

Book Reviews

Galbraith Redux

Economics and the Public Purpose. By John Kenneth Galbraith. Boston: Houghton Mifflin, 1973. Pp. xvi, 334. \$10.00.

Reviewed by James Tobin†

John Kenneth Galbraith is surely the best known economist in the world today and, textbook writers aside, probably the most read economist of all time. *Economics and the Public Purpose*¹ is his mature restatement and extension of the themes of *The New Industrial State* (1967 and 1971)² and *The Affluent Society* (1958),³ both best sellers. The book deserves serious and candid review, and that is what this reviewer, a long-time friend and admirer of the author, is going to give it.

I

As the title says, Galbraith is writing as much about economics as about the American economy. On page after page he contrasts his picture of the economy to that of "neoclassical economics,"⁴ and refers derisively to the blindness, obtuseness, and irrelevance of the bulk of his professional colleagues. Worse yet, he finds, economists' sins of omission and commission serve the ruling corporate "technostructure."⁵ Although Galbraith does not quite charge conscious venality, he does suggest that economists are protecting "intellectual and pecuniary capital"⁶—this is strong language from the 1972 President of the American Economic Association.

The attack is familiar from Galbraith's earlier books. By now the running battle with neoclassical foes is pretty tiresome. Most of

† Sterling Professor of Economics, Yale University.

1. J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973) [hereinafter cited by page number only].

2. J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (2d ed. 1971).

3. J. GALBRAITH, *THE AFFLUENT SOCIETY* (1958).

4. See pp. 11-18.

5. See p. 82.

6. P. 312.

Galbraith's readers, of course, know nothing of economics save what he tells them. Even noneconomist readers must wish Galbraith would, for once, make a straightforward argument without foils, straw men, and whipping boys.

There is, goodness knows, plenty of blindness, obtuseness, irrelevance, and parochial scholasticism in the discipline of economics. It is just not true, however, that the profession insists on analyzing the American economy as if it were an ideal type described by Adam Smith. Modern economics does not contend that competitive markets without public intervention do or could achieve maximum satisfaction of the wants of "sovereign" consumers. Anyone who takes a freshman course, reads a textbook, peruses the journals, or scans the titles of new publications can quickly satisfy himself that the profession does not ignore the salient features of the modern economy stressed by Professor Galbraith, including conglomerates, multinationals, monopolies, oligopolies, market failures, environmental "externalities." Most work of economists is highly empirical and closely related to practical issues of policy, such as utility regulation, manpower training, pollution, education, exchange rates, and property taxes.

Galbraith identifies contemporary economics with neoclassical economic theory. Innocent readers have a right to know what "neoclassical" means. Economists have always been looking for a theory of value, a theory which explains the relative prices at which commodities and resources are traded for one another. Classical economists—Adam Smith, David Ricardo, John Stuart Mill, Karl Marx—sought the answer solely in production costs. Neoclassical economists in the late 19th century—William Stanley Jevons, Karl Menger, Leon Walras, Alfred Marshall—showed that relative values are determined by demand as well as supply, tastes as well as technology, subject utility as well as cost.

A great intellectual achievement of the neoclassical tradition has been to spell out what might be called the pure logic of relative scarcity. For given tastes, technologies, and resource availabilities, there is in theory a price for every commodity and every factor of production, a price indicative of its relative scarcity. Corresponding to these prices are determinate outputs and allocations of all resources and all commodities. When elementary students learn that a commodity has an "opportunity cost" both in production and consumption, they encounter a simple version of these ideas. The notion of opportunity cost is indispensable for clear thinking about pollu-

tion control, gasoline rationing, university finance, subway fares, supersonic transports, and a host of other practical problems.

The "general equilibrium" solution of the allocation problem could, in principle, be found and implemented by a socialist planning board; under certain conditions it can be achieved by competitive markets. The elegance and power of this insight has attracted the best minds of economics over the years, and the logic of relative scarcity has been clarified, refined, and extended. No one understands its limitations better than its most sophisticated practitioners.⁷

Neoclassical theory itself explains why market results cannot be regarded as socially optimal. First, markets are not competitive. Second, even competitive markets fail to handle the uncertain future, "externalities" like environmental damage, and communally used goods and services. Third, market processes may result in socially unacceptable inequalities of income. Fourth, "consumer sovereignty" must frequently be limited to protect citizens from their own ignorance or shortsightedness and from the irresponsibilities of others. On all these matters a great deal of theoretical and applied work proceeds, unnoticed by Galbraith.

Vulgar apologists for private enterprise do, of course, invoke the "free market" to justify the privileges of the rich and powerful. Galbraith is dead right to object. But it does not follow that every interference with the market proposed by Congressman Wright Patman, Secretary Earl Butz, the Federal Power Commission, the Texas Railroad Commission, or Galbraith himself therefore is justified. We have to choose among imperfect alternatives. One does not have to be a devout disciple of Chicago economic liberalism to prefer market-clearing by price to gas pump queues, rent controls, wheat acreage restrictions and resale price maintenance, or to regard cash transfers as a more efficient and equitable way to redistribute income than farm price supports, minimum wages, and 35-cent subway fares.

There is a big difference between Galbraithian and straight economics, though not the one that Galbraith depicts. He is the leading exemplar of adjectival or denominative economics, creative nomenclature for the phenomenon described by the author. Galbraith's names are suggestive—technostructure, planning system,⁸ bureaucratic symbiosis.⁹ The names make readers think they understand the institutions. Conventional economists, instead, are obsessed with mechanism.

7. See, e.g., Arrow, *Limited Knowledge and Economic Analysis*, 64 AM. ECON. REV. 1 (1974) (1973 presidential address to the Am. Econ. Ass'n).

8. P. 44.

9. P. 143.

They like to build models that specify the behavior of the various actors in an economic drama and trace the outcomes of their interactions.

