these countries, in the foreseeable future, agree on a major disarmament program which would involve a significant degree of on-site verification. There can be no doubt that today the USSR would find it immeasurably easier than the United States both to adapt its laws and to secure the acquiescence of its citizens to the requirements of international inspection. Soviet citizens are accustomed to a comprehensive, virtually all-embracing, governmental surveillance and to the absolute primacy of the Union's interests over any individual interest or right. No matter what the Soviet constitution or Soviet statutes prescribe, the fact remains that in the USSR — as was to an important extent the case in pre-revolutionary Russia — the right to privacy is not a guaranteed freedom, Article 128 of the Soviet Constitution notwithstanding. Ironically, with the progressive democratization of Soviet life, the task of an international arms inspection on Soviet territory may become more onerous. There are many indications, despite occasional setbacks, that the Soviet Union is gradually developing greater respect for the rights of its citizens, including respect for the sanctity of the person and his private home. By the time a major arms inspection program is agreed upon, the Soviet citizen, like his American counterpart, may come to regard his home as a castle and refuse to have it invaded by any intruder, national or international.

The authors of this book have wisely incorporated in their volume the full text of, or excerpts from, sixteen legal documents of direct relevance to arms inspection in the Soviet Union. The documentation is a most helpful addition to the original contribution; however, it would be unjust to the authors to convey the impression that their work can be of interest only to those concerned with disarmament. As Professors Berman and Maggs rightly emphasize, "a study of the problems of inspection under Soviet law has both practical and theoretical value, because it brings into a focus the entire Soviet system of rules and procedures applicable to foreign presence in Soviet territory." [16] It follows that any student of the political and legal system of the USSR will profit from this excellent yet compact study.

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[15] P. vi.
[16] P. vii.

What are the future prospects for a meaningful disarmament agreement? All indications point to the conclusion that there will be no major changes in the attitudes of states until revulsion against the arms race and against international violence becomes an integral part of our ethical and moral standards and the advocacy of such violence comes to be regarded as a common crime, not unlike the advocacy of armed robbery. Nor will a system of arms inspection, no matter how comprehensive and how ingeniously organized, ever be foolproof unless there first exists a climate of mutual understanding and respect, and a widespread desire for disarmament among both the ordinary citizens and a significant segment of the elite of the superpowers. Only when these conditions are achieved will the prospects for a truly disarmed world look encouraging. Hence, what is urgently needed are statesmen with vision, whose essential dedication is not to the aggrandizement of their national communities but rather to the whole family of mankind. These qualities are patently absent in most contemporary men of politics.

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Postscript

Since the completion of this review, the President of the United States, on March 14, 1969, announced his decision to begin deployment of the *"Safeguard"* (formerly *"Sentinel"*) anti-ballistic missile (ABM) system. If carried out, the President's decision is bound to have far-reaching effects on the future course both of the arms race and disarmament negotiations, as well as on the viability of existing arms control agreements.

Given the present questionable efficacy of the ABMs and the unquestioned superiority of offensive strategic weapons over the defensive ones, the *Safeguard* program is likely to precipitate another massive escalation in the nuclear arms race, matching if not exceeding the ICBM competition of the late fifties and the early sixties. As the *New York Times* noted, a major reason for the President's action was "the installation of 67 ABMs around Moscow, weapons the Pentagon recognizes as already obsolete. The planned American response involves more than 700 antimissile missiles and, through the use of MIRV multiple warheads, a probable fivefold increase in offensive delivery vehicles from 1,700 to more than 8,000." [17] There can be no doubt that both sides will renew their efforts to perfect offensive weapons which will provide the anti-ballistic defences with little or no time for interception. In pursuit of this

[17] March 17, 1969, p. 34, col. 2.

goal, it is also conceivable that increasing attention will be given by the military to the possibilities of using outer space for offensive purposes, e.g., for stationing in orbit weapons of mass destruction. Such measures would, in turn, call for the deployment of anti-satellite satellites, and so on *ad absurdum.*

These developments cannot but adversely affect the prospects for disarmament, despite the assurances voiced by the ABM advocates that the existence of an anti-missile system would make disarmament negotiations easier by improving the stability in relations between the two superpowers. If the installation of the ABM defences were part of an agreed arms control plan, carefully prepared by the Soviet Union and the United States, such a step might indeed eventually lead to some measures of arms reduction. But under the present conditions of uncontrolled arms race, the most likely outcome of the *Safeguard* decision will be to increase the distrust between these two adversaries, and also between them and the rest of the international community. Furthermore, as past experience demonstrates, once a substantial investment has been made in a new weapon system — and the cost of the *Safeguard* could be anywhere from $7 billion to $400 billion — it is here to stay. In all the history of disarmament negotiations, not a single weapon system has been eliminated from the arsenal of major states as a result of such negotiations. The deployment of the ABM network will inevitably complicate the already complex arms control talks and therefore make agreement that much more difficult.

Of particular concern is the potential effect of the *Safeguard* decision on disarmament agreements already in force or about to enter into force. A new round in the arms race involving strategic nuclear weapons might place the Moscow Test Ban Treaty and the Outer Space Treaty in jeopardy. On the one hand, the necessity to test the anti-ballistic missiles in the medium where they are supposed to operate, i.e., at high altitudes, could spell the end of the test ban; on the other hand, the urge to develop ABM-immune spaceborne weapons (e.g., "bombs in orbit") could result in the violation of the specific prohibitions contained in the Outer Space Treaty. However, it is the still inoperative Non-proliferation Treaty that may become the first casualty of the *Safeguard.* A number of states have been induced into signing the Treaty only after receving assurances from the principal nuclear powers that they will in good faith pursue negotiations leading to nuclear disarmament. To underscore the seriousness of their promise, the United States and the USSR agreed, on July 1, 1969, to begin discussions in the near future on the limitation and reduction of both offensive strategic nuclear weapons

delivery systems and systems of defence against ballistic missiles. The talks were, however, indefinitely postponed as a result of the Soviet intervention in Czechoslovakia. Many states, especially potential nuclear-weapons states, which have so far been reluctant to sign or ratify the treaty, can be expected to be even more reluctant to do so now that the two superpowers seem to be further escalating the nuclear arms race.

Should the Soviet Union and the United States proceed with the deployment of the ABM installations, the world community may have lost the last chance to revert the trend in the nuclear arms race. Fortunately, as neither side appears at this time to be irrevocably committed to this course, there is still a glimmer of hope that they could be persuaded to refrain from further expanding their overkill capabilities. Particular responsibility for bringing about such a change falls upon states participating in the 18-Nation Committee on Disarmament, of which Canada is a member. They should without delay or equivocation remind the two superpowers of their freely given promise to urgently enter into bilateral negotiations on the limitation and reduction or armaments, including the ABM weapons. The response to this reminder by the United States and the USSR will provide a critical test of how these countries view their obligations towards international agreements and towards the maintenance of peace and security in the world community.

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