

Hospitals and the Corporate Practice of Medicine. By Alanson W. Willcox. Chicago: American Hospital Association, 1957. Pp. 60.

Considerable controversy has developed during the past few years between the nation's hospitals and certain medical specialists, particularly pathologists and radiologists, whose practice is conducted in hospital laboratories and X-ray departments. This monograph, written by the General Counsel of the American Hospital Association, presents the hospitals' "side" of the controversy. Its purpose is obviously to serve as a guide to attorneys representing hospitals engaged in legal disputes with specialists.

The controversy arose because the courts have said that the corporate practice of medicine is illegal. In other words, an employer-employee relationship cannot exist between a physician and a hospital—as was traditional until a few years ago. The typical arrangement in Texas today is a contractual one between the specialist and the hospital whereby the specialist receives a percentage of the gross or net income of the X-ray or laboratory "departments." It is believed that no Texas statutes are violated by these contracts.

This reviewer is engaged in hospital administration and does not wish to assume the role of the devil's disciple. He is convinced, however, that the present contracts are serving well the public, the specialists and the hospitals, and that there is little desire on the part of any party concerned to revert back to the employer-employee relationship. If the author of the monograph had been a little more objective he would have been obliged to point out a substantial number of evils in the old arrangement. Most hospitals and specialists sincerely hope that the problem can remain at the local level where contractual agreements can be developed to meet local conditions.

The monograph represents considerable research and the documentation is extensive. The whole picture is lacking, however, and it may be that the legal profession will have to wait until a similar monograph is prepared by the specialists' national associations. Combining the two studies would certainly give attorneys a more comprehensive reference for study and consultation.

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Freedom, Virtue & the First Amendment. By Walter Berns. Baton Rouge: Louisiana State University Press, 1957. Pp. xi, 264. \$4.00.

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The Hidden Persuaders. By Vance Packard. New York: David McKay Company, Inc., 1957. Pp. 275. \$4.00.

"Congress shall make no law . . . abridging the freedom of speech."¹ These few words express the world's shortest philosophical treatise enacted into law. What is its future?

Does this philosophy permit—indeed, require—that only "good speech" be truly free? Berns suggests that it does. The questions raised by Packard regarding recent advances in the science of molding men's minds are more basic, but are left unanswered.

Four short paragraphs from the end of his book, Berns voices the stark realization that, "The problem we have discussed in these pages is not really the problem of free speech at all; it is the problem of virtue."² It is not altogether regrettable that, undaunted, he published his views nevertheless. He has provided the literature of free speech with perhaps its best-reasoned legal and philosophical justification of censorship. Unfortunately, the best is none too good.

Berns takes issue with those who put "good" and "evil" in quotes (*e.g.*, "good speech" in the question above).³ He delights in the discovery that the inscription on the Supreme Court building does *not* read EQUAL "JUSTICE" UNDER LAW.⁴ But this is more than a typographical tussle. It is fundamental to his thesis. For him, words like "virtue" and "evil" have *a* meaning. Moreover, this meaning is clear to all who seek to find it. It logically follows that since there is nothing of virtue or value about "evil" it should be abolished wherever found. "[T]he best we can do is to interpret [the First Amendment] to read: Congress shall make no law abridging the freedom of *good* speech. The basic point is that the purpose of law is and must be to promote virtue, not to guarantee rights of *any* description."⁵ Libertarians will no doubt be relieved to know that "this in no way detracts from the validity of freedom as a goal"—that is, Berns' "freedom to do good and speak the truth."⁶

"Virtue" has never lacked supporters. It is a nice word. It rolls off the tongue with a satisfying release like a sneeze, and still manages to have a pure sound about it. But somehow unanimity ends with its utterance. Of course, few would contend that the word "virtue" is utterly devoid of meaning. Everyone has some idea of what the word means to *him*. But

¹ U.S. CONST., amend. I.

² BERNs, FREEDOM, VIRTUE & THE FIRST AMENDMENT 255 (1957).

³ *Id.* at 20.

⁴ *Id.* at 129, n. 1.

⁵ *Id.* at 251. A constitutional scholar has succinctly posed the other view, "I would hold that the First Amendment prohibits . . . a balancing [of conflicting values] and demands that the freedom involved be protected as against what society mistakenly thinks is its immediate interest to the contrary." Wright, Book Review, 38 MINN. L. REV. 87, 89, n. 7 (1953).

