

Book Reviews

THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC. BY DAVID J. ROTHMAN. Boston: Little, Brown & Co., 1971. Pp. xx, 376. \$12.50.

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David Rothman's *The Discovery of the Asylum* is one of those extraordinary books that survive failings and flaws beyond number to alter the way we apprehend an era and its issues. Boldly postulating connections where predecessors have contented themselves with isolated case studies, Rothman claims that "all at once" in the age of Andrew Jackson there emerged in concert the modern penitentiary, poorhouse, insane asylum, orphanage, and reformatory.¹ And as if that were not intriguing enough—if, even taken together, such institutions still seem somewhat outside the main currents of American life—Rothman implies quite palpably their similarities to the public schools, factories, and slave plantations that touched so much more of the population with an analogous institutional discipline and hypothesizes quite focally the dependence of the asylum movement on ideals and fears for the family and community that must have touched almost everyone.

For historians, Rothman thus points the first real prospect of a social history of ante-bellum America with the amplitude and narrative sweep of the traditional political accounts, one which addresses the very meaning of bourgeois modernization and illuminates tellingly an essential strand of the national character. For all of us, he poses the liberating possibility of reconsidering the institutional legacy and organizational ethic which we derive and sustain from the ambivalent aspirations and anxieties of the early republic, by reminding us how recent, and even bizarre, is our attachment to institutionalization of the deviant and dependent.

Colonial Americans could only have found inconceivable our readiness to confine large numbers of people, as a matter of course, for long periods of time. More than two million colonists managed with but a single orphanage and a mere handful of special buildings for the impoverished and the insane. They had not one reformatory for the young, and they did not use their jails to punish more seasoned offenders. Imprisonment in the 18th century was simply a stage in the

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¹ D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* xiii (1971).

process of judgment, not a penalty in its own right. Men and women awaiting trial or the carrying out of a sentence might be held, but institutionalization was rarely part of the sentence itself.

Commitment was unnecessary because the counties, towns, and parishes took care of the troublesome within the confines of communal routine. Local authorities relieved the needy at home, placing paupers and lunatics with their own families or those of nearby neighbors at public expense, and rebuked the wayward openly and at once, so that malefactors not executed or expelled were restored speedily to society. Social relations even shaped the very penalties themselves. Standing in stocks and other shaming sanctions presupposed sensitivity to the opinion of others; differential reliance on fines for the most respectable and whippings for the rest fit the punishment to the criminal and his social status rather than to the crime; ready recourse to banishment and hanging rid the vicinage of undesirables. Similarly with welfare, settlements took for granted their obligation to care adequately for their own inhabitants, debating residential qualifications rather than moral qualities of applicants and callously hustling outsiders on to the next jurisdiction. In the provision of public support and in the discipline of deviance alike, the nature of a man's membership in the local community determined the disposition of his case.

Moreover, according to Rothman, a man's inhabitancy was not any the less legitimate, in the colonial era, if he grew destitute or disolute. Proper villagers and parishioners displayed no evident ignorance or fear of the lower orders, nor did they seek to set themselves sharply apart from those the 19th century would call "the dangerous classes." The poor and the helpless had as integral a place as anyone else in the hierarchic order of the 18th century. They were "pawns in a divine game where the better sort made the moves."² No one doubted their right to relief, and no one thought to reform them, either. Misfortune and evil were, in the religious doctrines of the age as much as in its secular assumptions, inevitable and ineradicable among men. The depravity of human nature could only be controlled, not corrected; an appropriate social policy could aim only at relief of need rather than its removal, penalization of misconduct rather than purification.

Against the background of these colonial conceptions, Rothman unfolds a fascinating tale of transformation. The first steps were spurred by the success of the Revolution. Republican rationality seemed to require alteration of the antique criminal codes, and postulates of republican virtue seemed to suggest that punishments less cruel yet more certain of application than those inherited from the Old World would deter all but the most hardened from careers of crime. By the turn of the century half a dozen states led by Pennsylvania had drastically reduced recourse to the death penalty and substituted varying terms of

² *Id.* 9.

incarceration in the new prisons they began building. Still other states soon followed. And though Rothman ultimately sees little significance in these stirrings, arguing that they reached legal codes without ever touching social arrangements or ideals, he does find a basis for more fundamental change in the concurrent diffusion of evangelical departures from strict Calvinism and their intimations of man's perfectibility. By the dawning of the age of Andrew Jackson, Americans had already come to conceive man as essentially innocent, his failings of conduct and control the fault of society rather than his own nature.

By then, too, the structure of society appeared faulty indeed. Among men who had always depended on constraints of kinship and the mutual discipline of neighbors to sustain stable social relations, the disarray of family and community life in the new democracy emerging in the wake of the War of 1812 was profoundly unsettling. Sons drifted away from fathers, whole families fled old farming villages for new ones further west or for the cities, masses seemed disinclined to concede deference to their betters; and the stresses of such social and geographic mobility induced not only a high opportunism but also a deep fearfulness for the coherence of the social order itself. Even as Americans exulted in the brilliant promise of their egalitarian society, they worried over its erosion of the only sources of social control they had ever known. Wondering what could hold the new system together, they could not escape the dark suspicion that it might "succumb to chaos."³

Out of that urgent anxiety, according to Rothman, the reform impulse was born. And out of its attendant analysis, the reformers invented the asylum. Men and women who held society responsible for the madness and malevolence they took to be gaining all about them—and took to be stimulated by the incessant stress of the new competitive order—insisted that society cure what society had caused. The traditional techniques of penology and psychiatry could not do this, precisely because they were predicated upon a communal milieu that had itself become pathological; they continued victims in the very environments that triggered trouble in the first place. A new public institution—an "artificially created and therefore corruption-free" refuge⁴—would be required, where casualties of the competitive struggle could be rehabilitated in isolation from the destructive influences of disordered families and communities, "literally buried from the world" in the words of one Sing-Sing official.⁵

But repudiation of the specific structure of the family implied no rejection of the ancient ideal of the family. Quite the contrary. The reformers modeled their refuges quite openly on the more adequate

³ *Id.* 69.

