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Book Reviews

THE INDIVIDUALISTIC ETHIC IN CRIMINAL LAW: COMMENTS ON EDWIN
M. SCHUR'S—OUR CRIMINAL SOCIETY.*

By Henry W. Seney**

What (not whom) do we *see* as “criminal?” This becomes the focal question of Mr. Schur’s enlightening but labyrinthine book. Both his Dedication, presumably to a fresher generation: “that they may see a less criminal society;”¹ and his Preface, which asks for “basic social science . . . perspectives,”² demand our unsealing of prejudice-propaganda-power and poppycock-blinded eyes. (Unfortunately for focus, the reader wanders in a maze of “as we shall see’s” and “as we have seen’s.”)

Popular myth and criminal law have equally envisioned (not envisaged): The lurking shadow-menace of the backalley mugger;³ the leering superpotent black rapist of panting white virgin ladies;⁴ the freely-willing, morally responsible, non-reasonable man; and the deliberate, wanton, premeditating, right-from-wrong cognoscente.⁵ Mr.

EDITOR’S NOTE: The footnotes to this review are the author’s and have not been edited for reasons that will be obvious if they are read.

* OUR CRIMINAL SOCIETY. By Edwin M. Schur. Englewood Cliffs, N.J.: Prentice Hall, 1969, Pp. 244.

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¹ Page prior to first page of “Contents.”

² “Preface” page, following “Contents,” and immediately preceding “Introduction.”

³ [T]he Commission [President’s Commission on Law Enforcement and Administration of Justice] suggested . . . fear of crime appears to incorporate a ‘fear of the stranger’ . . . SCHUR, p. 27.

⁴ “The risks of victimization from forcible rape, robbery, and burglary, are clearly concentrated in the lowest income group and decrease steadily at higher income levels . . . it is Negro males and females who are most likely to be victimized in a crime against the person . . . A Negro woman (in Chicago, runs the risk of being a victim) nearly eight times as often as a white woman.” SCHUR, p. 26-27 (quoting from the Crime Commission referred to in note 3, supra)

⁵ “[F]ewer than five per cent of all known homicides are premeditated, planned intentional killings, and the individuals who commit them are most likely to be episodic offenders who have never had prior contact with the criminal law.” SCHUR, p. 128 (quoting Wolfgang and Ferracuti as indicated by footnote 12 which refers to “op. cit. p. 141.” The op. cit., as revealed in footnote 6 on SCHUR, p. 126 is *The Subculture of Violence*, (London: Social Science Paperbacks, 1967))

Justice Jackson, in *Morissette*,⁶ spoke of a "universal and persistent belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." He added that "crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." From these D.A.R. and F.F.V. roots⁷ have crept, twining with Harvardarian fondness around the system of the status quo, such arrête-ban suckers as Professor Packer's⁸ demand that we hang onto individual culpability, along with "free will and human autonomy"⁹ as "a necessary condition of liability to punishment."¹⁰ According to this pseudo-sapiential view we need such good old stuff of Waspish dreams as free will, moral blame, mens rea, malice aforethought, *because of* the legal focus on individual fall guys. Without such sticky fantasies to clog our criminal justice system, Professor Packer asserts, we would suffer even more human breakage¹¹ from

⁶ *Morissette v. U.S.*, 342 U.S. 246 (1951), (my quotes, however, came out of CRIMINAL LAW by Donnelly, Goldstein, and Schwartz, p. 565, columns one and two respectively. Myrmecophagous ones may check the original source for their brand of fun. . . .