⁶ BERNs at 257.

to presume that anyone who does not define or apply the term as you do is wrong, or worse yet "evil," is to ignore considerations of common sense as well as the most basic tenets of general semantics.⁷

More fundamentally, such an idea is contrary to the underlying "philosophy" of the First Amendment. If the drafters of the First Amendment had felt it possible to separate "good" speech from "bad," and socially useful doctrine from harmful, presumably *they* would have limited the Amendment to "good speech" rather than leaving this interpretive task to Berns a century and a half later.

The First Amendment is supported by two hidden presumptions. No one has a monopoly on the truth; and man will eventually respond to reason. As the Supreme Court said in *Board of Education v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."⁸ This is the essence of democracy. Though the people may make mistakes, so the theory goes, they will be fewer and less devastating, and more quickly remedied, than those under any system of rule by experts. This is a "fundamental" in our scheme of government. But Berns says "[Free speech] is no longer an innocent idea if this principle of majority rule is meant to apply not only in cases of political differences such as tariffs and tax legislation, but in those involving fundamental questions."⁹ If free speech loses its "innocence" when applied to fundamental questions, then Berns' own book, as a discussion of the fundamental of free speech itself, should have been banned under his own standard! I would not be so harsh.

The "libertarians" that receive Berns' sniping realize that there are underlying philosophical, Constitutional and even biological¹⁰ reasons

⁷ "[U]rges to do good have led to the burning of books and even to the burning of 'witches.'" *Beauharnais v. Illinois*, 343 U.S. 250, 274 (1952) (dissenting opinion per Black, J.).

⁸ 319 U.S. 624, 642 (1943). "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover . . . truth." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

⁹ BERNs, at 170. To which reasoning Justice Jackson has said, "Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizens from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify censorship only when the censors are better shielded against error than the censored." *American Communications Assn., C.I.O. v. Douds*, 339 U.S. 382, 442-43 (1950) (separate opinion, concurring and dissenting in part). And earlier, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁰ Just as man is "the only creature who can talk himself into difficulties that would not otherwise exist," JOHNSON, *PEOPLE IN QUANDARIES* 268 (1946), so he is the only creature who can talk himself out of his difficulties—for he is the only creature who can "talk." Man has a deep need to verbalize and share experiences, and to invent and

for the First Amendment, and tend to feel that "no danger flowing from *speech* can be deemed clear and present."¹¹ But they should not completely discredit this book. Berns has done a remarkable job of historical and philosophical analysis in trying to support his position. Furthermore, no reader can help but think through again the reasons why Berns is wrong, which is in itself of value.¹²

But free speech faces a greater challenge today than any the Bernses could conjure up in its path. A market place of ideas¹³ requires more than a free market. It requires ideas.¹⁴ "Without freedom of thought there can be no free society."¹⁵ As Justice Brandeis phrased it, "the greatest menace to freedom is an inert people."¹⁶ Our "freedom for the thought that we hate"¹⁷ arises not from tolerance, but from an inherent need. As Justice

shuffle symbols. "Free speech" is cherished in part because it is of the essence of humanity and the basis of our pre-eminence in the animal kingdom.

¹¹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring opinion per Brandeis, J.) (emphasis added). "The remedy to be applied is more speech, not enforced silence." *Ibid.*

¹² See note 18 *infra*.

¹³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion per Holmes, J.); *Dennis v. United States*, 341 U.S. 494, 584 (1951) (dissenting opinion per Douglas, J.).

¹⁴ And one would suppose ideas would require books. But an oft-quoted 1955 Gallup Poll reveals that only 20% of the American people went in a library during the previous year, and only 61% read a book (excepting the Bible). Our attitude seems to be similar to that of one of the animals on Orwell's farm. "Benjamin could read as well as any pig, but never exercised his faculty. So far as he knew, he said, there was nothing worth reading." ORWELL, *ANIMAL FARM* 28 (1946). By contrast, "There is no appetite in the Soviet Union more insatiable than the appetite for reading." Dolbier, *Russians Use Their Libraries. Do You?*, N.Y. Herald Tribune, Jan. 5, 1958, Book Review section, p. 2. Our poor showing could hardly be entirely the fault of the struggling book publishers, whose distinguished Alfred A. Knopf has said, "I feel confirmed in the conviction I have held for more than forty years that by and large the taste of the reading public is better than that of us who cater to it." Knopf, *Book Publishing: The Changes I've Seen*, 200 *ATLANTIC* 155, 160 (no. 6, December, 1957). His judgment is being born out, Walker, *Big Boom in Good Books*, *THE SATURDAY REVIEW*, 16, 38 (Feb. 8, 1958). Justice Douglas concurs, "I have the same confidence in the ability of our people to reject obnoxious literature as I have in their capacity to sort out the true from false in theology, economics, politics or any other field." *Roth v. United States*, 354 U.S. 476, 514 (1957) (dissenting opinion). For an excellent, thorough-going, yet brief analysis of censorship by an eminent philosopher, a sociologist and a lawyer see MCKEON, MERTON & GELHORN, *THE FREEDOM TO READ* (1957), sponsored by the National Book Committee.