⁴ *Id.* 71.

⁵ *Id.* 95.

families they thought they recalled from hypothetically happier days. "The routine that they would create in the asylum would bear no resemblance to a casual, indulgent, and negligent household that failed to discipline its members or to inculcate a respect for order and authority."⁶ It would, instead, demand the deference and obedience of the traditional family, and it would consequently confer a fixity and certainty the lack of which had driven men mad or impelled them to a life of crime. The new asylums were accordingly regulated even unto the minutest details of architecture and administration. Inmates were put in uniforms and subjected to precise schedules and rigid work routines, in full confidence that these would heal the headstrong individualism that disenabled men "to withstand the temptations at loose in the society."⁷

Rothman is richly aware of the abundant irony in all this. He knows that despite their rhetoric of reform the founders of asylums never transcended their attachment to the traditional standards of social organization by which they found the Jacksonian scramble so unsatisfactory; and conversely he knows that though the founders sought nostalgically for a reinstatement of the 18th century they still prefigured much of the 19th in their unflinching advocacy of institutional solutions for every incapacity or indisposition to abide by conventional canons of conduct. He understands that the asylum issued from a village ideal yet fostered a "regimentation, punctuality, and precision . . . far more in keeping with an urban, industrial order."⁸ He recognizes the rage for segregative classification in the asylums themselves and the broader alienation of rich from poor that attended the collapse of local cohesion in the society beyond, and he appreciates the unprecedented distance and distrust between classes that thus characterized the age of egalitarianism. He realizes that the benefits of institutionalization which the reformers never ceased to celebrate were ultimately reserved for those too feeble to fend them off: deviants, dependents, and, by extension, schoolchildren, slaves on plantations, and women and immigrants in the factories. And above all he acknowledges and elucidates the irony on which his story ends, as a generation conditioned by the reformers to confuse "the fact of incarceration" with "the improvement of the inmate" managed to assure itself of its therapeutic benevolence merely by building more massive custodial institutions, so that the humane hopes of the founders led directly and in less than a generation to a system of social control perhaps unparalleled in its dismaying disdain for the humanity of its inhabitants.⁹

Since the passage of a century has scarcely altered the essential

⁶ *Id.* 152.

⁷ *Id.* 190.

⁸ *Id.* 154.

⁹ *Id.* 238.

contours of the institutional landscape already evident by the Civil War, it is good to have Rothman's account of how we set out toward our present pass. But just because his story resonates so tellingly in our own time—just because he has shown that there is truly a story to be studied, not simply a string of isolated case studies to be collected or an unfolding of the inevitable to be traced—it is regrettable that he has left so much of that story unconsidered, and all the more regrettable that he seems often to have done so quite willfully.

His very determination to demonstrate that “a cult of the asylum swept the country”¹⁰ uniquely in the age of Andrew Jackson inclines him to ignore anything that might diminish that demonstration. He hardly speaks of the European experiments in incarceration that generally antedated and frequently affected American efforts. He discounts indigenous American ventures in prisons and private mental hospitals in the 1790's, though they seem to have employed almost all the routines of regulation that their successors did and though they were surely as renowned as any of the later operations. (Forty years later Tocqueville and Beaumont could still recall that “all the world repeated the praise of La Rochefoucauld” for Philadelphia's Walnut Street prison.)¹¹ He never addresses the accumulating evidence of colonial instability that challenges his idealization of 18th-century order, and to preserve his answering idealization of 19th-century upheaval he disregards even his own open suspicion that the reformers' fears were primarily projective. He permits himself no puzzlement at all that lamentations for the lost cohesion of family and community and the impending menace of unbridled selfishness were already two centuries old by 1830, dating back as they did to Bradford and the Pilgrim fathers; nor does he recognize that they have been a persistent plaint ever since, carrying forward far beyond any alleged exhaustion of the reform impulse to the strikingly similar arguments of social workers and child savers of the late 19th century and foes of permissiveness still with us today.

More consequential than the unduly narrow context in which Rothman casts the ideology of asylum, however, is his disposition to exaggerate vastly the very extent, coherence, significance, and success of the asylum movement itself. For the fact is that reform rhetoric always outran reality, and the reach of the asylum was always quite limited. A great majority of the nation's insane remained in private homes, local jails, or poorhouses throughout the period, never receiving “proper accommodations” in the new institutions.¹² A preponderance of prisoners never saw the inside of a state penitentiary, staying instead

¹⁰ *Id.* 130.

¹¹ O. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, WITH SPECIAL REFERENCE TO EARLY INSTITUTIONS IN THE STATE OF NEW YORK* 29-30 (1922).

¹² G. GROB, *THE STATE AND THE MENTALLY ILL: A HISTORY OF THE WORCESTER STATE HOSPITAL IN MASSACHUSETTS, 1830-1920*, at 148-49, 164 (1969).

in city or county establishments, exactly as their colonial predecessors had done (even to the point that, a few years later, four-fifths of them in a state as advanced as Illinois were still in jail solely to await trial).¹³ And the mass of America's paupers were maintained to the middle of the century on traditional techniques of outdoor relief. In truth there were but eight states that built penitentiaries, less than a dozen states that supported an asylum, and only three cities that had instituted reformatories by 1840. At Andrew Jackson's death the Commonwealth of Massachusetts administered not a single charitable institution save Worcester, and as late as 1850 there was not in all New York an effective workhouse for the impoverished.¹⁴