⁷[S]ince social and political power is far from being evenly distributed among the various social strata, we have to recognize that crime situations almost invariably embody an important element of group conflict. Those holding the power in society have a great deal to do with the making of laws; those with less power must be content to try to obey them—and sometimes to suffer because they are differentially enforced to their disadvantage. In modern American society, the criminal law in some respects represents the efforts of the middle and upper classes to control the working and lower classes; of whites to control Negroes; of men to control women (the laws against abortion being a case in point); of adults to control youth (through the juvenile court and related institutions). SCHUR

⁸ *The Limits of the Criminal Sanction*, by Herbert L. Packer, Stanford U. Press, 1968. I harbor more than professional disgust at Packer's sellout rationalizations of our incredible system of criminal injustice. His fat and indignant "oof" at Fred Rodell's review of Bickel's *The Supreme Court and the Idea of Progress* was an attempt to denigrate a man who has fought for Democratic values throughout a life which will, I am sure, overbalance the scales against the entire tribe of Packers and Bickels and their legions of Establishment boot-lickers. Said "Ooof" (sounding exactly like the fat boy who has been punched in his overly sensitive tum-tum) appeared in the Letters To The Editor section of the New York Times Book Review for Sunday, April 26, 1970. Fred, of course, has no peer in his chosen fields, only one of which is the United States Supreme Court.

⁹ PACKER at 74.

¹⁰ *Id.* at p. 69.

¹¹ If people bring so much courage to this world the world has to kill them to break them, so of course it kills them. The world breaks every one and afterward many are strong at the broken places. But those that will not break it kills. It kills the very good and the very gentle and the very brave impartially. If you are none of these you can be sure it will kill you too but there will be no special hurry. HEMINGWAY, A FAREWELL TO ARMS. (Too many editions to waste time looking up the page number in mine. Anyone who doesn't know the book ought to).

official interference with individual eccentricity.¹² Such a confounding rationalization of tried-and-false black-letter crap is analogous to building cities on a left forty-five degree angle because you happen to be wearing right forty-five degree angle glasses. Mr. Schur, quite sensibly, would rather remove the mythomaniac, legalistic blinders:

Can the criminality of our society be solved by dealing with so-called lawless individuals?¹³

.....

The desire to isolate troublemakers runs deep. . . .¹⁴

.....

The war problem and the crime problem exhibit striking similarities. In each case, strong social sentiments develop to support a differentiation between the wrongdoers and the wronged. These categories are viewed as being clearly definable and separable—a conception that fits in well with the pervasive American tradition of the 'good guys' and the 'bad guys'.¹⁵

.....

[T]he emphasis on learning about crime through studying offenders, and the relative neglect of specific offenses, probably lent support to the popular view that crime is simply a function of individual maladaptation. . . . In the focus on comparing individuals, even the researchers sometimes lost sight of the broad social sources of crime.¹⁶

.....

[D]efining individual offenders as 'sick' . . . foists on doctors—especially psychiatrists—responsibility for managing social problems with which they are inadequately equipped to deal.¹⁷ . . . concern with the 'treatment' of offending individuals should not be allowed to overshadow the need for broader social reform.¹⁸

.....

We see quite clearly that no explanation of crime that limits itself to the motivation and behavior of individual offenders can ever be a complete one.¹⁹

A white-collar sample from the crime spectrum might be congenial to wealth-tender tenurites of our wealth-oriented system. The 1961 Sherman Act prosecution of General Electric and other heavy electrical equipment conspirators²⁰ "was not only the biggest criminal case in

¹² PACKER, note 8, *supra* at 70 and 73 *et seq.*

¹³ SCHUR at 14.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 20-21.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 10.

²⁰ I could send someone to the library to look up the cite, but so can you and if you haven't heard of the G.E. case, you'd better.

the history of the Sherman Antitrust Act, but also a landmark in the application of significant criminal sanctions for involvement in acts of white-collar crime."²¹ This stupendous celebration of traditional criminal law rituals resulted in thirty day jail sentences for seven executives. Here was a truly fixing of individual blame and punishment in the good old early-rooted, American, or Packerdian, or Harvardarian, or nouvelle Harvardarian (i.e. Yale) style, and yet there was "general recognition that the impact of the prosecutions on overall levels of corporate morality and legality would probably be . . . quite limited. . . ." ²² "[J]ust as the predominant reaction of the defendants was not sincere acceptance of guilt but rather a sense of being the 'fall guys' for what was standard (and hence, legitimate) business practice, so too the most likely overall outcome appeared to be 'business as usual.'" ²³

