BOOK REVIEWS

ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES. By Simon N. Whitney. New York: The Twentieth Century Fund, 1958. 2 vols. Pp. xxiii, 560; x, 541. $10.00.

John C. Stedman †

This study, by the ex-Chief of the Twentieth Century Fund's Research Department and present Chief Economist for the Federal Trade Commission, examines the operation of the antitrust laws in twenty major industries.[1] The pattern followed is much the same for each: a description of the industry structure, the antitrust litigation that has occurred and its effects, and an examination of the resulting competitive status. Each individual study closes with a useful summary. Following the individual studies, there is an over-all evaluation by the author, a brief commentary report by the Fund's Committee on Antitrust Policy, and a series of invited comments by experts in the several fields covered.

From these case histories, the author draws the following major conclusions concerning the role of the antitrust laws in these industries and in our modern economy (vol. 1, pp. 385-438):

The dissolution cases have had only slight effect. Where unsuccessful, defendants' market shares declined anyway for other reasons. Where successful, either no declines occurred or declines would have come about anyway, although perhaps not quite as soon.

By creating a fear of prosecution and rendering agreements unenforceable, the antitrust laws have been more effective in preventing price, cartel, basing point and other collusive agreements, although other factors probably played a substantial part.

The antitrust laws have also helped to prevent monopolistic practices such as tying clauses, exclusive dealing, and price discrimination, although such practices are probably more the consequence, than the cause, of monopoly.

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1. Meat packing, petroleum, chemical manufactures, steel, paper, bituminous coal, automobiles, cotton textiles, cast iron pipe, tobacco products, anthracite, aluminum, shoe machinery, motion pictures, tin cans, farm machinery, corn refining, cement, pullman cars, and insurance.

The current structure of the industries studied, typical of American industry, possesses the following characteristics: (1) it is oligopolistic in nature, with no sharp trend toward either greater or less concentration; (2) there is considerable vertical integration; and (3) entry has become increasingly difficult, expensive and infrequent, except as achieved through mergers, but is not impossible. However, antitrust action has facilitated entry to some extent, although other factors, for example surplus property disposals, have also helped.

The competitive practices in these industries are also oligopolistic in character. Prices are generally "administered," with a high degree of price leadership, uniformity and stability. Such competition as occurs is largely of a non-price sort, such as style variations, research expenditures, services, massive selling efforts and advertising. Inter-industry and "substitute product" competition plays an important part.

The record of performance by the studied industries, with minor exceptions and temporary rest periods, is one of high and expanding production and increasing efficiency.

The author also discusses a number of special features, such as patents, international cartels, interlocking directorships, trade association activities, and special exemptions that protect against vigorous competition. None of these appears to the author of great significance from an antitrust standpoint.

On this record, Dr. Whitney concludes that the antitrust laws and actions have made a varying, but not really outstanding, contribution to the cause of competition. Although they have served a useful purpose in erecting barriers to cartelization, preventing monopoly and preserving ease of entry, the same results would eventually have come about anyway. Forces stemming from price and demand movements, technological development, new products and industries, and changes in management attitudes, plus our vast natural resources, our huge domestic market, our political policies and traditions (respect for contract and property, minimal government regulation, affirmative aid to business), and certain features of our national character (independence, emphasis on material things, mobility) have, he feels, been much more important. The main contribution of the antitrust laws is the deterrent effect that comes from "the ghost of John Sherman sitting on every board of directors."

The author has, indeed, damned the antitrust laws with faint praise, and the tenor of his case histories would suggest that he is being overgenerous in going even this far. If his appraisal is accurate, perhaps we should take antitrust off our list of government activities and help the President balance his budget. The fact that none, including Dr. Whitney, suggests this makes one wonder whether his appraisal *is* accurate. Is his picture in true perspective or distorted? We just do not know—and, unfortunately, his own studies do not really tell us.