Even the institutions that did exist did not measure up to Rothman's model. Being neither very like the ones the reformers envisioned nor very like each other, they offered their inmates a meagre "asylum" and they constitute for us a meagre "movement." Some, such as the prisons and mental hospitals, were established under the cosmopolitan provenance of the states, but others such as the almshouses remained under local auspices, and others still, the orphanages and reformatories, were local and largely private besides. Some, such as the state penitentiaries and insane asylums, were initiated primarily in the 1820's and 1830's, but almshouses seem to have been begun before 1820 more often than after, and orphanages and reformatories gained most greatly in the 1840's and 1850's, the very decades when the original prisons and mental hospitals were suffering sharp declines. Some institutional managers such as the penologists sought to "break" the individual, others such as the psychiatrists to impose order in his life, and still others such as the almshouse masters to supply "energy and initiative,"¹⁵ and in daily routines and disciplinary regimes the various institutions were even more divergent. It is, in fact, more difficult to find a single one of Rothman's specifications that each of his asylum types shared than to cite the disabilities under which they labored in common. At every point in every state except perhaps Pennsylvania, economy was more crucial to the sustenance of asylums than enthusiasm for their redemptive premises; in some cases economy was so completely the "primary consideration" that asylum supporters themselves soon lost sight, as Rothman admits, of the very "possibility of rehabilitation."¹⁶ In prisons such as Auburn and Sing-Sing, rule was less rational than purely punitive, and wardens openly avowing a "pitiless" policy dismissed the dream of reformation as "a pious wish."¹⁷ In state mental institutions such as the pioneering one at Williamsburg, benefactors

¹³ A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 118-19 (1969).

¹⁴ G. GROB, *supra* note 12, at 180; D. ROTHMAN, *supra* note 1, at 198.

¹⁵ D. ROTHMAN, *supra* note 1, at 165.

¹⁶ *Id.* 194.

¹⁷ Gittleman, *The Maryland Penitentiary in the Age of Tocqueville, 1828-1842*, 56 *MD. HIST. MAGAZINE* 272 (1961).

mouthed progressive and humane phrases while pocketing hospital funds; in others such as Worcester there was overcrowding from the outset and soon such serious understaffing that the strict supervision and supportive therapy that was promised became quite impossible to provide. And in almshouses, orphanages, prisons, and mental hospitals alike, the therapeutic ideal was subordinated so swiftly to custodial considerations of public security that it is hard to evade an implication Rothman cannot countenance, that failures of reformation disturbed only the reformers, not their fellow countrymen who sought scarcely more than to sequester the dangerous and the deviant from the first.

Ultimately, then, Rothman's is an unduly simple story. It is not as simple as it might have been—Rothman does resist the temptation to read back into the past the recent radical critiques of our large institutions of incarceration and correction, "unmasking" the men and women who established them as crypto-conservatives or worse—but despite all its irony and all its effort to affirm a wider complexity that can encompass the reformers' courage and creativity as well as their interests and ignorances, it is a simpler story than it ought to have been. Rothman tells it totally from the standpoint of the reformers, muffling his indignation in admiration as he goes and finally producing an apologia for them as much as an analysis of them. He catches their aspirations, traces the transformation of their ideals, details the development of their formal structures, and no one else's. He rarely addresses himself to the relations of this little coterie in Philadelphia, New York, and Massachusetts with the populace at large or its legislative representatives, and he never sets his reform elite in touch with the inmates of the institutions. He tells us little of the politics of asylum appropriations, less of the attitudes of the American people (unless we wish to honor the fiat tautology by which he substitutes the statements of his asylum spokesmen for the sentiments of the public), and nothing at all of the patients and prisoners in their own right. And since he does not confront these people, he cannot catch even the reformers themselves in their fullness, for we have surely learned by now, from philosophers, novelists, and social scientists as diverse as Hegel, Solzhenitsyn, Simmel, and Goffman that not even total institutions can be taken so totally at the estimation of their masters. There are ironies even upon ironies in the relation of captor and captive, and inversions upon inversions, in a complex and dizzying dialectic of mutual dependence that is utterly inaccessible to Rothman. On his account inmates and outsiders alike are inert and insignificant, incapable of consequential action and therefore inconceivable in interaction with wardens and superintendents in ways that might illuminate more truly the reformers and their institutions.

Yet Rothman's simplifications are worth making more complex precisely because his work is so suggestive. For even as it stands, it

compels a remarkable reconsideration of the era and the American character itself. The 18th century he idealizes is one in which social control was solely external and environmental—dependent on sanctions of shame, not guilt, and altogether indisposed to rely on such inner restraints as men might possess—and the strategies of the 19th-century discoverers of the asylum were designed to save just that system. In their conviction that “the fundamentals of proper social organization”¹⁸ could be embodied in bureaucratic and even militarily regimented establishments, the reformers displayed nothing of the putative American propensity for dismantling institutions to elevate the self; and in their animus against the free enterprise and fluidity of the new society, in which penologists found only the prolific sources of crime and superintendents the etiology of insanity, they evinced nothing of our vaunted individualism. So far from celebrating personal freedom, the reformers scarcely sought more for inmates—and, by extension, for all Americans—than what one warden called “most important of all,” that a renewed regularity of discipline “break the prisoner into a state of *passive obedience*.”¹⁹ The cruelest punishment could be justified if, by its use, men could be “*made to submit*,” since an obedient conformity was held to be “the first step to reformation” as surely as early independence was a path to perdition.²⁰ Refuge managers insisted that the child who became “his own boss and went in the way that was right in his own eyes” was bound to fail,²¹ and all the reformers inveighed against saloons and any other settings that offered young men a measure of autonomy. It is surely striking on this score that the ideal the founders kept always before them was their conception of the traditional family, with its apotheosis of dependency, and it is surely symptomatic of this attitude that patients and prisoners alike remained purely passive in their own rehabilitation (except in a few extraordinary institutions such as the penitentiary at Philadelphia) while treatment of inmates was, as Grob called it, “the sole prerogative” of superintendent or warden or manager.²² In truth, the reformers never did simply find their subjects dependent. At least as consequentially they made them so, recruiting deviants into relations of dependence and then consolidating their new-made incompetence by denying them their legal rights so long as they remained in the institution.²³

In the name of reformation, the inhabitants of asylums were stripped of most of the privileges of citizenship and many, indeed, of

¹⁸ D. ROTHMAN, *supra* note 1, at 79.