But if the individualistic approach doesn't work in spite of all the fascist spirals of crime rates,²⁴ civil protest or disobedience,²⁵ and get toughers,²⁶ what then? A lesson from criminal law's older brother, tort law, might prove instructive. Industrial accidents used to be processed on an equally individualistic basis. The fellow-servant doctrine, assumption of risk, contributory negligence, negligence itself, all focused on individual culpability, free will, and human autonomy.²⁷ The legal inquiry poked around in the entrails of "intent," "fault," "blame," etc.²⁸ But we finally shifted our perspective. We learned to

²¹ SCHUR at 160.

²² *Id.*

²³ *Id.* at 161.

²⁴ [I]t would be wise for us to pay somewhat less attention to the *amount* of crime and to think a bit more about what *kinds* of crime are currently plentiful in the United States and *why*. To continuously belabor the fact that Index crimes show a steadily upward trend—as the FBI is fond of doing—hardly enlightens us or produces steps toward effective reform. Certainly the high level of crime is an indication that something is seriously wrong in American life. But it tells us nothing about *what* is wrong. *Id.* at 35.

²⁵ It is difficult to see . . . how one could ever have a problemless society. For what some people view as socially desirable, others invariably see as a problem . . . including long hair, premarital sex, and pacifism. . . . *Id.* at 120.

[M]any white-collar offenses represent conscious challenges to, or protests against, restrictions many consider to be 'bad law' (a kind of businessman's civil disobedience). *Id.* at 162.

²⁶ What is . . . needed is a substantial shifting of anticrime energy and money away from specialized enforcement schemes and crash programs, and into basic long-term efforts at amelioration of the general socio-economic ills of our society. As I shall show, these ills lie at the very heart of most serious crime in the United States today. *Id.* at 4.

²⁷ Green, *The Individual's Protection Under Negligence Law*, Affeldt, *Law & Society*, Book I, p. 646 (unpublished) (That's where I got it).

²⁸ *Cf.* *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

see industrial accidents as a product of industrial society and so we allocated these costs on a semi-insurance basis to those who appeared to profit most directly from the mayhem and the murder.²⁹ Mr. Schur advocates a similar social-engineering approach to crime:

If we are not to speak of individuals as criminal, can we then refer to a criminal society?³⁰

.....

America is a criminal society because it is an unequal society . . . many of the most serious aspects of our crime situation are integrally tied to the basic social and economic inequalities of our society.³¹

.....

[C]ertain emphases in our cultural values that help generate crime . . . dynamism, individualism, competition, and personal success (measured largely in monetary terms) . . . create pressures and frustrations that lead individuals into criminal behavior.³²

.....

[C]rime is learned (and neither inherited nor invented by the individual); crime cannot be understood unless we examine its relation to approved social values and arrangements; the role of the social class system is especially crucial in shaping crime problems, particularly through the structuring of opportunities for achieving success by approved means; and crime situations are shaped by the social and official reactions to them, both in the broad sense of the 'creation' of crimes by lawmaking, and in terms of the direct social-psychological impact on individuals produced by the responses of others to their behavior.³³

.....

All available evidence indicates that crime in America will not be effectively reduced until we make basic changes in the structure and quality of American life. Respect for law and order will not be restored until respect for the nature of our society is restored.³⁴

To again descend to the example of white-collar crime in order to morally exonerate those darlings of the wealth-orientees, Mr. Schur suggests that white-collar crime, like most other criminal hobbies and vocations, is far more significantly a product of our social structure—of institutions and practices and values—than it is a product of

²⁹ [E]xisting patterns of crime represent a price we pay for structuring society as we have structured it. SCHUR at p. 9.

³⁰ *Id.* at 12.

³¹ *Id.* at 16-17.