For Galbraith the economy is as simple as a bicycle; any intelligent, unbrainwashed observer can see at once how it works. For the straight economist, the economy is more like the human body; a very complex and often baffling network of interlocking systems. Galbraith rarely offers a hypothesis that might be tested and conceivably refuted by observation. New names and colorful adjectives are not testable propositions: Who is to say whether corporate managers and technicians constitute a technostructure? Perhaps because he believes truth is easy to come by (if only vested interests in falsehood are overcome), Galbraith offers little evidence for the propositions he does assert. By contrast, a conventional economist tries to state testable, refutable hypotheses. He is generally impressed with the difficulty of empirical verification, and he goes to great pains to tease information from recalcitrant and ambiguous data.

Consider, for example, Galbraith's description of the United States as a dual economy, split between the "planning" and "market" systems.¹⁰ This distinction is the central theme of the book, and it is important and illuminating. But the observation is only a beginning. Any recent Ph.D. from M.I.T. would embed it in a model which takes account of trade and mobility between the two sectors. Solved or simulated, the model would suggest some observable effects on employment, wages, prices, inflation.¹¹ With luck the credibility of the model could be statistically checked; it might turn out to be an accurate reflection of reality. No one says Galbraith has to play this game, though one hopes he might have students who would. But does he have to denigrate the serious scientific economists who do engage in this kind of work? The answer is no. It is unbecoming, unwarranted, and unnecessary.

The dismal science is not noted for literary merit. But the style of Galbraith's prose has aroused no inconsiderable admiration. Style and substance are in symbiotic relationship. The style distracts the reader from the substance. For an author this will be perceived as an agreeable circumstance. That sentences are frequently begun with substantive clauses will not escape the attentive reader's notice. Nor

10. See pp. 38-51.

11. See, e.g., A. OKUN, UPWARD MOBILITY IN A HIGH PRESSURE ECONOMY 207-52 (Brookings Paper on Economic Activity No. 1, 1973). Of course Okun's Ph.D. is neither recent nor from M.I.T.

is the author a slavish devotee of neoclassical rhetoric. The passive voice is much favored. The double negative is not abhorred. Reviewers' criticisms are explicitly predicted. The reader is invited to regard the fulfillment of those predictions as proof of the author's thesis. The overall tone is one of subtle irony. To sustain subtle irony for 324 pages is a task of no slight sophistication. This technostategy cannot be too much admired.

II

The argument of the book will be summarized¹² in nine points, each followed by the reviewer's comments.

1. *The Two Systems*. The private enterprise economy of the United States is about evenly divided between the planning system and the market system. The planning system is the world of the thousand largest corporations; the market system contains the smaller corporations, unincorporated businesses, farmers, self-employed professionals and artisans, and merchants of vice. In advanced capitalism the "unequal development"¹³ of the two systems has resulted in an "inequality"¹⁴ of power which favors the planning system at the expense of the market system.

Comment. The planning system, as defined by Galbraith, does not comprise as much of the economy as Galbraith says it does. In 1969, private business originated 82 percent of national income; the rest was produced by governments. Of privately produced national income, corporations were the source of 68 percent. There were 1.7 million active corporations, of which the 1,112 largest did 34.5 percent of corporate business. Thus the planning system apparently accounts for about 23 percent of private business activity, or 19 percent of total national income.¹⁵

12. This summary leaves out tangential but topical chapters on women and households, the environment, and the international economy. According to Galbraith, capitalist progress made servants too expensive and became dependent on "converting women to menial personal service" in their own households. P. 31. Galbraith favors liberation and equality. For the environment, Galbraith endorses "explicit and unyielding," p. 290, legal limitations on environmental damage and scornfully dismisses the taxes and prices beloved of neoclassical economists. As for the international economy, Galbraith has no use for monetary tinkering or tinkerers; he rightly says there is no substitute for coordinated planning, p. 322, and most tinkerers would agree.

13. P. 77.

14. *Id.*

15. Of the 1,112 largest corporations, by asset size, 581 were financial companies. Galbraith does not exclude them from his calculations, pp. 42-43, though there is a case for doing so. The 1,079 largest nonfinancial corporations did 40 percent of non-financial corporate business, or about 23 percent of national income. If corporations are classified by size of business receipts rather than assets, the 1,137 largest non-

In any event, Galbraith thinks the planning system is too large. Sometimes he gives the impression that ever-increasing disproportion is endemic to our political economy,¹⁶ although he does not flatly say so. Aggregate concentration figures for 1969, however, are much the same as those for 1957. In that year the 1,129 largest of 0.95 million active corporations accounted for 34 percent of corporate business, 23 percent of private business activity, or 19 percent of total national income. Concentration has increased, nevertheless, in the sense that 1,112 companies are a much smaller proportion of the population of enterprises than 1,129 were in 1957.

The concentration of economic activity in the 100 largest corporations has steadily increased since 1945 but at a much slower rate recently. This may be true of the share of the 500 largest manufacturers as well;¹⁷ their sales grew 187 percent from 1955 to 1970, while gross national product grew 145 percent, but the increases between 1965 and 1970, 45 percent and 43 percent respectively, were quite comparable.

Membership in "X largest" lists is not constant. Of the 100 largest industrial corporations, an average of 1.7 are displaced each year.¹⁸

On trends in concentration in particular markets, there is a lively statistical debate. Thanks to the conglomerate movement, market concentrations have risen less rapidly than aggregate concentration. Some students say that market concentration has not been increasing at all.¹⁹

None of these subjects is seriously discussed in the book.

2. *The Technostructure's Obsession with Growth.* The business firms of economics textbooks and of the market system seek to maximize the profits of their owner-managers. But the large firms of the planning system are ruled by their managerial technostructures, not by their owners. Individually and jointly, the technostructures' objective is to grow as fast as possible while making decent minimum profits for the shareholders.

Comment. As Galbraith acknowledges, the divorce of ownership and control is an old story, suggested by Thorstein Veblen²⁰ and

financial corporations did 44 percent of corporate business, or about 25 percent of national income. I cannot reproduce Galbraith's estimate that the planning system accounts for half of private economic activity, which would imply more than 40 percent of national income.