My reservations do not stem from his selection of case studies. They appear quite representative. Nor am I much troubled by his factual presentation as far as it goes. His source references appear quite adequate and well-balanced in terms of antitrust outlook. (I had a feeling throughout that he accepted too uncritically many industry explanations and attitudes, looked with too jaundiced an eye upon the government positions, and was much more avid in his search for instances of antitrust failure than of antitrust success,[2] but this may merely reflect my own biases.) Rather, I am troubled by what I feel is inadequate treatment of several crucially important antitrust issues which his factual presentations open up. I sense a mission not fully accomplished. Within the limits of a book review, one can do no more than list these shortcomings, but here they are, as I see them:

What is the full and long-range impact of such competitive conduct as is brought about by antitrust enforcement? While a new entry or two into a market, or the freeing of a captive customer, may seem quite unimpressive, more searching inquiry may disclose quite a different picture. *Undesirable* competitive conduct often touches off extensive reactions, as witness the initiation of a price war or an important merger. Surely, *desirable* conduct may do the same—indeed, many such instances suggest themselves in Dr. Whitney's own account, if one searches hard enough for them. Studies in this field must not look only at the small stone thrown into the pond and ignore the widening ripples that stem from it.

What is the real extent of the deterrent effects of the antitrust laws? The author makes a bow to this important feature, but I question whether he has given it the attention it deserves. (I am assuming, of course, the existence of a vigorous, effective enforcement agency; it is the cop on the beat, not the law on the books, that counts.) Who would suggest, for instance, that the *du Pont-General Motors*[3] and *Bethlehem*[4] decisions have had only casual effect upon subsequent merger discussions? On both this and my first point, some measure of these forces may be suggested by asking what would be the situation today had there been no antitrust laws or had none of these cases been brought.

What part should "satisfactory performance" play in determining antitrust liability or in evaluating antitrust contributions? A very important part, Dr. Whitney suggests. He frequently stresses the high productivity and efficiency of certain concerns in his implied or express criticism of selected antitrust actions, and opposes certain dissolutions on grounds of the existing efficiency and productivity of the firms involved (vol. 2, p. 392). But this is troublesome in two respects. First, what constitutes "satisfactory" performance? Dr. Whitney finds it exists in case after case, but one

2. See, *e.g.*, vol. 1, pp. 430-31.

3. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

4. United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

must take him on faith for he presents little evidence or measurable criteria to support his position.[5] Second, the value of performance, from a public interest standpoint, depends upon who benefits from it. On this, the study sheds only limited light. Carried to its logical conclusion, the performance test as a criterion for antitrust action or inaction reduces every concern to a public utility status in which the sole criterion would be adequate service at reasonable rates—but with no responsible public agency deciding what is adequate or reasonable. Few would buy this kind of proposition if they knew what they were buying. In any event, a system that relies upon one's desire for the public goodwill or one's fear of government action to assure proper conduct is a far cry from a competitive system with its reliance upon impersonal economic forces, and would require complete reorientation of our approach to business regulation.

The study largely ignores the issue of "optimum" size, unwarrantedly leaving the impression that one's only choice is between atoms and mastadons. The issue of size is further thrown out of balance by posing it solely as a question of whether the existing entity is performing well, ignoring the question whether a smaller entity would perform just as well.

The dangers of bigness from social, political and psychological standpoints, receive no attention.

The study says nothing about possible variations in treatment of those competitive practices, whether fair or unfair, that are the very essence of the competitive battle, and "second-level" practices that one could proscribe completely and still maintain a vigorous competitive system.[6]

There is little examination of the possible ways in which oligopolistic industry prices, freed as they largely are from the restrictions of competition, are, or can be, prevented from rising to the level of what the traffic will bear.

There is some discussion of "sick" industries, but little effort to ascertain what really makes them sick. What is needed is some significant insight into what distinguishes "healthy" from "unhealthy" competition and how one may promote the former and prevent the latter. Casual explanations in terms of excessive competition and ease of entry are not enough.

The study fails to explore and distinguish, in terms of what to do about them, those difficulties of small businesses that arise out of their own shortcomings (inefficiency, incompetency), as contrasted to those that arise out of the excessive power and influence of big concerns (control of supplies, markets and credit, excessive advertising).

There is considerable criticism of certain conduct as having been *caused* by antitrust action which, upon closer examination, really appears attributable to other factors, including *not enough* antitrust action.[7]

5. See Comment, vol. 2, pp. 253-54, 442, 462, 494; *cf.* vol. 1, pp. 499-500.

6. Discussed in Stedman, *The Merger Statute: Sleeping Giant or Sleeping Beauty?*, 52 NW. U.L. REV. 567, 612-16 (1957).

7. See, *e.g.*, vol. 1, p. 431.

The study does not seriously explore the impact upon competition of the current merger movement, vertical integration and the drive for diversification.