³² *Id.* at 19.

³³ *Id.* at 118-19.

³⁴ *Id.* at 237.

individual bad guy immorality.³⁵ Mr. Schur uses the obvious examples of tax games (deductions, exemptions, write-offs, special tax rates . . . manipulation of capital gains and losses, creation of private trusts and foundations, exploitation of oil 'depletion allowances,' deferred payment salaries for top executives, routine and substantial padding of expense accounts"),³⁶ and advertising con games³⁷ to make the clearly visible point.

"Whether the offense involves income tax evasion by an individual or misrepresentation in the prospectus for a stock offering, improper labeling of drugs or collusive agreement to overprice in a particular industrial market, a philosophy of contempt for and manipulation of individuals at least subtly colors the behavior. Similarly the perpetual exposure of the public to high-pressure sales techniques, hyperbole in advertising, and mass depersonalizing of seller-consumer relations, induces a kind of narcotization to fraud in which the citizenry becomes largely inured to deceptive practice. . . . There is, then, a mass susceptibility to fraud, a collective learning toward a 'putting something over' outlook—for which advertising, along with other major agencies of value shaping and reinforcement, bears at least some degree of responsibility.³⁸

. . . .

³⁵ [I]n the business world a variety of structural features—including internal corporate authority structures and power struggles, differential pressures on executives to achieve corporate goals by whatever means, structured avenues to success within particular industries, the history of the corporation's and the industry's relations with government agencies and with major clients (often the government itself), and even the social and attitudinal features of the local community within which a particular corporate operation is located—probably have important bearing on the nature and extent of white-collar criminality. *Id.* at 162.

³⁶ *Id.* at 165.

As in the case of corporate regulatory crimes, we have to recognize that individual immorality is an insufficient explanation of [tax] law violation. Again institutional factors are involved—in this case the fact that we have structured the 'game' of taxpaying in such a way that substantial fraud became almost inevitable. . . . 'For virtually every law taxing big money, there is a way those with big money can avoid it or minimize it'. *Id.* at 164-65. (The quote within a quote comes from C. Wright Mills, *The Power Elite*)

³⁷ Equally pervasive at all levels of our society—and hence, once again, suggesting that the criminality in question involves a great deal more than the unscrupulousness of particular individuals—are numerous other types of consumer fraud. . . . [M]odern mass advertising at its heart represents a kind of institutionalization of deception and misrepresentation. . . . We are all too familiar with advertising's appeal to the emotions, its play on (and to some extent creation of) status anxieties, its continuous use of techniques of symbol-manipulation that in other contexts would be called the devices of 'propaganda,' its relentless insistence on the individual's ever-expanding consumption 'needs'—whether related to real need and usefulness or not. . . . Overall, it has demonstrated a thoroughgoing commitment to and promotion of the values of 'conspicuous consumption' and 'pecuniary emulation' . . . *Id.* at 168-69.

³⁸ *Id.* at 170.

No thinking American can doubt that fraudulent behavior is commonplace in our society. Deception and predatory economic behavior are not restricted to any particular sector of American life. On the contrary, fraud cuts across various institutional realms in such a way that we are forced to see it as a significant characteristic of our entire social system. Advertising fraud, consumer fraud, medical fraud, welfare and charity frauds, con games big and small, forgeries, embezzlements, violations of securities laws and copyright regulations—all these and more represent symptoms of an underlying systematic disorder. . . .³⁹

