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BOOKS REVIEWED

The Silent Partners: Institutional Investors and Corporate Control. By Daniel Jay Baum and Ned B. Stiles. Syracuse: Syracuse University Press. 1965. Pp. xiv, 176. $5.95.

Perhaps an initial help, in a nontechnical approach to *The Silent Partners,* would be a translation or paraphrase of the book's title, various chapter headings and some of its terminology. The reader might thus discern more exactly the directions and scope of the book.

More correctly explicative of the book's content would have been the title: *The Growth and Internal Regulation of Institutional Investors,* with the subtitle: *With Occasional Reflections on Their Influence on Portfolio Corporations.*

To the contrary, the title as used, and especially the subtitle, could lead to the impression that the institutional investors—pension funds, insurance companies, trust departments, mutual funds and foundations—were in fact in a position of corporate control over their portfolio companies and that the book would propose a philosophy of law for these massive, silent, behind-the-scenes *contrôleurs.*

A second pitfall arises from the chapter headings and terminology, particularly the repeated reference to institutional "power." In fact, the word "power" is in a sense the focal point of the book. Understandably, "power" could be thought to be synonymous with the "corporate control" of the subtitle. The reader might think that it was this power that constituted the institutional investor as the *contrôleur* of its portfolio companies. The word, however, is actually used in three different senses.

The "power" referred to throughout the heart of the book, chapters five and six, designates powerful attributes of the institutional investor. But these attributes are almost entirely unrelated to the portfolio companies. The "power" here, and the power principally discussed throughout, concerns the institution itself and not its corporate holdings. It is the "power," for example, to control rates within the banking industry, or to eliminate competition among insurance companies, or to affect the economy, or to influence governmental action, to badger suppliers, to coerce labor, or even to cheat the minority shareholders. But in every case, the rates, the competition, the suppliers, the labor and the minority shareholders belong to the institution itself and operate within the industry of the institutional investor, and are irrelevant, except remotely, to the portfolio companies. The "internal regulation" of this "power" is the major concern of the book—hence the hypothetical title.

In the brief chapter four, "Some Uses of Institutional Power," the word "power" assumes its second meaning, and, for the first time, it does refer to the portfolio companies. But, it is not yet the "corporate control" of the subtitle. The distinction between these types of power is, in reality, the distinction between "influence" exerted upon the portfolio companies and actual "custody" of them:

> Conceivably only a difference of degree exists between influence and custody, although in their purest forms they are antipodal extremes. General Motors as a sole consumer undoubtedly will exercise more or less hidden pressures on a parts supplier. These pressures, although highly influential cumulatively, do not constitute custody.
>
> As these pressures, however, approach and pass a certain point, mere influence ceases and custody begins. Differences in degree become a change in kind. General Motors moves from minor suggestions to isolated policy dictation to the final assump-

tion of complete custody—through a voluntary or possibly forced appropriation—expressed in the nomination and dictation of the board of directors.[1]

"Influence"—the second usage of the word "power"—is truly "antipodal" to the total custody of "corporate control."

Only when the book reaches the last chapter, "Power and Responsibility," does it take up the question of corporate control over the portfolio corporations. Here the word "power" takes on its third meaning. The analysis in these pages leaves no doubt that the "corporate control" of the title, and the "power" of the last chapter, have been used in the modern, technical sense as "the ultimate power in the policy-making hierarchy."[2]

Armed with these terminological distinctions, the reader can approach the book for what it is really worth: (1) a factual summary of the recent growth-rate of the institutional investor, and (2) the internal regulation of its various powerful attributes. The chief contribution of the book relative to corporate control itself is this factual background, which is indispensable to the work of the corporate philosophers.

I. An Analysis of the Contents

A. *The Distant Background*

To set the scene for the recent emergence of the institutional investor, the first chapter traces the gradual evolution of the modern corporate society from individual entrepreneur and small partnership to the present-day separation of ownership from control and the diffusion of that corporate ownership into the hands of twenty million shareholders. In a familiar story, the authors detail the concentration of the country's assets in a relatively few corporate giants and describe the mechanics of mere-incumbency control effected by the wide diffusion of shares and the dominance of the proxy system.

Chapter one, correctly titled "The Evolution of a Proletarian Capitalism," next comments on three "existing restraints on the corporate power elite":[3] (1) the Gilbert-Soss liaison; (2) the threat of a proxy fight (the tender-offer had not yet gained popularity at the time of writing);[4] (3) the derivative suit.

Into this wide share-diffusion has come a new force—and a source of further diffusion—the institutional investor. "Institutional holdings of common stocks listed on the New York Stock Exchange have risen from approximately 12 per cent of all

1. Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 445, 450 (1965).