16. Cf. p. 105.

17. See M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 41-44 (1970).

18. See *id.* at 48-49.

19. See *id.* at 50-63.

20. See T. VEBLÉN, THE ENGINEERS AND THE PRICE SYSTEM (1921).

documented by Adolph A. Berle and Gardiner Means.²¹ William Baumol²² and Robin Marris²³ argued that corporate management seeks to maximize growth subject to a minimum profit constraint. Galbraith presents no evidence for the truth of this theory. Since growth and profits are usually correlated, the growth hypothesis is not easy to test against profit maximization. Incentive compensation of executives generally is geared to profit performance and share values. But it is also undeniable that managers of large organizations are, other things equal, better paid than those of small organizations.

3. *Planning as a Technological Imperative.* The new industrial state is the inevitable consequence of modern technology. Large corporations—large socialist enterprises, for that matter—generally produce goods (not services) with complex technology requiring large investment commitments long in advance of production and sale. That is why they must plan and why technicians and managers who do the planning have all the power. Failure is an unacceptable risk. So the firm controls its environment. It makes sure that consumers and governments will buy its products. It generates its own investment funds to avoid dependence on financiers. It captures control of needed raw materials and supplies. It arranges a sympathetic political climate. And so on.

Comment. Are the risks and lead times of modern technology exceptional? How about the lead times and risk faced by capitalists who sent sailing ships to the Far East or began laying railroad track across wild prairies?

Are large corporations omnipotent and invulnerable? Young Louis Brandeis made his mark by assailing the corporate octopus that dominated New England financially, politically, and socially: the *New Haven Railroad*! Powerful firms cannot always bend customers to their will. DuPont lost millions on Corfam; the Edsel is only the most striking example of an automobile promotion that failed; and Boeing is only one of many firms to find the Pentagon an inconstant customer. Nor are all large corporations immune from capital markets. (None of them would be if they sacrificed profits to growth in the manner Galbraith describes.) Of the 552 largest nonfinancial corporations, 164 are public utilities, which borrow heavily and constantly.

Galbraith's typical corporation is in manufacturing, a relatively de-

21. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

22. See W. BAUMOL, *BUSINESS BEHAVIOR, VALUE AND GROWTH* (1959).

23. See R. MARRIS, *THE ECONOMIC THEORY OF "MANAGERIAL" CAPITALISM* (1964).

clining sector of the economy. The truth, I suspect, is that most of the time Galbraith is writing about General Motors, a deserving enough target but hardly typical.

4. *The Public Sector*. The technostructure enjoys a symbiotic relationship with the federal executive and bureaucracy, especially the Pentagon, and with strategic senior committee chairmen in Congress.²⁴ Public expenditure programs which support the planning system prosper. Those which help the market system and the general public are shortchanged; their only political support comes from powerless rank and file members of Congress.

Comment. Since the publication of *The Affluent Society* in 1958—perhaps because of it, who knows?—public civilian use of goods and services has increased from 10 percent of gross national product to 19.5 percent. In addition, over the same period governmental transfer payments to individuals have grown from 6 percent to 10.5 percent of personal income. These trends have not been deflected by either Vietnam or the Nixon presidency. Civilian government has grown fast, faster than the economy. Meanwhile defense has declined from 9 percent of gross national product to 6 percent.

Galbraith's readers will not find these figures or any other recognition that the civilian public sector is not as undernourished now as when the earlier book voiced so eloquently his well merited complaint. Well, aren't many public purposes still shortchanged, relative to the needs? Aren't streets still dirty, parks unsafe, schools ineffective, inner cities blighted, mass transits abysmal, poor people ill-fed, mental hospitals disgraceful, jails medieval, and the arts—very important to Galbraith—neglected?

It's all too true, but the morals are not the ones Galbraith leads the reader to draw. First, the problems are tougher than anyone imagined or admitted. Schools, neighborhoods, cultures, transportation systems are not that easy to turn around. Money is necessary but not sufficient. Second, legislators will support the public sector, but what public sector? The sky's the limit for social security and agricultural subsidies, not because these programs appeal to the technostructure but because they, unlike jails and mental hospitals, have irresistible constituencies.

Nothing in Galbraith's political theory prepares us for these distortions of priority, which are not the will of the corporate establishment but the outcome of pluralistic politics. That same politics

24. See generally pp. 134-45, 155-63.

has not reduced defense spending enough to suit Galbraith or me, but cuts in weapons orders have thrown major Pentagon contractors into insolvency.

5. *The Two Systems and Market Power.* Jobs are secure and well paid in the planning system.²⁵ The technostructure has long since made its peace with the unions, knowing that labor costs can easily be passed on to consumers. But those who cannot gain admission to the planning system are relegated to the market system. Some are self-employed, some are hired workers, but all are overworked, underpaid, and untenured. The market system really operates like the neoclassical model, with competition and flexible prices. The results are disastrous, in part because the planning system imposes severe terms of trade on its powerless suppliers and customers.

Comment. The dual labor market observation rings true and commands widespread agreement. However, by no means all preferred jobs with restricted access are within Galbraith's planning system—consider construction workers, municipal employees, and other well-organized crafts.

The claim that the planning system can with impunity dictate prices to consumers and to the market system is less credible. Here as elsewhere Galbraith artfully dodges the problem of aggregation. The 1,000-firm planning system is not just a single corporation writ large. Galbraith himself gives the various technostuctures no credit or blame for coordination; in fact he points out that their individual plans frequently fail to mesh.

The sector as a whole may be able to pass on cost increases, simply because the government, fearing unemployment, inflates demand as needed. But this macroeconomic possibility does *not* mean that a company is assured that its customers will still be there if it individually raises prices. Likewise, large corporations are often competing with each other in buying supplies and services from the market system.

6. *Antitrust and Socialist Alternatives.* Competition can never be enforced in the planning sector. The antitrust myth, kept alive by economists, serves the technostructure by diverting attention and energy from real solutions.²⁶ Anyway, the problem is not that the planning system is too small, as conventional monopoly theory tells us, but that it is much too large. Galbraith recommends (a) na-

25. See pp. 161-62.

26. See pp. 215-17.

tionalization of big government contractors and of other "fully mature corporations"²⁷ (as well as of industries—medical care, transportation, residential construction—where private enterprise has clearly failed),²⁸ (b) limitation of executive rewards by aggressive unionism (white collar as well as blue), by tax reform, and by government regulation,²⁹ (c) permanent wage and price controls.³⁰

Comment. Certainly it is hard to be optimistic about antitrust policy. Its history is full of decisions which actually impede competition,³¹ while blatant concentrations without redeeming economic virtue remain unscathed. Prosecutors and judges are often innocent of economics. Federal administrations are timid. Solutions are genuinely difficult. But fear of antitrust prosecution is a constraint on corporate policy, and we had better not relax it.