¹⁹ K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 202 (1966).

²⁰ D. ROTHMAN, *supra* note 1, at 101-02.

²¹ *Id.* 77.

²² Grob, *The State Mental Hospital in Mid-Nineteenth-Century America: A Social Analysis*, 21 *AM. PSYCHOLOGIST* 518 (1966).

²³ A. PLATT, *supra* note 13, at 67.

the claims of a common humanity. Administrators of the institutions maintained absolute disciplinary power over inmates, and they did so without any significant interference from the courts to which they were technically responsible because the courts embraced the reform supposition that "a good dose of institutionalization" was bound to benefit its recipient rather than harm him.²⁴ Relying upon this medical model of therapeutic coincidence of interest rather than upon more lawyerly assumptions of adversary relationships between differentially situated parties, the courts were "disinclined to bring the protections of due process" to institutional clients.²⁵ Though none but the prisoners among them had actually broken any laws, they were all—for their own presumptive good—denied their civic personality and their moral personality besides. They retained relatively few of the rights that would have been theirs in a more overtly antagonistic understanding of their situation. They simply "surrendered body and soul," as one proponent of the penitentiary explicitly urged, "to be experimented upon."²⁶ And they were allowed neither intentionality nor responsibility for their acts; segregated from the community of man in their various domains of disability, they were victims of the new exclusiveness that marked the emergence of the Jacksonian middle class and of its incapacity to acknowledge idiosyncrasies among men. The asylum sought simultaneously to discredit disconcerting differences and, by rehabilitation, to eradicate them. Individuals who did not conform to the dominant modes could be made null or made over, but they could not, apparently, be admitted into the community in their undoctored individuality.

Rothman's reformers never did renounce the ancient priority of public to private, nor did they ever abandon the ancestral assumption of social cohesion. They did not even develop an intellectual alternative to their "nostalgic image"²⁷ of the older order. Their every adverse judgment on the chaos they believed they beheld about them was predicated on the criteria of the colonists. Their every effort to redeem that disorder aimed at "stabilizing the community" and "binding its citizens together."²⁸ When Rothman argues that the predominance of immigrants, hardened criminals, and hopeless cases on asylum rosters doomed the designs of the founders by the end of the era, he ignores his own evidence that such types were prevalent from the very beginning.²⁹ Communities always used the state institutions essentially to exile their most offensive inhabitants. Just as the colonial towns and parishes had rid themselves of those who did not fit, so the societies of the 19th century sent off the incorrigible and the chronic while main-

²⁴ D. ROTHEMAN, *supra* note 1, at 209.

²⁵ *Id.*

²⁶ *Id.* 84.

²⁷ *Id.* 127.

²⁸ *Id.* 59.

²⁹ *Id.* 247-48.

taining in their midst the ones they supposed salvageable. The changing asylum populations of the later part of the age never "ended the hope" that incarceration "might restore the good order and homogeneity of the community" so much as they bespoke that hope, reflecting as they did the removal of the inconvenient from the vicinage.³⁰ In that antipathy to individual variation, the reformers simply echoed the communal ideals of the 18th century, even as they anticipated the suburban ideals of the 20th.

Today, 150 years after the origin of the asylum, it is difficult indeed to recover the precise significance of the submissiveness its founders aimed to instill, the submergence of self they sought to impose, and the surrender of individual rights they extorted. The context that could confer meaning on these intentions must still be studied. But there are two large possibilities that present themselves, and neither of them is reassuring. If the reformers were truly both benevolent and in touch with the temper of their age—if the docile obedience and passive conformity to which they rehabilitated their charges were prevalent and functional in the workaday world of Jacksonian America—then we are deceived about the individualism we suppose we inherit. If, on the other hand, the "complete despotism"³¹ that the reformers established answered no analogous demand in the world outside—if there was ultimately no one for inmates to obey upon their release into communities which were, on the founders' own analysis, completely chaotic—then the representativeness of the reform version of the good society may be discounted but the reformers' propensity to a very virulent professionalization must be moved to the fore.

On Rothman's own evidence, if not on his interpretation of it, there is every reason to take seriously such a thrust to professionalism. Since he never does demonstrate that the general public shared the particular tensions, obsessions, and aspirations of the reformers, it may well be that this little circle of self-styled welfare specialists became its own constituency and that its asylums emblemized not merely the fateful separation of the kept from all kinship with their keepers but also the separation of the keepers from the rest of society. Certainly it is suggestive that the psychiatric superintendents organized nationally before the American Medical Association itself, while the wardens and reformatory managers each joined in national conclave before the American bar did. Certainly it is significant that such associations pronounced laymen and all others who lacked "formal training and instruction in this specialty" unqualified to concern themselves with the treatment of asylum inhabitants and that strategically situated editorial spokesmen anathematized even professional peers who dared deviate from orthodoxy; and certainly it is symptomatic that such self-sealing

³⁰ *Id.* 293.

³¹ *Id.* 101-02, 333.

exclusion was perpetrated, in each case, under the aegis of a "science" soon demonstrably laughable.³² By the middle of the 19th century, in fact, these professional subcultures were engaged in assiduous efforts to discredit the remarkable rehabilitation rates declared in earlier decades. The new wardens and superintendents adamantly disdained to be judged by therapeutic performance, claiming that their clients were incorrigible anyway³³ and insisting that sheer compliance with standard professional procedures was the only appropriate criterion for asylum management. Thus they aimed to terminate the conflicts of custody and curing inherent in their roles, and thus they succeeded in securing themselves against all public responsibility for the results of their conduct.