2. Bayne, Corporate Control as a Strict Trustee, 53 Geo. L.J. 543, 561 (1965). To be meticulously correct: "The corporate control is a relation of total custody, subsisting between the office of the contrôleur and the corporation, giving rise to a complexus of duties and a corresponding complexus of rights." Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 445, 446 (1965).

3. The word "power" as used in the term "power elite" is most generic, without any specific reference either to corporate control or even necessarily to any influence over a portfolio company.

4. "To illustrate the increased use of the device, during the last year there have been twenty-nine cash takeover bids involving companies listed on the New York Stock Exchange and fifteen involving companies listed on the American Stock Exchange. This compares with only eight cash takeover bids in 1960 involving stocks listed on both exchanges." Address by Manuel F. Cohen to the American Society of Corporate Secretaries, Inc., June 28, 1966 (unpublished).

stocks listed on the Exchange in 1949 to over 20 per cent at the end of 1963, and the Exchange has estimated that this figure will reach 30 per cent by 1970."[5] This estimate may be conservative. Thus, a 1966 *Fortune* survey indicates that at least the pension funds "are unswervingly bullish about the long-term case for equities, and plan to hold higher and higher proportions of stock in bigger and bigger portfolios."[6] *Fortune* did not discuss corporate control, but did remark, at least regarding pension funds, that "there is every reason to believe that their influence will keep right on rising."[7]

This interposition of the institutional investor between the owned-asset in the portfolio company and the owner-shareholder of the institutional investor succeeds in separating ownership from control by one more manager. The authors' alarmed view of institutional-investor influence on portfolio companies is appreciably mitigated when they "recall that majority ownership of the large publicly held corporations is a near impossibility. As a rule, no individual shareholder holds more than 1 per cent of the outstanding stock. And even institutional holdings generally do not exceed 5 per cent."[8] These institutional holdings, of course, represent "the aggregate amount of such issues held by eighteen hundred institutions . . . ."[9]

Although the author is fully cognizant of "the improved climate of corporate morality,"[10] attributable generally to the SEC, the New York Stock Exchange and the corporate Bar, nonetheless the first chapter correctly closes with a plea for heightened standards for the corporate *contrôleurs,* especially the institutional ones. Finally, the chapter poses the question for the future: what will come of the "opportunities springing from the fact that the institutions are rapidly acquiring, and indeed already possess, enormous powers that can be brought to bear to insure management fidelity"?[11] Here, "powers" refers to *influence,* not corporate control. "As yet these powers have remained substantially unexercised."[12]

B. *The Growth and Functions of Institutional Investors*

Chapter two contains some of the authors' valuable factual material. Collectively, the five major institutional investors had total assets in 1962 of $695 billion as

5. Baum & Stiles, The Silent Partners 6 (1965). For more complete citations and commentary, see Baum, Institutional Investors: A Check on the Management of the Giant Corporation, Aug. 1960 (unpublished thesis in New York University Law Library). The book is an edited and updated version of this thesis. In general, resort to the thesis for further treatment is effortless, since chapters and headings follow along in the same order, with the exception of chapter seven, the bulk of which appears early in the thesis at pages 36-57.

6. Loomis, The Pension Funds Still Want Stocks, Fortune, June 1966, p. 130.

7. Ibid. Specifically referable only to pension funds, the survey summarized: "In 1964 their net purchases of stocks amounted to $2.3 billion (roughly the same as in each of the three years before), or 46 per cent of their total investment. But in 1965 net stock purchases rose dramatically to $3 billion, an impressive 60 per cent of the total." Ibid. Later figures tell the same story regarding mutual funds. "At the end of 1965 some 300 U.S. mutual funds owned an estimated 5% of the $537.5 billion worth of shares listed on the New York Stock Exchange, up from 4% of the value of all Big Board issues in 1960 and 2% in 1950. In some individual issues, mutual fund ownership runs as high as 40%." Wall Street J., June 7, 1966, p. 1, col. 6.

8. Baum & Stiles, The Silent Partners 12 (1965).

9. Ibid.

10. Id. at 7.

11. Id. at 27.

12. Ibid.

compared with the gross national product for the same year of $554.8 billion. "The New York Stock Exchange has estimated that, through these institutions, more than 100 million Americans today share indirectly in the benefits of equity investment."[13] (Would not the total asset-value of the nation have been a more appropriate comparison than the GNP?)

"The growth of institutional investors in recent years has been dramatic. Total assets of savings institutions, exclusive of commercial banks, have increased from $37 billion in 1929 to $361.7 billion in 1962."[14] After this introduction, the authors discuss the parallel dramatic growth of each of the major institutional investors.