¹⁵ *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (concurring opinion per Frankfurter, J.).

¹⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion). "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; [nor] even do much to help it." HAND, *THE SPIRIT OF LIBERTY* 190 (1952). Irving Dilliard, who edited *THE SPIRIT OF LIBERTY*, has said in his own words, "Freedom of the press, along with all freedom of expression and opinion, will inevitably disappear in the United States unless there is a strong and insistent public demand for it." Book Review, N.Y. Herald Tribune, Feb. 16, 1958, Book Review section, p. 4.

¹⁷ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (dissenting opinion per Holmes, J.).

Douglas has said, "Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart."¹⁸ Without diversity democracy dies.

Diversity is presently threatened on at least two fronts: increased centralization of control of mass media, and continually improving means for molding men's minds. The first factor is not new: the newspaper chains, the syndicated columns, the wire services, the increasing number of one-paper towns, and the radio and television *networks* (coupled with the inherent limited monopoly in each station's channel, or frequency). But their combination has tended to give increasingly fewer people a daily invitation into more and more persons' minds than was ever before possible.

It is the second factor, and Packard's uncovering of the previously *Hidden Persuaders* that should give everyone concerned with free thought a real shudder. Growing out of a need to stimulate consumption in the race with production, merchandisers have taken up psychoanalysis of their customers to channel sales talk more accurately toward the "real reasons" why people buy. They have psychoanalysed women in order to sell cake mixes during all times of the month,¹⁹ probed the motivations of the cigar smoker²⁰ ("a lot of infantile people never get any further than having fun with their mouths"),²¹ and perfected the means of intensifying women's natural "hypnotic trance" in supermarkets.²² Children have been brought into the act as a present market (Davy Crockett was worth \$300,000,000),²³ for their effect on parents (Winston has found a real saleslady in my own four-year-old),²⁴ and as a future investment ("think of what it can mean to your firm in profits if you can condition . . . ten million children who will grow up into adults . . . to buy your product").²⁵ "Psychological obsolescence"²⁶ is a big tool in their knapsack. It is related to Veblen's theory of "conspicuous consumption"²⁷ and the observation that we don't buy what we "need"—in any but a

¹⁸ *Dennis v. United States*, 341 U.S. 494, 584 (1951) (dissenting opinion). Mr. Dooley accepted the "clear and present danger" test. As he put it, "I'm sthrong fr anny rivolution that ain't goin to happen in me day." Quoted in Bander, *The Dooley Process of Law*, CASE AND COMMENT 20, 22 (Sept.-Oct., 1957).

¹⁹ Packard, *THE HIDDEN PERSUADERS* 37, 78 (1957).

²⁰ *Id.* at 91.

²¹ *Id.* at 98.

²² *Id.* at 105-13.

²³ *Id.* at 164.

²⁴ As Pall Mall has in Packard's eight-year-old daughter. *Id.* at 159.

²⁵ PACKARD, at 158-59.

²⁶ *Id.* at 21.