The last few years have shown, at last, that there are remedies for denial of due process that are open even to prisoners and patients. It is not yet nearly so clear what protection the legal system affords against such professionalism become a law unto itself.

³² G. GROB, *supra* note 12, at 358-59; *cf. id.* 201, 218-28, 230, 356.

³³ D. ROTHMAN, *supra* note 1, at 268.

ALIENATION AND ECONOMICS. BY WALTER A. WEISSKOPF.
New York: E. P. Dutton & Co., 1971. Pp. 202. \$7.95.

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.

—Charles Dickens, *A Tale of Two Cities*

Dickens' description of the ambivalent ferment of the French Revolution strikes home at a time when the most visible dividend of our current prosperity is widespread alienation. The corporate sector in particular stands near the top as a source of discontent, a fact evidenced by a sweeping frontal of attacks unequalled in the history of this country's industrialized economy and characterized by the wide variety of origins and styles of attack. Ecologists place the blame for an impending doomsday on modern technologically resourceful robber barons who callously pillage the environment. Naderites contend that the shadow of a nationwide corporate conspiracy makes possible and profitable a progression of devious anti-social activities. Consumerists object to Madison Avenue force feeding the public shoddy and superfluous products. All reformers are extremely disturbed over the sheer size of business enterprises and their alleged immunity from any sort of externally imposed accounting.¹

In this era of criticism and tension most economists have taken on the task of identifying the sources and explaining the effects of various market abuses. A number of industrial organization theories purport to expose market power and such concomitants as barriers to entry, product differentiation, and parallel pricing.² Similarly, imperfect

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¹ A full range of criticisms may be found in: M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* (1972); R. HEILBRONER, *IN THE NAME OF PROFIT* (1972); M. MINTZ & J. COHEN, *AMERICA, INC.* (1971); C. REICH, *THE GREENING OF AMERICA* (1970); *IN THE MARKET-PLACE* (Editors of Ramparts Magazine eds. 1972).

² See, e.g., J. BAIN, *INDUSTRIAL ORGANIZATION* (2d ed. 1968); R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* (2d ed. 1967).

and monopolistic competition models furnish loose frames of reference for establishing permissible limits of departure from desirable norms.³

Industrial organization economics provokes two types of criticism. First, many economists dispute the accuracy of the theoretical assumptions and conclusions. For example, not all economists accept the teaching that oligopolistic market structure leads invariably to artificially high prices or operates in every set of circumstances as a damper on effective competition.⁴ The second criticism assumes the validity of the theories but laments the failure of government officials—especially those entrusted with enforcing the antitrust laws—to remake the marketplace in the image of the theoretical imperatives.⁵ Hence the Justice Department stands accused of dereliction of duty for not breaking up oligopolized industries.⁶

Just now emerging is a third criticism which opens a totally new dimension. The charge is that conventional economics is at best irrelevant and at worst serves to facilitate the corporate establishment's rape of society. Springing from a wide spectrum of ideological sources, the new school of dissenters condemns blind obsequiousness to analytically symmetrical models which allegedly channel societal aspirations toward destructive goals such as growth, Gross National Product worship, and irresponsible consumption. The values of a humane society are obscured by indiscriminate obedience to the statistical purity of the debits and credits of production and aggrandizement figures.⁷

In one of the better reasoned pieces of the "new" economic criticism, Walter Weisskopf argues that today's societal turmoil is triggered by a corrupt orthodoxy which represses the better instincts of man and entices him to worship false gods. Man is eternally confronted with the conflict between the universe of possibilities and the limited realm of actuality. Since man chooses within the constraints of his own potential and the shared beliefs of society, he must sacrifice other choices and thereby place himself in a state of perpetual alienation from some of those possibilities. Weisskopf's thesis is that alienation and repression are tolerable only so long as man is willing to accept with minimal reservations the moral validity of the system. Having established a

³ See 1955 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 315-42.

⁴ J.M. CLARK, COMPETITION AS A DYNAMIC PROCESS 51-54 (1961); A. KAPLAN, BIG ENTERPRISE IN A COMPETITIVE SYSTEM 49-61 (1964); see Bernhard, *Competition in Law and Economics*, 12 ANTITRUST BULL. 1099 (1967).

⁵ Government officials are accused of being unschooled in, and not disposed to learn, structural economics. *Foreword*, 3 ANTITRUST LAW & ECON. REV., Fall, 1969, at 1, 3-4.

⁶ This is the persistent complaint of the Nader group. See M. GREEN, *supra* note 1.

⁷ A fairly representative sampling of writings or evaluations of the "new" or "radical" economics can be found in: IS ECONOMICS RELEVANT? (R. Heilbroner & A. Ford eds. 1971); A. LINDBECK, THE POLITICAL ECONOMY OF THE NEW LEFT: AN OUTSIDER'S VIEW (1971); E. MISEAN, TECHNOLOGY AND GROWTH (1970); M. TANZER, THE SICK SOCIETY (1968); Silk, *Wanted: A More Human, Less Dismal Science*, SAT. REV., Jan. 22, 1972, at 35.

universe of assumptions, the author gets to the point: at the present time a valueless system endeavors to direct choices to socially destructive and morally perverted goals (growth, advertising, consumption) and, in doing so, pushes a growing segment of the population to contest the repression and to challenge the very legitimacy of the system itself.