One intriguing suggestion by the author, which I hope the economists might pick up and explore thoroughly, is the proposition that the greatest progress comes from the *hope* and effort to achieve a monopoly position (vol. 2, p. 438). What is the effect of such hopes and efforts? How shall we get the maximum benefit from them at the minimum cost in terms of adverse effects? At what point must we, in the public interest, put on the brakes? As I have suggested elsewhere, "a functioning competitive system seems to involve a constant striving for security and stability without ever reaching the goal." [8]

Within the limits of 1,000-plus pages, one cannot, of course, adequately explore and resolve these crucial issues. But until they are resolved, a final or even tentative evaluation of the antitrust laws and their effect, seems premature and presumptuous. The present study, with its broad-gauged and genuine insistence upon trying to find out what is really going on, what is needed to maintain effective competition, and what is being done (and not being done) to achieve this, is both a major and a massive contribution for which the world of antitrust is greatly in the author's debt. It is, indeed, a "promising beginning," as the Fund's Antitrust Committee puts it (vol. 2, p. 445). But it is only that. May the author and others explore further and dig deeper in this promising lode. We shall all be the richer for it.

CATHOLIC VIEWPOINT ON CENSORSHIP. By Harold C. Gardiner, S. J. Garden City, New York: Hanover House, 1958. Pp. 192. $2.95.

George Soll †

For the most part, public discussion on radio and television and legislative debates concerning obscene materials and the wisdom and method of censoring them bog down in the use of epithets, truisms and the repetition of deliberately emotional catchwords. Almost invariably, there is nothing to learn by listening to, or reading the reports of, such proceedings. One may wager (and win every time) that if the air is filled with cries of "pressure groups," "poison literature" and "juvenile delinquency," the air is also hot.

8. Stedman, *supra* note 6, at 602.

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But the contrary is true when one turns to the serious treatment of the same subject in books and law review articles. Particularly since the end of World War II, there have been a number of excellent treatments of this most difficult and provoking subject.[1] Another important and challenging contribution to this select group of materials is Father Harold C. Gardiner's *Catholic Viewpoint on Censorship.*

One may disagree with many of Father Gardiner's views—that is, the official Roman Catholic approach to the censorship of mass communication media and Father Gardiner's own opinion of the work of the Legion of Decency (the Legion) and the National Office for Decent Literature (NODL)—but one cannot challenge the integrity of his effort to discuss the problem on its most profound level.

His explanation and analysis of the official position of the Church on obscenity is brilliant. After treating the philosophic background of the conflict between freedom and authority, Father Gardiner explores the basic tenets of the Catholic view on censorship. These views are, of course, obligatory only on those who voluntarily desire to practice Catholicism. Regardless of what may be the wisdom or propriety of these views (in whatever sense "propriety" may be applied to religious conviction), they do not directly affect the rest of our society.

However, it is interesting—and probably not too well known by the average Catholic as well as by others—that the official Catholic approach to obscenity and censorship is very close to the views expressed by the majority of the United States Supreme Court in the *Roth, Alberts* and *Kingsley* cases,[2] the most important decisions of the Court on the subject. Where the Supreme Court searched for "prurient interest" in defining obscenity, the Church's touchstone is "the intrinsic tendency . . . of the work to arouse sexual passion." Like the Court, the Church believes that the whole tenor of a book, not isolated pages, must be taken into account in judging pornography. Also, the impact of the material on a "person of normal instincts" is the criterion of the Church just as the effect on the "average person" is one of the standards applied by the Court.

It is, however, when the author leaves discussion of the Catholic view on censorship and turns to the activities of certain Catholic groups that, in this reviewer's opinion, there is a distinct departure from the analytic brilliance of the first section of the work.

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1. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947); MCKEON, MERTON & GELLHORN, THE FREEDOM TO READ; MODEL PENAL CODE *Sexual Offenses* art. 207 (Tent. Draft No. 5, 1956); Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution,* 38 MINN. L. REV. 295 (1954); Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship,* 106 U. PA. L. REV. 214 (1957); Note, *Entertainment: Public Pressures and the Law,* 71 HARV. L. REV. 326 (1957).