The privileges of workers in large parts of the planning system and elsewhere are protected by barriers to entry of other workers, erected by unions with support from employers and governments. This is a topic Galbraith completely avoids. There are no unkind words about trade unions in this book though in the heat of politics Galbraith has been known to speak unfavorably of George Meany.

If some industries in the planning system are too large, as Galbraith alleges, it is because they indulge, not in too much price competition, quite the contrary, but in too much nonprice competition. Galbraith dismisses as "illiberal" any ban on advertising.³² But, as the present neoclassical liberal reviewer has long advocated, it would be feasible, and not illiberal, to limit the tax deductibility of advertising and sales expenses. As to Galbraith's complaint that top executive salaries and other perquisites are unconscionable and must be brought under control, I can only say Amen. This, too, could be handled in the tax law.

What is to be gained by nationalization of large "mature" corporations if, as Galbraith observes, the technostucture would remain in command? Something would be lost—discipline of management by adverse stock market judgments and possible takeovers.

27. P. 272.

28. Pp. 179-81.

29. Pp. 166-70.

30. Pp. 170-71.

31. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). Continental Baking Co. broke into Utah Pie's Salt Lake City market with cheaper frozen apple pies than those offered by Utah Pie. The Court found price discrimination in violation of § 2(a) of the Clayton Act.

32. Pp. 229-30.

Anyway, Galbraith's socialist proposals are too casual to be taken seriously. Galbraith does not tell us how the investment needs of a nationalized automobile company would be determined and financed, how industries would operate half-nationalized and half-private, how collective bargaining would be kept out of Washington politics, or other details. Galbraith is certainly right that government is bound to have a big role in transportation and medicine, but again he does not face the really difficult problems, which will remain whether or not the industries are socialized.

7. *Planning the Market System.* The principal remedy for the unequal development and inequality of the two systems is to equip the market system with countervailing power.³³ Let small businessmen combine to "stabilize prices and output."³⁴ Let government regulate prices and output when, as in agriculture, producers cannot combine on their own. Encourage unions; universalize and boost the minimum wage. Encourage international commodity agreements; do not on principle deny tariff protection to the market system. Provide government support for the educational, capital, and technological needs of the market system.

This program will reduce output and employment in the market system. Indeed, that is its purpose—to eliminate production which does not yield its producers a decent income. So there must be alternative income guaranteed for those who are unable or unwilling to find jobs. Galbraith evidently has in mind a negative income tax; his illustration is a guarantee of \$5000 for a family of five.³⁵

Comment. This is the heart of the book. And this is where most of Galbraith's fellow economists will disagree most strongly.

It really is a letdown to go through a supposedly revolutionary book and to learn toward the end that salvation lies in those unlamented inventions of the early New Deal, the NRA and AAA.³⁶ In brief, Galbraith would have us each in toll booths where we could share in tolls from passers-by, not because they choose to pay for what we can produce but because they have no alternative. Yet there will not be enough toll booths to go around, so the rest of us will live on the dole. It is not just an inefficient prospect; it is unfair and it is terribly dreary.

Today people in the "market system" are excluded from com-

33. See pp. 252-63.

34. P. 256.

35. P. 263.

36. See pp. 252-63.

petition for the fruits of the "planning system." The solution is not to remake the "market system" with the worst imaginable noncompetitive features. The answer is to break down barriers to equal opportunity throughout the economy.

8. *Macroeconomic Policy*. The planning system is inherently unstable. It is subject to failures of aggregate demand, to excess capacity and unemployment, and to chronic inflation in every kind of economic weather. For stabilizing demand, fiscal policy is the answer. Raise government expenditure when demand is deficient; raise taxes when it is excessive. The asymmetry is a virtue; the policy will gradually raise the share of the public sector in the economy. When the day for a symmetrical policy arrives, "it will be sufficiently noticed and celebrated."³⁷

Monetary policy should almost never be used. Keep a permanent level and structure of interest rates, "on the low side."³⁸ The reason is that monetary policy is socially regressive, hitting the market system, notably home building, but not the planning system.

The aim of demand policy is to avoid all but frictional unemployment in the planning system and to stabilize prices in the market system. But demand policy is not enough. To prevent inflation, beyond a slow drift to accommodate relative price adjustments, permanent controls of wage bargains and of planning system prices are required.

Comment. The chapter on macroeconomic policy is analytically weak. For example, Galbraith confuses marginal and average propensities to save.³⁹ And, after saying that rich people and corporations do not spend anyway, he tells us that the more we rely on taxing them the more stabilizing the tax system will be.⁴⁰ More important, he throws away so many policy instruments that he leaves policymakers with no practical way to stabilize aggregate demand. Fiscal measures, especially expenditures, cannot be adjusted fast enough.

Galbraith does not explain the basic causes of instability and chronic inflation. The consistency of his two criteria for fiscal policy—full employment in the planning system and price stability in the market system—is surely not obvious. But Galbraith does not even regard their possible incompatibility as a problem deserving discus-

37. P. 308.

38. P. 309.

39. P. 306.

40. *Id.*

sion. He does not defend his assertion that wage and price controls need apply only to big boys. It needs defense—recent bouts of commodity inflation have made the union-corporation spiral look like price stability. Anyway the author of this chapter evidently forgot that a few pages earlier he was refashioning the market system in the image of the planning system. Once he finishes that job, controls will surely have to be universal. Finally, Galbraith assumes without discussion that inflation is an intolerable evil, just as if he were a Zurich banker.