Weisskopf makes clear that the economist, with the influence to shape the authenticity of alienation, is an instrumental contributor to the unsatisfactory state of affairs. Although he acknowledges the usefulness of most economic analysis prior to the advent of the modern consumption-oriented economy, the author nevertheless notes the detrimental effects of the traditional emphasis on internally consistent models of economic behavior. Their minds honed on the whetstone of abstraction fashioned by the classical (Adam Smith's "invisible hand") and neo-classical (Marshall's "rational economic man") schools, modern economists carried this mode of analysis to the ultimate by creating a system of inevitability, neutrality, and objectivity and thereby sealing up all openings for evaluation in the light of moral or ethical systems.⁸

Weisskopf also reproaches his colleagues for their continuing reliance upon antiquated models in the face of the patent capability of giant corporations to use the stratagems of product differentiation to make a mockery of the ideal of an impersonal marketplace. The doctrine of monopolistic competition recognized the reality of market power, then blocked out consideration of its implications through an *a priori* cop-out: "Market power has again been caught in the net of deterministic theory and the disturbing freedom of choice is eliminated by the assumption of a singular goal: profit maximization."⁹

To Weisskopf the critically repugnant consequence of blind addiction to these spurious models is that a neutral and impersonal conception of the marketplace operates to excuse society from the responsibility to make moral value judgments on what is repressed and what is actualized. The result of value neutrality is reflected in the smoldering presence of counter cultures, drop-out societies, protest movements, hardhats, and the like.¹⁰ Absolved by the theoretician from moral evaluation, the corporate sector needlessly plunders the environment and exploits vulnerable consumers. Efficiency, technology, and

⁸ It has been suggested that the cloak of objectivity and a concomitant distaste for making moral judgments constituted the quid pro quo for the recognition of economics as a pure science. Boulding, *Economics As A Moral Science*, 59 AM. ECON. REV. 1 (1969).

⁹ W. WEISSKOPF, *ALIENATION AND ECONOMICS* 129 (1971). Managerialists are no better than economists. They recognized the autonomy of the managerial elite but then reintroduced mechanical determinism by resorting to a "balancing of conflicting interests" formula. "According to this approach both corporate management and government do not have to do what is right but have merely to balance conflicting interests. This is, in part, still a relativistic, value-empty theory informed by technical formal reason like the free market theory." *Id.* 142.

¹⁰ Galbraith, who serves as an important authority for Weisskopf, concludes that model determinism is used as a barrier against government interference. "The doctrine thus outlaws a wide range of government interference and does so in the name of the individual." J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 216 (1967).

innovation are exalted: "because it can be done efficiently and profitably, it is assumed that it should be done, regardless of its negative moral implications."¹¹ Without the guidance born of moral enquiry, Weisskopf demands, what is the difference, other than, perhaps, efficiency, between a concentration camp and a factory?¹²

Although not a work of great literary finesse, *Alienation and Economics* is a well-reasoned and readable piece of analysis. Much of its appeal comes from the author's skill in marshaling the insights of a variety of disciplines to provide a neatly packaged explanation for today's disquiet. His interpretive overview of the history of economics well repays the reading. In short, there is enough of style and fiber to lull the reader into an unquestioning acceptance of Weisskopf's thesis. This is a temptation best resisted.

Clearly questionable is the assumption that the endemic tide of dissent is a synchronization of the "vibes" of such diverse groups as hippies, yuppies, Campaign G.M., "Jesus freaks," and so forth. Any similarity of motivation and purpose between the Abbie Hoffman *coterie* and the Sierra Club puts an awesome strain on credibility. Moreover, as Professor Wallich points out, there are simply too many crisscrossing demands ("raise up the poor, protect the environment, slow down economic growth")¹³ to permit one to determine a common denominator.

Weisskopf's critical assumption that the corporate establishment is ensconced behind an impregnable wall of non-accountability has by no means reached the point of acceptance by consensus among economists. While conceding that the oligopolist has the capability to exploit varying degrees of market power, a host of economists refuse to go further and ascribe to him complete dominion over the destiny of the marketplace and society.¹⁴ For one thing, economists do not read the testimony from the marketplace as sustaining this thesis.¹⁵ Admittedly, many an economist hedges on this issue with a plea for additional empirical research. Moreover, oligopolists stand confronted with the imposing counterbalancing power of a "pure" labor monopoly, "big government," a scientific and cultural elite, and, most recently, "consumer power."¹⁶

¹¹ W. WEISSKOPF, *supra* note 9, at 92.

¹² *Id.*

¹³ Wallich, *How Business Can Rescue Capitalism*, FORTUNE, Mar. 1972, at 123. See note 25 *infra*.

¹⁴ See, e.g., J.M. CLARK, *supra* note 4; A. KAPLAN, *supra* note 4. See also Adams, *Comment on Galbraith's 'New Industrial State'*, 1 ANTITRUST L. & ECON. REV., Winter, 1967, at 21; Demsetz, *Book Review*, 77 YALE L.J. 802 (1968); Raskind, *Book Review*, 1967 UTAH L. REV. 622. Even some of the most vociferous critics of size dispute the Weisskopf-Galbraith thesis. W. MUELLER, A PRIMER ON MONOPOLY AND COMPETITION 168-70 (1970). Others acknowledge pockets of market power in the economy but nevertheless hold that "the problem is not beyond hope of correction." W. SHEPHERD, MARKET POWER AND ECONOMIC WELFARE 244 (1970).

¹⁵ See, e.g., Burck, *The Myths and Realities of Corporate Pricing*, FORTUNE, Apr. 1972, at 85.