2. Roth v. United States, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

Father Gardiner's thesis is that the Legion, which concerns itself with the appraisal of motion pictures, and the NODL, with soft-cover books and magazines, are simply guiding the formation of public opinion. Whatever "suppression of material (films or books) follows as a result of the formed opinion, is secondary and, to a degree, accidental to their main purpose." (p. 83). He equates their criticism of a movie or book with that of Orville Prescott's criticism of a book in the *New York Times* or of drama critics' review of a new play. (p. 83).

His view is that, apart from the impact that the Legion and the NODL may have on Catholics, both organizations are entitled to persuade non-Catholics to take the same view of certain reading material and motion pictures as they do. With this assertion, no one can quarrel. Everyone and every organization is entitled to try to persuade everyone else in a democratic society. But if the proprietor of a stationery store is not persuaded that books such as Vicki Baum's *Grand Hotel,* Arthur Koestler's *The Age of Longing,* John Dos Passos' *1919* and *42nd Parallel* and Irwin Shaw's *The Young Lions* should be banned from his shelves (all are on the NODL condemned list), should his store be boycotted? Father Gardiner believes that a boycott by Catholics and others is a just and proper method of persuading the store owner to change his views. Nor is he troubled, apart possibly from its public relations consequences, by the act of a bishop in ordering all Catholics to stay away for a period of six months from a theater which had shown "Baby Doll," a motion picture condemned by the Legion. Was this persuasion or something else which, apart from its legality, should be criticized or commended in a pluralistic culture?

Two points need to be made. First, if economic reprisal is to be the means of settling ideological discussion, then would it be justifiable for those who believe that Catholic political power stands as an obstacle to a rational divorce or birth control law to picket all Catholic-owned businesses? This approach would make our country a veritable jungle. It would seem clear that toleration of other points of view means that opponents should be as free of the fear of being killed by starvation as by the cruder, but swifter, means of yore. Persuasion means to affect the mind, not the pocketbook.

Second, to the extent that the Legion, the NODL, or any organization representing another religious, racial, political or economic group attempts by persuasion or by economic or social coercion to prevent people from reading or seeing a book or motion picture, do they actually serve the cause of a free society? It is one thing to rate motion pictures by whatever values one likes. It is another thing entirely to decide that one is so omniscient that there is no point in others seeing the movie since the rating should suffice. Has it ever occurred to those who do the rating that, with the best of intentions, they may be wrong, that one man's meat is another's poison, that the "evil" picture or book they have read or seen

may have the same harmless effect on others as it, fortunately, has had on them? Obviously, if many people really dislike seeing a particular motion picture or reading a specific book, the author, publisher or exhibitor will lose money and will be slow to produce or publish another like it. But the taste exercised should, so far as is possible, be individual, uninhibited and unintimidated. Equating the stinging criticism of a drama critic in a newspaper with the shouting and muttering of a picket line in front of a local neighborhood theater, where every patron is carefully scrutinized, is hardly objective analysis.

Father Gardiner is incisive, however, when he points out that organizations such as the American Civil Liberties Union (ACLU) are inconsistent when, on the one hand, they condemn *any* kind of censorship, but, on the other, do not object to curbs being placed on freedom of the press if the curbs are based on a clear and present danger of a substantive harm resulting from a particular publication (p. 30). The question, he says, is one of degree and, implicitly, of the philosophy determining the choice. Too often have self-styled civil libertarians dodged behind the "clear and present danger" test to avoid meeting head-on the troublesome and complex problems of obscenity, untrue picketing signs in labor disputes or the right of the government to be free of security risks.

But how objective is Father Gardiner when he states that "there is every reasonable ground for suspecting that most of the 168 signers" of a statement sponsored by the ACLU, critical of NODL activities, "signed for the sole reason . . . [that] they felt their Americanism would be suspect if they did not sign"? (p. 120). Apart from its on-the-face unlikelihood, he points out himself that some 267 others approached by the ACLU did not sign the statement. Yet, censuring the ACLU for the allegedly coercive means it used in garnering signatures to the statement, he nevertheless sees no problem in describing as "voluntary" and as "a promise freely taken" (p. 134) the pledge Catholics are called upon to make in support of the Legion of Decency "when it is read to them from the pulpit of their parish churches." (p. 91).