9. *Irrepressible Liberalism*. How can reform prevail? Belief, politics, government must be emancipated from the planning system and the myths that serve it.⁴¹ Important among those myths is current education in economics and other subjects. Emancipation will be accomplished by “Public Cognizance” of the inherent conflict between the planning purpose and the public purpose.⁴²

Comment. In the last pages of every Galbraith book hopeful liberal faith triumphs over the unrelieved cynicism of the earlier chapters. A neoclassical economist or a political philosopher might blush to introduce “public interest” as a principle of obvious, unproblematic content and application. Galbraith is as sure of the public interest, and as dedicated to it, as the most starry-eyed idealistic sophomore.

This confidence has been the foundation of Galbraith’s great contributions to the public weal. He awakened the literate public to the undernourishment of the public sector. He challenged the insatiable appetite of the Pentagon and its corporate allies. To any readers of his present book who needed to be convinced that what is best for General Motors or Exxon is not usually best for the country, Galbraith has once again conveyed an important message.

41. See pp. 223-32, 241-51.

42. See p. 229.

Beyond Any Discipline's Competence

Beyond the Best Interests of the Child. By Joseph Goldstein, Anna Freud & Albert J. Solnit. New York: The Free Press, 1973. Pp. xiv, 170. \$7.95.

Reviewed by Nanette Dembitz†

A judge usually can decide with self-confidence the legal and factual issues in litigation over who should have custody of a child. Where he¹ needs help, however, is in evaluating which of the available alternatives will best satisfy the child's psychological needs. The mission of authors Goldstein, Freud, and Solnit in their new book is to provide guidelines, based on psychoanalytic theory, to govern the judge's decision in all types of child placement cases. The promise is seductive but impossible; the authors fail to devise usable scales because the amalgams of factors to be appraised in custody contests are too complex.

It may be beyond the competence of any discipline to construct a simple yardstick to measure, for example, whether ten-year-old Ann will develop better with her mother or father, when (to mention only a few factors): Her mother is outgoing, but overly permissive, and leaves the child with maids while traveling with her paramour; her father is loving, but lives by rigid schedules, and, according to Ann, has deserted her and her mother. Later in the review, I shall detail regretfully the inefficacy of the authors' proposed guidelines. The book does, however, make several persuasive points concerning current child care controversies.

I

The authors believe that the law must "make the child's needs paramount"² over those of any adult. And the child's primary need is for care by his "psychological parent," the adult who, regardless of his biological relationship, satisfies the child's psychological as well as material needs.³ Thus, with exclusive focus on the child, the

† Judge, Family Court of New York State.

1. The masculine pronoun is used herein to refer to the feminine gender as well.

2. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7 (1973) [hereinafter cited to page number only].

3. Pp. 98-99.

Beyond Any Discipline's Competence

authors are undaunted by the Supreme Court's constitutional concern for the biological parent's status.⁴

The authors emphasize society's interest in meeting the child's needs through a psychological rendition of the Biblical warning that the Lord will visit the iniquity of the fathers upon the children:

Each time the cycle of grossly inadequate parent-child relationships is broken, society stands to gain a person capable of becoming an adequate parent for children of the future.⁵

This cycle, according to the authors, cannot be broken if the child's needs are disregarded whenever the biological parent asserts an alleged natural right to his child. Not only societal interest but simple humanitarian concerns often dictate that the courts focus on the needs of the helpless child rather than the claims of the biological parents. Finally, the argument for looking only to the child's interests gains strength from the civil libertarian thesis that no one can claim ownership of an individual once he has left the womb.⁶

Those arguing for the biological parent's claims to his child can point to the parent's right, accepted by the authors, to automatic custody of the child at birth and can question whether this right can be abrogated without good cause. The only answer to this argument is something of an *ipse dixit*: The parent's right to initial custody is a result of the state's policy of laissez faire as to natural processes; when the parent's conduct precipitates state intervention in the parent-child relationship, the state then may seek primarily to satisfy the needs of its ward, the child.⁷

The issue of the parent's right versus the child's welfare has been most dramatic in child adoption cases. In New York (whose practices are much discussed in the book) popular attention was aroused by a 1971 case known as the *Case of Baby Lenore*. The highest court of New York affirmed orders directing Lenore's return from her established home with prospective adoptive parents to her biological mother, who had first permitted the baby's adoption and then withdrawn her consent.⁸ The Court of Appeals reasserted the

4. See *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

5. P. 7.

6. Anti-abortionists have argued that the American Civil Liberties Union and other civil liberties groups are biased in refusing to attribute individual rights to a foetus.

7. The writer knows of no legal doctrine supporting the proposition, basic to the book's theme, that the biological parent's right vanishes when it becomes the subject of litigation. Nor is any suggested in this volume.

8. *Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 192, 269 N.E.2d 787, 791, 321 N.Y.S.2d 65, 70 (1971), *aff'g* 36 App. Div. 2d 524, 317 N.Y.S.2d 928 (1971), *cert. denied*, 404 U.S. 805 (1971).

New York doctrine that the biological parent has a "right to the . . . child, superior to that of all others, unless he or she . . . is proved unfit" ⁹ At the same time the decision spoke in terms of promoting the child's interest and welfare, and indeed emphasized psychological, rather than material, well-being (although the book implies that the judiciary frequently fails in this respect). The junction between these two tracks was fashioned by the court's assumption that a biological mother will provide "tender care and love" ¹⁰ and that this affection "will endure." ¹¹

This assumption that maternal love is always born with the birth of a baby surely is unjustified, particularly in the conflicted relationships which lead to court cases. Male judges, who generally are fathers of biological children left in the care of their biological mothers, may indulge this wishful assumption more than do female judges. All courts, as the authors urge, ¹² should discard the doctrine of the biological parent's superior right. ¹³ Despite the perils of psychological predictions, the courts in all cases must appraise, rather than assume, who will be the best "psychological parent," ¹⁴—albeit, in an individual case unusual psychological tensions about adoption might weight the scales for the biological parent. ¹⁵

The doctrine of the biological parent's natural rights, which continues to appear in numerous New York decisions, reflects a deeply held ethic. Even some child care social workers have suggested in court that a mother who, for instance, is mentally ill should not be denied her child; this is a punishment which should be in-

9. 28 N.Y.2d at 192, 269 N.E.2d at 791, 321 N.Y.S.2d at 70.