¹⁶ See J. BAIN, *supra* note 2, at 91-92; Phillips, *Antitrust Policies: Could They Be*

In one important respect it makes little difference whether the reader succumbs to Weisskopf's assumptions. After condemning traditional economics for sophistry and unresponsiveness, the author pulls a cop-out of his own; he leaves society languishing in the hell of the existing system without posting any directions to redemption. Almost as an afterthought, he attempts to outline a remedy in his appeal for "multidimensionality" which, despite its impressive sound, turns out to be simply an evangelistic call to balance the spiritual with the material. When he gets down to the task of identifying the catalyst for multidimensionality, the best Weisskopf can do is to duplicate the Reich exhortation with the observation that "[T]he revolution and the reform have to start with the individual and from within."¹⁷

It is difficult not to sympathize with a reluctance to undertake the burden of itching out solutions.¹⁸ When Weisskopf eschews the use of government resources to effect change, he presumably recognizes the possible disastrous effects from a government bureaucracy certain to be more unmanageable and unproductive than the present system. Or consider the problem of antigrowthism, which Weisskopf considers an essential element of the "new balance," but whose ramifications are obscured by his fluid notion of "multidimensionality." Even the strongest advocates of growth controls acknowledge the possibility that such a system could, with the slightest encouragement, lead to Orwellian totalitarianism. Anthony Lewis, a supporter of growth restraint, elaborates: "The idea that economic growth is approaching the limits of earth's capacity could lead, by a short step, to advocacy of totalitarian remedies. One can foresee the argument that man must be persuaded out of his yearning for more material goods by mental reconditioning in the manner of B. F. Skinner."¹⁹ Moreover, cloaking antigrowthism in a nebulous formulation like "multidimensionality" is a way of avoiding the prospect of facing up to the repercussions of putting an instant freeze on development in "have-not" nations and thereby perpetuating technological elitism and international friction.²⁰

Evasion of the tough logistics and trade-off costs of remedy seem to characterize the reform movement. The ethereal set—e.g., Galbraith, Reich, and now Weisskopf—write titillating scenarios for the theater of the intellectual chic that are replete with adroit theoretical tracings of causes and effects, but never condescend to enter the trenches of ways and means and trade-offs. "Consciousness by revolution"

Tools of the Establishment?, in *ANTITRUST POLICY AND ECONOMIC WELFARE* 54, 73 (W. Sichel ed. 1970).

¹⁷ W. WEISSKOPF, *supra* note 9, at 191.

¹⁸ This is one of the criticisms leveled against Galbraith. *Wall St. J.*, Dec. 17, 1971, at 8, col. 3.

¹⁹ *N.Y. Times*, Mar. 6, 1972, at 33, col. 1.

²⁰ See Passell & Ross, *Don't Knock The \$2-Trillion Economy*, *N.Y. Times*, Mar. 5, 1972, § 6 (Magazine) 14.

(Reich),²¹ "political initiative" from the educational and scientific estate (Galbraith),²² and Weisskopf's plea for "multidimensionality," have scant practical value other than for use in conversational one-upmanship contests at cocktail parties. Muckrakers, highly proficient in the hand-to-hand combat of exposé, apparently lack the perspective to proceed beyond detection and accusation. The best that the Nader groups and the Cohens and Mintzes can do is to chip away at the edges with proposals to install public representatives on boards of directors²³ and pass national incorporation statutes.²⁴ Meanwhile, back at the ranch, the system blunders on, with the businessman caught in the crossfire of the phrasemaking visionaries and the muckrakers.²⁵

²¹ C. REICH, *supra* note 1, ch. XI.

²² J. GALBRAITH, *supra* note 10, at 380.

²³ National Observer, Dec. 25, 1971, at 14, col. 3.

²⁴ M. MINTZ & J. COHEN, *supra* note 1, at 357-63.

²⁵ Consider the lament of the President of duPont de Nemours: "We are expected to create more jobs, but to do this we must remain competitive in world markets, and that calls for more productivity, investment and technology. At the same time we are asked—often by the same people—to slow down technology, put more money into pollution control and increase our commitments to education and urban improvement." In frustration he continues: "Something has to give. It just isn't possible to optimize for all these goals at the same time." U.S. NEWS AND WORLD REPORT, May 31, 1971, at 66.

FREE ENTERPRISE AND ECONOMIC ORGANIZATION—
ANTITRUST AND REGULATORY CONTROLS. By LOUIS
B. SCHWARTZ. Mineola: The Foundation Press, Inc., 1972. Pp.
xlv, 1380. \$19.50.

Carl H. Fulda†

The fourth edition of this book, appearing twenty years after the first edition, retains the original scheme of coverage which distinguishes it from all others in the field. Twelve years ago I tried to describe that scheme in a review of the second edition as “[a] combination of federal antitrust laws with ‘public utility’ law,”¹ and as an “admirable over-all plan”² which opened the eyes of students to the fact that the free market regime of competition does not govern all aspects of economic life, but that vast and vitally important industries are subject to administrative regulation. The passage of time has confirmed the wisdom of this approach, which looks at the totality of “economic law,” rather than merely on the free segment of it.

Professor Schwartz’s combination of the two contrasting techniques of law, the competitive (antitrust) and the interventionist (regulatory), would be less persuasive than it is if these two methods were separately and alternatively applied, with no overlapping areas. Indeed, the uninitiated are likely to presume that “regulation” and “competition” are mutually exclusive, and that the former, epitomized by control of entry and prices, prevails in industries where the latter, for one reason or another, is deemed impractical and actually harmful. The student in a course based on Professor Schwartz’s book will quickly be disabused of this widely held popular misconception. He will learn that competition and regulation are frequently employed as complementary devices. For instance, in a setting of controlled entry, we find intense preoccupation with the problem of admitting newcomers for the purpose of protecting the public from inadequate service.³ Although mergers and acquisitions which would offend the antitrust laws may be authorized by regulatory agencies, the public interest in competition must be considered⁴ and, in some industries, has led to disapproval of combinations.⁵ Moreover, mergers creating monopolies⁶ or exceeding spe-

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¹ Fulda, Book Review, 12 J. LEGAL ED. 632 (1960).

² *Id.* 635.

³ L. SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 346-72 (4th ed. 1972).

⁴ *Id.* 258-72.

⁵ *Id.* 282-93.