Father Gardiner's ultimate charge is that "the ACLU and similar groups are engaged in a campaign to censor the Legion and the NODL out of existence by disagreeing with their right to disagree . . . ." (p. 146). He could not be more mistaken. For in the very statement of the ACLU which is critical of the NODL (and which is contained in the appendix to Father Gardiner's book) the following statement appears (p. 176):

> "It should be emphasized beyond the possibility of misunderstanding that ACLU does not presume to object to the NODL's advising communicants of the Roman Catholic Church about any publication. Nor does the Union (ACLU) see any element of censorship in the NODL's informing the general public of its opinion that certain

writings are immoral. Such criticism is a right of private freedom, and must immediately be protected when threatened."

It seems to this reviewer that Father Gardiner should, in another book or pamphlet, return to two other points which *Catholic Viewpoint on Censorship* does not completely cover. One is that he ought to analyze the criteria used by the Legion and the NODL in their rating or condemning of books and pictures. Does he agree with the actual ratings of the NODL? Are their criteria good enough in view of the large number of well-known books by respected authors that have been placed on the forbidden list for children? The other and more important area to be covered is precisely what views of the Legion or NODL need a Catholic obey as a matter of religious requirement? Do *any* of their views have to be heeded? To what extent was the bishop's position in banning attendance for six months at the offending theater *the* Church position? When do the clergy, in speaking from the pulpit or otherwise, simply express a personal view or impose a religious command?

The service Father Gardiner's book renders is to make available in a single place the basic learning and approach of a powerful and respected segment of our society. Catholics, as much as others, will benefit by its reading. Indeed it is important for the Catholic, more than any other person, to know what stands on censorship he *must* take for religious reasons and which he may take or reject. As Father Gardiner points out, the absolute religious command operates in a much narrower sphere than most would suspect. There is a broad area of the censorship problem within which Catholics may and do disagree. Into this area falls an evaluation of the work of the Legion and the NODL.

CRIME AND INSANITY. EDITED BY RICHARD W. NICE. New York: Philosophical Library, 1958. Pp. vii, 280. $6.00.

Andrew S. Watson †

Most of the ideas in this book concerning crime and its relationship to mental illness have been stated often and one of the main justifications for reviewing it rests on the phenomenon of its strange diversity of authorship. It includes chapters by renowned experts in law, psychiatry and sociology, as well as some by persons whose writing bears the stamp of the evangelist or zealot. As a panoramic vista of social and professional opinion on the relationship of crime, punishment, and the treatment of emotional illness, it is an interesting volume.

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This book touches on most of the problems and fears which arise in considerations of criminal responsibility, and demonstrates as well the confusion which exists in the minds of some who are attempting to deal with concepts from fields not their own. Though all the chapters are written by individuals with a genuine interest in improving and dignifying the process of criminal adjudication and psychiatric care, some of the authors frequently misapprehend the problems under discussion.

Among the contributors are some who rank as acknowledged authorities in their respective fields. These include Professor Herbert Wechsler, Reporter for the American Law Institute's *Model Penal Code;* the Hon. Simon B. Sobeloff, now Chief Judge of the United States Court of Appeals for the Fourth Circuit; Professor Henry Weihofen, certainly an unquestioned authority on this subject; and Herbert A. Bloch, Professor of Sociology and Anthropology at Brooklyn College. Yet side by side with the work of experts such as these are several inept papers written by persons who apparently have little basic understanding of the problems involved. These latter writers, despite their admirable intentions, are frequently guilty of grossly misleading statements. For example, in the editor's introductory chapter there is this interesting comment:

> "Two classes of people are now left which are exempt from criminal liability, even though they may commit criminal acts. The first is children under the age of 7, who are considered not responsible for their behavior. The other is made up of people of any age who are mentally unable to distinguish right from wrong. Included in this group are feeblemindedness and insanity.
>
> "What type of mental disease is found by examining doctors in a plea of insanity? First it is necessary for the reader to know something of schizophrenia, a malignant disease popularly referred to as 'split-personality,' and the most common of all forms of insanity, not only because it may occasionally be associated with murder, but because reference to it may often be needed in order to explain the particular mental defect of a personality trait." (p. 3).

Regrettably this sort of confusion crops up in other chapters of the book as well.