10. 28 N.Y.2d at 194, 269 N.E.2d at 792, 321 N.Y.S.2d at 72.

11. 28 N.Y.2d at 192, 269 N.E.2d at 791, 321 N.Y.S.2d at 70.

12. See p. 98.

13. New York has enacted a provision similar to one in the authors' model code, applicable to cases like the *Case of Baby Lenore*, providing that in such contests "the best interest of the child" shall be the only determinant and "there shall be no presumption" in favor of any of the contestants. N.Y. Soc. SERV. LAW § 383(5) (McKinney Supp. 1973).

14. In *Scarpetta*, reliance on the assumption of the biological mother's love for the child resulted in only a limited inquiry into her psychological fitness. For a broader inquiry despite the presumption, see *In re S.*, 74 Misc. 2d 154, 347 N.Y.S.2d 470 (Fam. Ct. 1973); *Stone v. Maglio*, 62 Misc. 2d 292, 308 N.Y.S.2d 604 (Fam. Ct. 1970), *stay of adoption denied sub nom.* *People ex rel. Scaff v. Giglio*, Motion No. 632 (App. Div., Feb. 26, 1970); *Mittentaaal v. Dumpson*, 37 Misc. 2d 501, 511, 235 N.Y.S.2d 729, 738 (Fam. Ct. 1962). For an unusual implementation of the doctrine of the natural parent's superior right, see *Apgar v. Beauter*, 75 Misc. 2d 439, 441, 347 N.Y.S.2d 872, 875-76 (Fam. Ct. 1972) (sheriff must permit incarcerated mother to care for newborn baby in jail).

15. Judge Breitel (now Chief Judge of the New York Court of Appeals), looking at this problem from the standpoint of the child's rights, suggested that a child has a "claim . . . to be reared by its natural parents . . . and to be freed of the emotional problems associated with the status of being an adopted child" *People ex rel. Anonymous v. Louise Wise Servs.*, 21 App. Div. 2d 327, 329, 250 N.Y.S.2d 507, 510 (1964).

flicted on her only if she is unvirtuous or deliberately mistreating the child.¹⁶ Then, too, the parent's congenital claim may have religious underpinning: Some people may feel that a child ought to be raised in the religion of its parents. Thus it is not only judges to whom the authors must address their thesis of judicial focus only on the child's needs.

II

The authors' orthodox theories of child development are an antidote to current adventurism in child care. The child, they argue, derives many benefits from "a relationship with two adults who have an intimate relationship with each other";¹⁷ this conclusion refutes the contention that a child need not be raised in a nuclear family, that a single parent can care for a child adequately.¹⁸ Parents, they believe, who "reject their own male or female identity"¹⁹ are unable to nurture a child's sense of identity and self-worth. Thus homosexual couples would not be adequate psychological parents.²⁰

The authors also hold that the child's "family relationships . . . determine his social reactions."²¹ Through identification with his parents, the child will build "attitudes towards work and the community."²² Parents, however, "may provide the child with unsuitable models for identification."²³

This emphasis on the impact of parental values on the child is particularly relevant to parental neglect and abuse proceedings—a large class of cases in family and juvenile courts. These neglect and abuse cases typically involve low-income families, in which the mother and children are on public assistance, and the father has disappeared. Affluent mothers, of course, also are deserted by fathers; they as well may be subject to alcoholism, mental illness, or periods of irresponsibility or hatred toward their children. They, however, can employ caretakers or look to at-leisure relatives in order to protect infants from being alone at night or other flagrant dangers.²⁴

16. *But see In re B.*, 60 Misc. 2d 662, 664-66, 303 N.Y.S.2d 438, 441-43 (Fam. Ct. 1969), *aff'd mem. sub nom. In re Behrman*, 34 App. Div. 2d 527, 309 N.Y.S.2d 864 (1970).

17. P. 16.

18. *Cf. In re H.*, 69 Misc. 2d 304, 311-13, 330 N.Y.S.2d 235, 245-47 (Fam. Ct. 1972), *rev'd mem.*, 40 App. Div. 2d 513, 333 N.Y.S.2d 846 (1972).

19. Pp. 15, 17.

20. *Cf. Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), and cases therein cited which uphold denial of marriage license to persons of same sex.

21. P. 10.

22. P. 14.

23. P. 15.

24. *See Dembitz, The Good of the Child Versus the Rights of the Parent*, 86 *POL. SCI. Q.* 389, 391-93 (1971).

Poverty lawyers representing biological parents in neglect cases often contend that the parent has a right to raise his child in his "life-style" regardless of what the establishment regards as its malevolent effect on the child. A ghetto child, they argue, must learn to cope with an environment filled with drugs, crime, prostitutes, pimps, and other perils. An extreme of this argument, recently made in a neglect case in New York City's Family Court, was that a mother's deliberate punitive burning of her seven-year-old daughter's arm with a curling iron was *de minimis* in comparison to the general misery of life in Harlem and should therefore be ignored in considering the child's need for foster care.

The authors may be responsive to poverty lawyers' philosophy, for with respect to neglect and abuse cases, they seem inexplicably reluctant to apply their assertions of the child's right to an unshadowed place in the sun. Together with the parent's recognized constitutional right to rear his child as he wishes²⁵ and the state's recognized power to act as *parens patriae* for the child in neglect cases, the child's own rights ought to be recognized as a third side of a constitutional triangle. In this geometry a delicate balance must be struck to determine if foster care indeed will benefit the child. This reviewer suggests, however, that the principle of the paramountcy of the child's welfare, basic in this book, is as applicable in neglect and abuse cases as in adoption or other child placement disputes.