²⁷ VEBLLEN, *THE THEORY OF THE LEISURE CLASS* (1899).

psychological sense of the word. It's a two-step process of making the public extremely style conscious ("Dress right—you can't afford not to"),²⁸ and then switching styles as often as possible.²⁹

Packard spies the lurking problems of morality that come with manipulating children, playing on hidden frailties and deep sexual drives,³⁰ and encouraging impulsive nonrationality and economic wastefulness. He is noticeably disturbed, but provides no dogmatic answers.³¹

It is not surprising that such techniques have gone beyond the marketplace of products. "No longer is the aim just to play on our subconscious to persuade us to buy a refrigerator or new motorboat that we may or may not need. The aim now is nothing less than to influence the state of our mind and to channel our behavior as citizens."³²

Packard discusses the 1952 and 1956 presidential campaigns in a chapter called "Politics and the Image Builders."³³ One Republican strategist is quoted as saying, "I think of a man in a voting booth who hesitates between two levers as if he were pausing between competing tubes of tooth paste in a drugstore. The brand that has made the highest penetration on his brain will win his choice."³⁴ This politically successful attitude was described by Adlai Stevenson as "the ultimate indignity to the democratic process,"³⁵ but Packard sees no signs that the umbilical cord between Madison Avenue and the White House will be cut—be its occupant Democrat or Republican.

He takes a swack at the production of "team players"³⁶ and the "Care and Feeding of Positive Thinkers,"³⁷ and recognizes that not all of the psychological product of Ad Alley has been hypothesized, tested or re-

²⁸ PACKARD, at 167-68.

²⁹ *Id.* at 171-72.

³⁰ S. I. Hayakawa, author of *LANGUAGE IN THOUGHT AND ACTION* (1949), has provided a delightful portrayal of our automotive motives in *Sexual Fantasy and the 1957 Car*, 14 *ETC.* 163 (no. 3, Spring 1957). See also 15 *ETC.* 217 (no. 3, Spring 1958).

³¹ PACKARD, at 258.

³² *Id.* at 178. Institutional, thought-conditioning advertising is not limited to The American Institute of Men's and Boy's Wear. See note 28 *supra*. Book publishers now promise "business success," "social acceptance," "new pleasure," and "a new you," to commuters, housewives, students and working men who will "Wake Up and Read." See full-page advertisements sponsored by The Macmillan Company in *N.Y. Times*, March 2 and 9, 1958, Book Review section, p. 11.

³³ Chapter 17.

³⁴ PACKARD, at 193.

³⁵ *Id.* at 200.

³⁶ Chapter 18, "Molding Team Players' for Free Enterprise." *Id.* at 201-15. This was the subject of William H. Whyte's provocative journey through the mind, the schools, the testing, the work and the home life of the twentieth century's ready-made human component. *WHYTE, THE ORGANIZATION MAN* (1956).

³⁷ Chapter 20. PACKARD, at 225-31.

ported by means of the method or language of science. This raises "The Question of Validity."³⁸

But the biggest question can only be asked.

"Most of them want to control us just a little bit, in order to sell us some product we may find useful or disseminate with us a viewpoint that may be entirely worthy.

But when you are manipulating, where do you stop? Who is to fix the point at which manipulative attempts become socially undesirable?"³⁹

Democratic decisions and rule are premised on choice through reason, alternatives and discussion. What happens to foreign and domestic policy when discussion is limited to the three little words "peace and prosperity"? What is likely to come from a Senate whose members are chosen on the basis of who can afford the most TV subliminal advertising time?⁴⁰ Is it possible that Orwell's *1984*⁴¹ is nearer than its title portends?

There are two warming rays of hope. Reason seems to triumph over even the most fearful conformity; and we are becoming increasingly aware of what is happening.

The phenomenon sometimes described as McCarthyism has essentially passed. Orwell's book depicts life in a thought-controlled society with Big Brother looking over everyone's shoulder—an extreme case of "the suffocating influence or orthodoxy and standardized thought."⁴² Winston Smith, the last non-conformist hold-out, eventually came to realize that, like the others, "he loved Big Brother."⁴³ But despite the late Senator's attempt to play Big Brother, a hard core of non-believers held firm. Eventually they won out with their appeal, aided by a three-week view

³⁸ Chapter 22. PACKARD, at 243-54.

³⁹ PACKARD, at 240.

⁴⁰ The subliminal technique is to flash a short message on a movie or television screen which, its promoters claim, will be registered on the viewer's subconscious mind without his being aware of it. *Id.* at 42-43. They cite movie theater popcorn sale increases of 57.7%. The implications are unlimited. Business men are interested; Congress is alarmed. Henderson, *The Phantom Sell*, 21 *The Wall Street Journal*, March 7, 1958, pp. 1, 4. "Others wondered what the consequences would be if a politician bought time on TV and by subliminal flashes of 'Elect Doakes!' induced an unwary audience to do just that." Brean, "*Hidden Sell*" *Technique Is Almost Here*, 44 *LIFE* 102, 107 (no. 13, March 31, 1958).