To put this in layman's language, what happens when a crime—a mugging, for example—occurs? How does our individualistic system of criminal justice work? First of all, the harm is done. Everything else is after that fact.⁴⁰ Someone has been hurt—physically, emotionally, financially. A social cost has arisen, one which, incidentally, will never be paid—no compensation to the victim because it isn't society's fault, it's the mugger's free-willing morally responsible fault and if he could pay he wouldn't have mugged. Secondly, the mugging is also, at least temporarily, done. Whatever problems have been looking for an out have found a mugging solution—an unpaid fine over which his parole officer was last night threatening revocation of parole;⁴¹ nasty letters from the shyster who collects for the leech who fast-talked him into the 'easy credit' contract for installment buying of the t.v. and king-size bed he thought (from T.V.) he had to have to get married (she, too)—so they could begin living like the average American of *My Three Sons* or *Daddy's Darling Dimwits*. Thirdly, a whole host of contributing factors—causal factors—have been working: the mugger's past experience—why was he there, then, mugging?; the victim's past experience—why was he there, then, and vulnerable?; the situation itself—time, place, street-lighting, nearness of help, ease of escape; the wider social environment—slum or suburb, business or warehouse district, city planning or its failure, employment opportunities and mechanisms and discriminations, educational opportunities past present and lost, respect and status opportunities, love opportunities; the psychological environment—sexual opportunities, aggression oppor-

³⁹ *Id.* at 182-83.

⁴⁰ This is enormously important since it poses the key dilemma of the individualistic system. Punishment, deterrence, rehabilitation, all depend on doing something to an individual because of past behavior. None of this is particularly relevant to the central problems of a social-engineering approach—what social changes are necessary to prevent crimes, and what changes are necessary to provide tolerable (and tolerant) channels for "deviant" needs and impulses.

⁴¹ See the Garcia case in Donnelly, Goldstein, and Schwartz note 6, *supra*.

tunities, hate opportunities, self-image opportunities, and more love opportunities. All this is the real-life situation.

Now the law tromps in and what happens? Policemen who are paid and trained as antediluvian man-hunters swing into action. Scientific knowhow and equipment swing with them. Everything focuses on one factor out of all the real-life contributing factors—The Criminal. And he's easy to see. He's easy to find because the cops deal with those who don't make it in the system, in the rat race:⁴² the failures; easy prey. And he won't be missed. He wasn't part of the system. The leech will repossess the king-sized bed and the t.v. and sell them on another crooked installment contract to some other sucker. His girl will find a cooler guy. The cops know he'll be back to provide them with another hunt to justify their training and salaries and scientific equipment.

So now the mugger is found and enters the processing plant. He automatically translates from a man-in-the-world to a free-willing, morally responsible, Wasp-reasonable-man. This is the basic presupposition of the processing plant. The total responsibility for what was, in the real world, a complex, interpersonal, social, interaction, will drop on his individual shoulders. The system will personally blame (i.e. convict) him so that the system, and society looking over the system's shoulder, can relax.

But this relaxing requires us to go a bit deeper. A terrible thing has happened and people are personally or media frightened—it might happen to them. They are more frightened because they have soft, advertisingly-drummed-in-as-indispensable-to-respect-and-sexual-success things that people—mythically harder and tougher by privation—must want to take away from them. These soft powerful puppets feel guilty no matter how hard they try the self-made, own-bootstraps, arguments that can't cover the secret knowledge of how much luck and fraud and other people were in it. But now their legal system, having rigorously excluded any sociological defenses from its gladiatorial ritual (that is, having written off the real-life contributing factors—the complex real *causes* of the mugging, automatically, via the Rules of Evidence which are, of course, solely dedicated to The Truth) has identified The Criminal. He has been fairly tried (perhaps over-fairly due to Supreme Court activist coddling⁴³—they don't understand how the Supreme Court is guaranteeing them an easy conscience).

⁴² See PAUL GOODMAN, GROWING UP ABSURD. (Any hip or beat student can find a copy).

⁴³ See Bickel if that's how you get your kicks. I don't.

They are piously, self-righteously, free of guilt because The Law has impartially and fairly affixed The Blame.

And now the classificatory label is affixed. At once all the stereotypic characteristics of anyone's emotional pictures of The Criminal swing into action—garnered from garbled news stories whose most blood-stirring gory details have stuck; gossip from plainly titillated or mock-horrified friends; the movie and comic book and t.v. horror guys. These are applied to this man and then these pseudo-characteristics, wholly unrelated to the real-life mugging, are invoked to explain his crime. And this is what Professor Packer wants us to hang onto.