Finally, the authors' redirection of attention to familial influence argues against the possibility that adverse parental influences can be counteracted by changes in the schools and other social and political institutions. If the dose of adverse familial influence is continuing and virulent a child of course may grow obdurately hostile and unresponsive; he may be unable to grasp an outsider's helping hand. But the psychoanalytic approach to the problem should not be taken to negate the need for social change. Institutions outside the family may fail to offset parental influences on a child, but

25. The child's right may reach constitutional dimensions. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1922). In *Wilder v. Sugarman*, Civil No. 73-2644 (S.D.N.Y. 1973), the primary issue presented by the complaint is the constitutionality of state support of sectarian child care institutions; the right of a parent to determine his child's religious upbringing and the right of the child to observe his religion are aspects of the problem.

Concerning the rights of a minor to act contrary to parental wishes, see *Melville v. Sabbatino*, 42 U.S.L.W. 2242 (Conn. Super. Ct., Oct. 5, 1973) (right of 17-year-old to terminate hospitalization for mental illness); *Doe v. Planned Parenthood Ass'n*, 29 Utah 2d 356, 510 P.2d 75 (1973) (right of 16-year-old to receive contraceptive information without parental consent).

opportunities for employment, good wages, health care, birth control, and other material improvements for the parent may assuage his despair and thus release positive feelings for the child, in a social version of the capitalist theory of the "trickling down" of benefits.

III

The authors' most important guideline for evaluation of the child's needs and for changes in present court practices is the standard of continuity—the child is said to need "continuity of relationships, surroundings, and environmental influence."²⁶ The indisputable value of continuity is indeed hornbook law in custody and foster care cases.²⁷ But reliance on this one guideline ignores the mind-racking necessity for weighing continuity against competing values.

The book recommends, for instance, that "because of the child's need for continuity,"²⁸ custody decrees pursuant to divorces should be, as in adoption, "final, that is, not subject to modification."²⁹ In either a broken or intact family, however, the child's relationship to, and need for care by, the male or female parent may change with passing years. Moreover, the custodial parent's ability to fill the child's psychological needs may deteriorate, perhaps because of the strain of divorce or sole custody. Parental rejection of the child, alcoholism, an antagonistic paramour or second spouse are only three more of other innumerable contingencies which may become of far more importance to the child's welfare than the need for continuity. The authors themselves recognize, but then ignore, that "[p]sychanalytic theory confirms the substantial limitations on our capacity to make . . . a prediction [of which adult will best meet a child's psychological needs]."³⁰ There is also the unfortunate but real possibility of a hasty or misguided initial custody decision, either by the parties or the court. Thus the present presumption in favor of continuity is as far as the continuity principle ought to be carried.³¹

Factors competing against continuity are equally difficult to ap-

26. P. 31.

27. *Berlin v. Berlin*, 21 N.Y.2d 371, 376-77, 235 N.E.2d 109, 112, 288 N.Y.S.2d 44, 48-49 (1967), *cert. denied*, 393 U.S. 840 (1968); *People ex rel. XX v. ZZ*, 43 App. Div. 2d 196, 198 (1974); *Dintruff v. McGreevy*, 42 App. Div. 2d 809, 346 N.Y.S.2d 399 (1973). See *Halvey v. Halvey*, 330 U.S. 610, 619-21 (1946) (Rutledge, J., concurring) for the undesirable consequences of nonfinal custody awards.

28. P. 37.

29. *Id.*

30. P. 6.

31. See *Halvey v. Halvey*, 330 U.S. at 613-14; *Berlin v. Berlin*, 21 N.Y.2d at 374, 235 N.E.2d at 110, 288 N.Y.S.2d at 46; *Rowe v. Rowe*, 42 App. Div. 2d 830, 245 N.Y.S.2d 811 (1973); *cf. Niles v. Niles*, 42 App. Div. 2d 945 (1973).

praise in proceedings for parental neglect. Suppose a mother asks a judge to place her 11-year-old son in foster care because he "gets on my nerves and I'm sick and nervous already," and her paramour beats the boy for minor defiances. But the boy is so anxious to maintain his tenuous bond that he urges the judge: "Tell her she won't get any more welfare if she sends me away." What should the judge do? And suppose a child will receive continuous care in a foster home but will feel rejected and unworthy if taken from his mother (for a child in a neglect case—with the egocentricity stressed by the authors—often blames himself for his own mistreatment). The mother, on the other hand, has had continuous custody, yet has frequently deserted the child or neglected to care even for his material needs. How should the judge apply the continuity standard in such a case? And, finally, suppose the judge foresees, for instance, that a child will deteriorate as the condition of his mentally disturbed mother declines; if the mother worsens, no foster parents may be found for him.³² The continuity guideline is hardly useful in such a case.

The authors propose also that "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."³³ This rule is said to "protect the security of an ongoing relationship—that between the child and the custodial parent."³⁴ The proposal is blind and untenable.

Visitation arrangements might well be in the child's interest, but the custodial parent, wishing to punish a deserting spouse or erase all connections or identifications with him, may refuse to allow visits.³⁵ It is true, as the authors suggest, that court-imposed visits may disturb or embitter the custodial spouse. Mothers often say: "Why should he see the baby, when I have to take care of it?"; "He takes the child to see his mother who hates me."; "The father didn't take the child out while we were together so why should he have the right now?" Fathers say: "She deserted me and the children; she has no right to see them now." A clear demarcation of rights and obligations, however, sometimes quiets the custodial parent's anger.

32. In New York recent concern with the rights of foster parents and permanency in parent-child relationships resulted not only in the legislation cited *supra* note 13, but also in legislation requiring court review of any foster care placement lasting more than two years, the objective being to terminate this divided arrangement between foster and biological parents by either returning the child to the biological parent or legally severing his hold and securing the child's adoption. See N.Y. Soc. SERV. LAW § 392 (McKinney Supp. 1973). The thousands of foster care cases being reviewed under this law are producing a wealth of social data.