⁶ *Id.* 276-78.

cified numbers of enterprises⁷ are prohibited in aviation and broadcasting. Price fixing agreements among groups of surface carriers are allowed only on condition that the right to independent action must be guaranteed for each member.⁸ At least one agency enforced the antitrust prohibition against collective boycotts.⁹ There is a large body of law relating to discrimination in prices and services in regulated industries which furnishes intriguing analogies to the Robinson-Patman Act.¹⁰ And the Federal Communications Commission, in its Broadcasting Rules, has adapted the law against exclusive dealing and tying to the special problems arising between stations and networks.¹¹

These examples demonstrate the wide application of antitrust rules in regulated industries. The active role of the regulator begins only when competition appears or is believed to be not feasible or harmful, as it would if no floors or no ceilings could be established in rate making. Yet even here competitive considerations inevitably enter the picture: Management usually is free to set its rates somewhere in the zone between maxima and minima.¹² Hence, to quote Alfred E. Kahn's felicitous formulation:

The role of the government remains essentially negative— . . . contravening the decisions of private persons only after the fact, only when their performance has been or would otherwise be obviously bad. In these circumstances regulation cannot supply the same assurances as competition that performance will be *positively good* Its most important task is to define and develop institutional arrangements that will provide correspondingly powerful incentives and pressures on regulated monopolists.¹³

In short, regulation is a substitute for competition. But this does not tell the whole story, because regulation is also a method to limit or control competition. This is most obvious with regard to the question whether certificates of public convenience and necessity should or should not be granted, and in cases involving the administrative power to set minimum rates, which are intended to prevent "destructive competition." The most baffling example of this is the problem of intermodal rate competition in transportation, epitomized by the famous *Ingot Molds* case,¹⁴ where the regulators struggled with the question

⁷ *Id.* 296-98.

⁸ *Id.* 587-90.

⁹ *Id.* 633-34.

¹⁰ *Id.* ch. 8.

¹¹ *Id.* 1067-71.

¹² *Id.* 648.

¹³ 1 A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 18 (1970).

¹⁴ *American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968); L. SCHWARTZ, *supra* note 3, at 753-62. In view of the importance of that case the bibliographical references supplied by Professor Schwartz are not sufficient. I miss particularly

whether the rates proposed by the railroads would cripple a competing mode, and, if so, whether such a result would be in violation of the National Transportation Policy.

It follows that a course based on Professor Schwartz's book gives to students a much deeper insight into the phenomenon of competition than one limited to the "unregulated" segment of the economy.¹⁵ Hopefully—from the point of view of this reviewer's bias—the comparative treatment of regulation and competition may also strengthen the belief in the principles of the free market embodied in the antitrust laws at a time when the national ideological commitment to those laws is probably at an all-time low.

There remains only the question as to how the vast panorama unfolded in this book may be fitted into the curriculum. In eighteen years of addiction to this book, first in a three hour course and, in the last eight years, for four hours, I have encountered no difficulties in putting across its essential message. Three hours suffice for alerting students to the penetration of antitrust ideas into the field of regulation. Four hours are, of course, preferable; while complete coverage seems to me impossible,¹⁶ a selective treatment of the most important aspects of affirmative regulation and a full treatment of the application of antitrust rules in regulated industries can be accomplished. This is, of course, a demanding program. But all worthwhile goals are demanding, while those which are not are a waste of time. I hope this will persuade others to try.

the most helpful explanation of the accounting concepts in *The Role of Cost in the Minimum Pricing of Railroad Services*, 35 U. CHI. J. BUS. 357 (1962), and the articles by Professor Nathanson (Nathanson, *Administration Proposals for Revision of Our National Transportation Policy—Herein of Intermodal Competition and the Minimum Rate Power* (pts. 1-2), 58 NW. U.L. REV. 583 (1963); 59 *id.* 1 (1964)).

¹⁵ It should be noted that the international aspects of antitrust are treated very briefly. But this is no shortcoming, since this subject is more appropriately treated in courses dealing with International Trade and Investment. As to domestic law, the new edition is better organized and more compact than its predecessors; there are only two omissions which should be corrected in the next edition: In the *Brown Shoe* merger case (*Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)) the figures showing the horizontal effect of the merger in selected communities (*id.* at 342-43) have been left out, thus depriving the opinion of its persuasiveness. After *Schwinn* (*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)) the very important clause in the judgment entered on remand (291 F. Supp. 564, 567 (N.D. Ill. 1968)) permitting Schwinn to designate certain areas of primary responsibility for its distributors is not mentioned.

¹⁶ I have always left out the last chapter on labor unions.

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FOREWORD

The Editors of the University of Pennsylvania Law Review have dedicated this issue to Clarence Morris. This, a festschrift for a scholar, teacher, friend, and colleague, seeks to honor one who has done us honor by his work with us, by his being with us.

The contributors to this volume speak of the man and the friend. They speak of his great contributions to law and to legal education. And as he would wish, they speak to the law. Clarence Morris' concern for people is reflected in all that he has done and published, in all of his contacts with students and colleagues. Less known, I think, is the effort he led to make it financially possible for black students with inadequate funds to secure a legal education at Penn. Almost a decade ago he took the lead in establishing The Scholarship Fund of Faculty and Friends of the University of Pennsylvania Law School, the foundation which has provided a significant part of the tuition and other costs for many of the black students, lawyers now, who needed help.

Clarence will retire from classroom teaching at the end of the current academic year. He will remain with us, however, continuing to teach colleagues, continuing to teach students in informal contact, and continuing to teach the world as the inquiring mind and productive scholar are wont to do.

I invite all to share this feast at Clarence's table.

Bernard Wolfman



CLARENCE MORRIS

The Editors dedicate this issue to Professor Morris
upon his retirement from his professorship
after twenty-one years of devoted
service to the Law School.