Another statement by the editor is typical of misunderstandings about law by non-lawyers. He states: "There has been a tendency lately to adopt this ruling [*Durham v. United States*[1]] in favor of the older M'Naghten rule, and whether it will be accepted in every state as the basis for determining criminal responsibility, I cannot say." (p. 6). Similar passages indicating a lack of understanding of the present state and ultimate objectives of criminal law and procedure recur throughout the book, and greatly

1. 214 F.2d 862 (D.C. Cir. 1954).

diminish its usefulness. And although the legal writers generally have not made such glaring errors, some of them misconceive and misunderstand the exact status and nature of modern dynamic psychiatry. The book also includes a chapter by a psychologist, which demonstrates not only the kind of confusion mentioned above (pp. 190, 191, 193), but also indirectly deals with the present-day underlying professional rivalry between psychiatrists and psychologists. This emerges in the question of how and whether the psychologist's function as an expert witness in the courtroom should be extended (pp. 204-05).

Chapter two, written by a philosopher, deals with "principles of punishment" and attempts philosophical analysis of the goals of the criminal law. Though the author seeks the "rational aims of punishment," it would appear that many of the justifications for his suggested courses of action rest primarily on his moral predilections rather than on any "rational" approach to the problem. This chapter suggests by its tenor the pattern of attitudes frequently expressed in newspaper editorials about the nature of the criminal law, and illustrates all too clearly the manner in which underlying emotional attitudes crop out to influence the logic of the commentator (pp. 17, 25, 28).

Several contributions in this volume are reprinted from other sources. One such is Dr. Henry Davidson's chapter, "Irresistible Impulse and Criminal Responsibility." In it Dr. Davidson reiterates his widely-known opinion that the M'Naghten rules plus the irresistible impulse rule are adequate tests for criminal responsibility. Involving mainly a broadening of the definition of "knowing," his argument demonstrates the deep reluctance many have to depart from precedent. One is inclined to wonder why we struggle so hard to re-define and preserve archaic words to the point where they no longer bear much similarity to their original meaning. Does this truly sustain "the known certainty of the law?"

This chapter also illustrates graphically a logical error common among psychiatrists. Thus, some piece of manifest behavior attains magical designation as a "symptom"; and henceforth the designated symbol is treated as if it were an explanation. For example, in discussing the relationship of "Irresistible Impulse" to neurosis, the author states:

> "If the patient will pay the price in terms of his anxiety, he can resist—and in the presence of others, he often does hold his hand back. Assume an excessive-compulsive about to set a fire. A by-stander walks by. The patient abstains. If the by-passer remains, the patient waits. His anxiety may mount, he may get palpitations, he may feel faint, he may well-nigh drown in his anxiety. But he can and does wait. The impulse is resisted: it is, therefore, not irresistible." (p. 35).

This definition of *irresistible* would appear to rule out nearly all defenses of insanity on the basis of an "irresistible impulse." Even the most severely

deluded person will usually be prevented from acting violently in the physical presence of restraining authority. His violent behavior, in fact, is often an expression of his wish to force society to help him restrain the impulses over which he is losing control. Some few mentally ill patients, but only a few, have impulses so "irresistible" that they will even shoot through the policeman at their elbow, in order to kill their "persecutor." [2] Also, the word *impulse* tends to connote instantaneousness, a feature rarely if ever present in mental illness. For these reasons, the irresistible impulse test with its undesirable limitations will tend to force distortions into the psychiatric testimony and thereby lessen its potential usefulness. If we really want the psychiatrist's observations and explanations of behavior, we should not make him mutilate or distort them till they no longer make sense.

It would appear that Dr. Davidson has fallen prey to the human tendency to moralize when he says:

> "Finally, the moral issue considers the victim too. Thus it has been argued that this country was wicked to punish the war criminals in Germany and Japan. These men were, the thesis runs, driven to their atrocities by factors deep within themselves. Society made them sadists. Therefore we must forgive them for Society is the guilty party. The victims of the gas ovens and those who suffered their other unspeakable brutalities may not appreciate this highminded charity of judgment. Still it is laudable to be objective. To identify oneself with this, picture that your daughter or favorite niece was ruthlessly raped and then her belly torn open by a neurotic assailant. To view this objectively, you should try to protect the assailant from prison and agree that the proper disposition would be enrollment in a mental hygiene clinic." (pp. 39-40).