⁴¹ ORWELL, 1984 (1949).

⁴² *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (dissenting opinion per Douglas, J.).

⁴³ ORWELL, 1984 300 (1949). It is not just the exercise of freedom, nor the oppression of censorship, but rather the knowledge of their existence that creates hope or fear. Winston had a room to which he and Julia, his girl friend, occasionally retired. "What mattered was that the room over the junk shop should exist. To know that it was there, inviolate, was almost the same as being in it." *Id.* at 151. Likewise, "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

of McCarthy on nation-wide TV. Not only can you not fool all of the people all of the time, you cannot even fool *all* of the people *part* of the time.⁴⁴

The second source of hope is that we have some choice in the matter of our persuasion, and "we cannot be too seriously manipulated if we know what is going on."⁴⁵ Judging by the book's best-seller reception, Packard's hope that it will "contribute to the general awareness"⁴⁶ would seem to have been fulfilled. One of Butz's⁴⁷ spokesmen for *The Unsilent Generation* expressed it well when he said, "We talk about conformity more than anyone else in history; we read and write books on the subject. As a result of all this talk, increasingly large numbers of us are taking measures to protect ourselves from it."⁴⁸

The threat to free speech posed by Berns' thesis in *Freedom, Virtue & the First Amendment* is not too serious so long as the libertarian a-virtuous position is so widely accepted. *The Hidden Persuaders* details a

⁴⁴ However, the ways in which the social psychologists have demonstrated you can fool some of the people all of the time are nerve shattering. The S. E. Asch study is one of the most dramatic. Uninstructed subjects were asked to select the longer of two obviously unequal lines. They were observed after being put in an instructed group that sometimes chose the shorter as the "longer" line. The uninstructed subjects yielded to the erroneous group judgment 32% of the time. Some actually "saw" the shorter line as longer! Others' judgment was distorted by the feeling that the majority must be right, and a third group yielded so as to go along with the group, knowing they were wrong. The study, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, is reprinted in CARTWRIGHT & ZANDER, *GROUP DYNAMICS* 151 (1953), and SWANSON, NEWCOMB & HARTLEY, *READINGS IN SOCIAL PSYCHOLOGY* 2 (1952). That brain-washing "works" is now common knowledge. Most significant in this regard is one of Asch's conclusions: "There were wide, and indeed, striking differences among individuals within the same experimental situation." CARTWRIGHT & ZANDER, *op. cit. supra* at 161. Elmo Roper has observed, "the qualities I . . . found among the most outstanding men I have personally known well [are] that none was ever ashamed, or afraid, to say whatever he thought on any subject, never afraid that it might sound too sentimental or too religious, or too naive, or too trusting or too anything else . . . that none of them ever felt the obligation to conform to existing thought patterns however popular they might be at the moment or however dangerous it might seem not to conform . . . that each of them had the firm belief that one of the most important things there was to preserve in America was the right of the individual to dissent, openly, vigorously, and without any reprisals of any kind as a result of the dissent." Roper, *In Search of a Career*, *THE OBERLIN ALUMNI MAGAZINE* 4, 7-8 (February, 1958). Cf. Davies, *infra* note 48.

⁴⁵ PACKARD, at 265.

⁴⁶ *Ibid.*

⁴⁷ BUTZ, *THE UNSILENT GENERATION* (1958).

⁴⁸ *Ibid.*, quoted in *The "Unsilent Generation" Breaks Silence*, 44 *LIFE* 112, 130 (no. 7, February 17, 1958). The late A. Powell Davies, who lived "The Lives We Never Live," wrote these words about conformity under that title: "Not a day passes but men and women everywhere, in places high and low, . . . are intimidated by prevailing patterns of hypocrisy and by fear of finding themselves outside the shelter of time honored insincerities. They say, not what they think, but what they are supposed to think: what, in other words, people expect to hear." 13 *FREEDOM & UNION* 12-13 (no. 2, February, 1958).

more serious challenge—that of modern psychological techniques of persuasion. But, in vain is the trap laid in the eyes of the bird. We may muster moderate confidence, as we ponder Packard's portrayal of this potentially destructive trap, in the knowledge that the formerly hidden persuaders must now lay their lure before the eyes of all who will but look.

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