Or, if the doctors get into it, this is what happens: One of the psycho's (psychologist, psychotherapist, psychoanalyst, psychoetc.) picks over this man's past and isolates "unusual items" (non-Wasp items because the psycho will have the Wasp image of "unusual" which he calls "normal") and these become the "causes" of the crime. We all have unusual items in our backlives. Unless we commit a crime or otherwise go into the psycho's leaching process these items will pass unnoticed. If we do fall prey to the heartsuckers these items will then "explain" our misfortunes.

In the good old days of tort-law protection for infant industries, the system searched just as hard and myopically for "the cause" of the worker's smashed arm. What had he been doing or drinking before the accident? Was he tired from a night of non-Protestant-Ethic carousing? Eyewitnesses appeared to swear they saw him in O'Leary's bar at one a.m. The factory "safety expert" testified (he'd better) that no other stamping machine in the city had better safety devices. And so that part of the cost of industrial development was borne by the worker, just as the mugger bears his cost, subsidizing the structure—the institutions, operations, values and opportunity-distributions of our society. So the fat cats who profit from this particular structure can sit back and relax now that *the cause* of crime has been identified and disposed of at minimal cost to them.

Now we punish-rehabilitate the individual fall guy. In our most enlightened jails we try to mold him into the Wasp ideal pattern—honesty, thrift, temperance, neatness, cleanliness, adjustment (not that the Wasps possess much of these except adjustment which is why they hate the unchanneled ones). There is no thought of what this man's needs have been, what purpose his mugging has served (it is "bad" and therefore automatically non-useful, non-functional), and thus no attention to providing socially tolerable ways to fulfill those needs, to achieve that purpose. And then we return him to the real

world situation which produced the mugging solution to his problems, equipped-rehabilitated only to meet the artificial demands of jail and the Wasp dream world.

Now the game of cops and robbers can begin again.

This is what Mr. Schur is writing about. This is the individualistic ethic, grown from its good old Wasp roots to full Establishment flower.⁴⁴

HOW TO TALK BACK TO YOUR TELEVISION SET. Nicholas Johnson. Boston: Little, Brown and Co. 1970. [Paperbound], New York: Bantam Books, 197. Pp. 245. \$.95.

Nicholas Johnson is a commissioner of the Federal Communications Commission. He was appointed to the Commission in 1966 by President Johnson. The television industry most likely wishes he hadn't been, for he has been one of the industry's most outspoken critics for the past four years. This would not be especially noteworthy (it is generally considered rather chic to berate the "boob tube") but for the fact that members of federal regulatory agencies have compiled an unenviable record of "cooperation" with the industries which they have been charged to regulate. Johnson has not fallen into this mold, but has emerged as an extremely irritating gadfly nipping at the heels (and often higher) of the corporations which have condemned much of American television to the banality of "Green Acres" or "Nanny and the Professor."¹

Johnson is young (36), bright (Phi Beta Kappa, law review editor, clerk to Justice Hugo Black), and has written in this book an informative, readable and practical guide to the ills of current American television, the prospects for the future, and most importantly what Con-

⁴⁴ If anyone thinks my use of footnoting Packer, Bickel, Harvard, or the New Yale are irrelevant to the topic, these people and institutions are the intellectual backbone of the individualistic criminal law system; a system which I abhor as a destructive, anachronistic, elitist defrauding of those democratic values which Rodell, McDougal, and Lasswell have long been the superbly able and fiercely ardent—as they are now the last—Yale defenders.

¹ Several issues which Johnson has advocated (along with others) and which the television industry, and in some cases other segments of the mass media industry, have opposed include: investigation of ownership of stations by conglomerate corporations; prohibition and/or regulation of joint media ownership in a single market; network domination of the program production market; forms of cable television regulations; and the applicability of the Fairness Doctrine to the President's use of television.