While the impulse to punish such persons is easy to understand, it is hardly a rational basis for determining how the criminal law shall function in order to protect society. We cannot exceed the community's willingness to be "understanding" and "loving" in relation to acts committed against it. However, the professionals who are to shed light on questions of *why* these acts were committed, as well as to find ways permanently to protect society from further depredations by such individuals, must not be hampered in their efforts by rules which are predicated on ancient and atavistic concepts of protection. If we appeal only to our impulses for the answer to adequate self-protection, we all would be forced to arm ourselves with a brace of six-shooters, spend several hours each day in target practice, and go about with hands poised "at the ready," ever alert to be first on the draw. Incorporating Talion Law morality into the rules for responsibility only

2. People v. Gorshen, Crim. No. 6310, Cal. Sup. Ct., 1958.

inhibits the process of evolving techniques for social control which utilize what we know *now* about the forces which control human behavior.

Dr. Davidson's chapter points up another problem which is unfortunately common even among psychiatrists. According to most current theories, all behavior is a function of the manner in which we were reared. Once automatic patterns are established as techniques for reacting, there is little that an individual can do to alter them without outside help which leads to greater *insight* about himself. (It is unfortunate that ordinary penal procedures do not accomplish this, but criminological and psychiatric evidence all appear to confirm this fact.) The clear implication of this concept is that no person should be responsible for the nature of his own upbringing and its resultant effects on character. In other words, the sociopath (those formerly designated as psychopaths) no more merits our retributive impulses than does the slobbering idiot or the psychotic, living in his own private world of unreality. The psychiatrist as a private citizen certainly is entitled to his own private feelings about what moral attitudes society should hold in regard to anti-social behavior. However, when he functions in the role of doctor, his moral judgment should not be homogenized with his medical opinion. All too often psychiatric testimony is unwittingly subject to this kind of distortion, and Dr. Davidson's chapter has some examples of this kind of influence (pp. 44-46).

The next two chapters are by eminent criminologists. The first, by Professor Donald R. Cressy, is an interesting effort to solve a significant problem found in the criminal law and psychiatric testimony. We referred above to the wish to understand and deal with behavior conceptually, through the application of labels. Profesor Cressy quite rightly states that psychiatrists and lawyers have this tendency. However, he seems to reveal the same tendency in his own efforts to set up a rigorous criminal classification system into which all criminals would be placed by use of taxonomic methods. As he has pointed out so well himself, this cannot solve the problems of criminal treatment.

In this regard, it is interesting that after *Durham* there was a continued tendency to explain criminal behavior by means of the old word-magic. Psychiatrists made no use whatsoever of the testimonial freedom which *Durham* allowed, in their efforts to provide the jury with more adequate explanations of behavior from which to find the facts as to defendant's sanity. In *Carter v. United States*[3] the Court of Appeals for the District of Columbia stated clearly that in the future, appropriate psychiatric testimony would avoid the use of labels, and present the observational data from which the psychiatrist had drawn his conclusions. This would make words like *anxiety, schizophrenia,* and *irresistable* of limited usefulness in that jurisdiction at least. This is excellent advice and should be followed by all psychiatrists and lawyers.

3. 252 F.2d 608 (D.C. Cir. 1956).

The chapter by Professor Herbert A. Bloch is one of the best in the book and clearly points out the fact, all too often overlooked by some psychiatrists, that group cultural patterns are involved powerfully in the formation of individual behavioral patterns. To adequately understand the significance of individual behavior, it must be compared to the meaning it has for the group. This concept has been incorporated into current psychodynamic models of human behavior and is generally not overlooked by those well trained in psychodynamic methodology. The main problem which Professor Bloch's chapter leaves open, to the thinking of this reviewer, is how one moves from a statistical, group-centered analysis, to the individual on trial. This must be resolved by some individualized technique if the lawyer and the psychiatrist are to be satisfied.