33. P. 38.

34. *Id.*

35. Cf. *Kresnicka v. Kresnicka*, 42 App. Div. 2d 607, 345 N.Y.S.2d 118 (1973).

Beyond Any Discipline's Competence

But the disquiet that may attend court-ordered visitation must be weighed against the child's needs for the psychological assets of the parents and the child's feeling of confusion and rejection that may follow the disappearance of the noncustodial parent. Finally, court mediation, rather than argument between former spouses, may be useful in settling disputes arising from major changes in erstwhile agreeable visitation patterns. For instance, if the custodial mother moves from New York to California, a new visitation program can be arranged and increased expenses allocated equitably by a judicial ruling.³⁶

IV

The psychological calculus in child custody determinations compels the question of whether judges are the ablest individuals to factor these equations. Certainly in most cases psychiatric and psychological evaluations should be required before any order for a change of custody is issued. It has been suggested further that judges should make room on the bench for psychiatrists and other behaviorists in deciding the psychosocial issue of criminal sentencing.³⁷ Perhaps custody decisions as well should not be made by a legally trained judge alone.

Fact finding by the adversary method is an essential first step in custody cases. The psychiatrist studies emotions and attitudes rather than actual happenings, and his techniques are not adapted to determining facts. Moreover, his predictions of future behavior can be grossly inaccurate. Diagnosis and prognosis of a child's welfare in alternative custody situations therefore must depend largely upon past facts. It is important, for example, to know whether the mother left the home, as her husband contends, because she went to live with a paramour, or whether, as she contends, she left because he was drunk and violent. The actuality may be a better clue to which parent will give stable care to the child than psychiatric diagnoses of sado-masochism or hostility in the conjugal relationship.³⁸ It is

36. See, e.g., *Kovesdy v. Hines*, 75 Misc. 2d 644, 647-48, 348 N.Y.S.2d 281, 285-86 (Fam. Ct. 1973).

37. See M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 69-124 (1973).

38. In discussing the need for hearings to insure accurate fact finding in juvenile court proceedings (before such hearings were mandated by *In re Gault*, 387 U.S. 1 (1967)), a sociologist wrote:

However advanced our techniques for determining what an individual *is*, we have not yet approached the point at which we may safely ignore what he has done.

What he has done may often be the most revealing evidence of what he is.

Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 Soc. SERV. REV. 107, 117 (1958). And psychiatric evaluations may be contradictory. See *In re Blaine*, 54 Misc. 2d 248, 259, 282 N.Y.S.2d 359, 369 (Fam. Ct. 1967).

important, for another example, to try to find out through the adversary method whether the mother, accused by her child of abuse, in fact did beat the child; if she did not, the psychiatrist then should investigate not the child's reaction to the alleged beating but instead his reasons for fantasizing or misrepresenting the parent's conduct.

After judicial fact finding, the ultimate determination of the best "psychological" parent for the child, on the other hand, might be made with more objectivity and skill by a panel of experts trained in psychology and social sciences than by a judge alone. The deciding group should include the judge in order to insure due weight to his finding of facts and to counteract the tendency of some behaviorists to discount facts which do not fit their analysis of a family's psychodynamics.

The authors refrain from recommending participation by psychiatrists and other experts in a custody decision, but they do advocate independent legal representation for the child in all cases involving child placement.³⁹ To attack such a sacred and apparently innocuous cow is doubtless heresy. Nevertheless, the New York Family Court's extensive experience with counsel for the child indicates that the authors have an exaggerated and unrealistic view of the utility of such counsel in custody cases.⁴⁰

As the authors themselves stress, the judge deals with finite possibilities; he generally has to choose between two, or at the most three, placement alternatives. The evidence for and against the alternative custodians is developed by the adversary method: in divorce-custody cases the mother against the father; in parental neglect cases the Bureau of Child Welfare against the parents; in foster care or adoption cases the biological parents against the foster parents. There is little that counsel for the child can contribute to the fact finding unless by some mere fortuity he is better prepared on the case than the other attorneys or is a more competent interrogator. Thus he often sits mute at the counsel table during the fact finding. In evaluating the best—or as the authors phrase it, "the least detrimental"⁴¹—of placement alternatives, Legal Aid Society lawyers, who regularly act as "law guardians" for children in the Family Court's

39. Pp. 65-70.

40. N.Y. FAMILY CT. ACT § 249 (McKinney 1963) mandates appointment of an attorney for the child in all neglect and abuse proceedings; and counsel is discretionarily appointed in many other proceedings involving custody. (Delinquency proceedings or other proceedings *against* the child raise entirely different considerations; counsel for the child is of course indispensable in such cases.)

41. P. 53.

neglect and abuse proceedings, do contribute acumen, perspective, and diligence in tapping resources. Save for this exception, however, the experience and expertise of the child's counsel is generally far less than the judge's in making the ultimate custody determination.

Finally, the authors' own desire for speedy determinations in child placement cases may be frustrated by independent representation for the child. The proliferation of attorneys generally presents practical difficulties which prevent calendaring cases with dispatch. Securing counsel for the child thus is a detriment to the child, if the counsel is unlikely to contribute more than a superficial endorsement of the position of one of the adult parties.⁴² Admittedly, this ostensibly unbiased endorsement may serve as a crutch for a judge who wishes support for his decision to award the child to that one party. Nonetheless, routine appointment of counsel for the child in all custody matters, as the authors recommend, would result in a ritualistic and unconstructive use of the lawyer. It should be avoided.

The authors' major contribution in *Beyond the Best Interests of the Child* is their emphasis on the child's right to the best "psychological" parent, regardless of competing adult claims. The societal stake in effectuating this right is highlighted by the authors' development of the thesis that the "child is father to the man" who in turn may father still another child.⁴³ Authors Goldstein, Freud and Solnit observe, however, that "laws are made by adults for the protection of adult rights."⁴⁴ Thus, without continual insistence on the rights of children, the adult community and adult-staffed legislatures and courts may not be able to bring themselves to a recognition of the rights of another class.

42. Then, too, the lawyer for the child may have a bias toward one of the adult parties and act as a back up attorney for him. For example, during an unfortunate period of eight months in 1970-1971, when "militant" leadership directed a section of the Legal Aid Society, some Legal Aid lawyers representing children in parental neglect cases routinely advocated, as part of their attack on the "establishment," the position of the parent against the Bureau of Child Welfare.

43. See p. 7.

44. P. 106.

Printers of the Yale Law Journal



UNITED PRINTING SERVICES, INC.

263 CHAPEL STREET NEW HAVEN, CONNECTICUT

PHONE: 562-3101