A book on the general topic of crime and insanity appropriately includes something on the problem of commitment procedure. The District of Columbia, since *Durham,* has further elaborated its law regarding commitment of those found not guilty by reason of insanity, and questions about civil commitment standards have been forced increasingly to the attention of jurists.[4] It is therefore interesting that this book has a chapter by the "founder of the National Psychiatric Reform Institute," the thesis of which will have a familiar sound to those who have worked in institutions or universities under conditions in which their interests in law or psychiatric treatment are brought to public attention. Such persons occasionally receive letters filled with deep concern about the use of mental institutions for illegal incarceration. It is not unusual for the writer to raise the spectre of the doctor who functions as a tool for avaricious relatives, desirious of "putting away" members of their family who displease them. The civil rights of the patient are an appropriate and important concern, and we should take great care to fully protect him against illegal incarceration. However, all the recent studies of this matter have shown little to suggest that mental hospitals today are utilized as prisons by families. While it is not suggested that commitment procedures of mental hospitals have reached the desired level of therapeutic adequacy, neither is there much to suggest that they have been utilized for the ulterior purposes so often attributed to them. This chapter seems to urge that the main purpose of mental hospitals is to force human beings to live where they pass their lives in isolation as social outcasts (pp. 127, 134-35). It conveys the ideas and feelings often expressed in the over-drawn and fearful statements often made by former mental hospital patients. Such statements tend to be colored by extravagant fears of persecution by "the government" and "those others" who wish to injure and degrade private citizens, and deprive them

4. See Act of August 9, 1955, ch. 673, 69 Stat. 609, which makes commitment obligatory after a finding of not guilty by reason of insanity; Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958), which defines when a person committed after a verdict of not guilty by reason of insanity may be released.

of social contacts as well as human rights. This institute's aims will prove appealing to many of them.[5]

While these fears are comprehensible in the light of our understanding of mental illness and arouse one's sympathy, they are hardly an appropriate basis for social action in relation to problems of mental health. Yet, as with all the imaginary fears and anxieties which psychiatrists hear about, there is always a grain of truth behind them. We must concede from the outset that most state mental institutions and most public mental health clinics suffer from lack of adequate personnel and adequate financial aid, and therefore inevitably have slow-moving administrative machinery. Mental patients and their families have legitimate cause to protest such administrative inertia. These public health problems in mental hospitals as well as criminal institutions, highlight the necessity for greater public interest and greater financial assistance to them. In this regard, Mr. Burke is accurate in his pleadings.

"From McNaghten to Durham and Beyond," the excellent and widely cited address by Judge Sobeloff, is too well known to warrant further comment.

Professor Weihofen offers in his chapter an excellent and highly accurate analysis of the problems of psychiatric testimony, coupled with an argument in support of the rule of *Durham* as a solution. He says, "It is one of the strengths, and not a weakness, of the Durham Rule that it would rely more on a dynamic and changing medical concept of mental disorder than on a rigid and static 'test.'" (p. 162).

Dr. Merril T. Eaton, Jr. presents a good discussion of the role of the psychiatrist in the court and prison. By emphasizing "treatability and not responsibility," Dr. Eaton pays heed to the physician's preference for functioning in the role of therapist rather than as judge or moralist.

Professor Wechsler's final chapter outlines clearly the rationale by which the *Model Penal Code* writers arrived at their formulation for criminal responsibility. It reveals the strong desire to pin down somehow in explicit language the characteristics of the mental condition which the law will regard as "not responsible." This is an understandable desire, but as we have noted before, it is hardly attainable when dealing in a field where rigidity is likely to bring about undesirable results. To bring before the jury concepts as elusive as descriptions of the control mechanisms of the human mind, we must have either a rule which is as open-ended as *Durham,* or one which, although rigid in definition is procedurally administered as freely and liberally as the M'Naghten rule is treated in Scotland. Then and only then is it possible to get the kind of psychiatric evidence before the fact-finders which is needed to achieve the goal of insuring that only those who have chosen to offend society consciously, deliberately, and with

5. See *Hearings Before a Subcommittee of the Senate Committee on Interior and Insular Affairs,* 84th Cong., 2d Sess. 270 (1956).

malicious intent will be punished. That this is the law's purpose is well illustrated by Professor Wechsler in his excellent comments on the treatment goals of the criminal law.

Taken all in all, this book provides an interesting survey of the attitudes and beliefs which go to shape the criminal law. All of them have a powerful influence on those who write and administer the law, and none may be overlooked without anticipation of vociferous criticism. Some of these views may be met with the cold logic of the lawyer, while others might best be approached with the therapeutic skills of the psychiatrist, since they represent the unconscious atavistic forces present in everyone to some degree. Those involved in molding the criminal law and criminal procedure will have to develop and utilize some of each of these skills if they are to attain their objectives.