The remainder of the chapter describes the usual investment approach of any such company. The Wharton Report has disclosed mutual-fund information generally unavailable for other institutional investors. Arguably, however, the following Wharton judgment could be pronounced on all: " '[T]he funds' performance 'did not differ appreciably from what would have been achieved by an unmanaged portfolio with the same division among asset types. About half the funds performed better, half worse.' "[15]

As to investment policy "the overriding characteristic of all institutional investment is conservatism. 'Blue Chip' stocks, or the 'favorite fifty,' are overwhelming institutional favorites. New ventures and unseasoned securities are avoided."[16] As corroborative of this summary statement, the investment policies of each of the five institutional investors are then analyzed. As would be expected, "in 1962 mutual funds held $17.6 billion in common stocks, representing 82.7 per cent of their total assets,"[17] whereas "at the end of 1962 life insurance companies had . . . . only $4.1 billion or 3.1 per cent of their total assets invested in common stocks."[18]

The material in chapter three, "Institutional Concentrates and Market Impact," is largely an expansion of facts already presented earlier in the book. "Thus, the conclusion is inescapable that the 'favorite fifty' are really favorite."[19] The last paragraph makes the transition to the book's third major division by briefly adverting to the *influence*—but not *control*—possessed by the institutional investor:

> The conclusions of fact may be more generally summed up: Institutional investors possess power in their portfolio corporations. This power is reflected on the stock market as a factor in raising or lowering stock prices. It accordingly affects other shareholders. . . . Finally, this power, exercised or nonexercised, serves as a sanction or endorsement of management. . . . Some examples of the uses of this power are considered in the following chapter. Institutions have not always remained the silent partners in American businesses, despite the fact that they may have wished to do so.[20]

This brief paragraph could be particularly confusing to the casual reader, for here conjoined are all three meanings of the omnipresent "power."

The "conclusions of fact" which were "more generally summed up" refer to those *powerful attributes* of the institutions themselves. These attributes affect the market and only indirectly the portfolio company.

13. Id. at 30.
14. Id. at 31-32.
15. Id. at 35.
16. Id. at 43.
17. Id. at 45.
18. Id. at 47.
19. Id. at 54.
20. Id. at 65-66.

The last sentence of the paragraph once again alludes to "the silent partners." One would assume that the silence concerns the "corporate control" of the subtitle, which, of course, is not the case.

C. *Influences on Portfolio Companies*

In chapter four, several fascinating narratives exemplify the pressures, more often indirect than direct, that institutional investors have placed on their portfolio companies. The purposes of these pressures, as illustrated, were salutary: to avert catastrophies, to correct abuses or to aid in formulating specific management policies in the portfolio corporations.

To what extent has the institutional investor actually exerted this influence? "The conclusion prompted is this: '[I]nvestment companies as shareholders are doing little or nothing toward fulfillment of their obligations as shareholder participants in corporate affairs, either to their own shareholders or to shareholders generally.' "[21]

The various narratives describe the nature of this influence, as rare as it may be, but evidence no particular pattern, and concern successively: (1) the institutional suasion toward competent Ward management at the time of the Avery-Wolfson battle; (2) the nonexercise of institutional influence in the Robert Young-New York Central proxy fight; (3) insurance-company activity "in the shaping of fundamental corporate policies";[22] (4) the attacks by the Lewis Gilbert corps on excessive management compensation; and (5) institutional-investor representation on portfolio-company boards.

D. *Internal Regulation of Institutional Investors*

The principal burden of *The Silent Partners* is borne by chapters five and six. The opening words of chapter five raise hopes that now the promise of the book's subtitle will be fulfilled, that now the discussion is embarked on the legal restraints on the corporate control of the institutional investor. "Our purpose now is to examine the framework of existing legal restraints on the exercise of institutional power. We do not, of course, attempt to describe in detail the labyrinth of laws, regulations, and administrative practices governing institutional behavior, but only those which seem most relevant to the problem of portfolio holdings."[23]

But at the section's end, the discussion has not touched the portfolio companies at all, let alone corporate control, or even influence. The authors conclude and summarize this core section accurately: "The web of state and federal regulation affecting the activities of institutional investors has been described, although in somewhat summary fashion."[24] The summary was limited, moreover, to the internal affairs of four of the five major institutional investors: life insurance companies, banks, investment companies, and foundations. Without the understanding that the "power" discussed in these two chapters is strictly nonportfolio and exclusively intra-industry, one could again be misled.

Buried here in the very middle of the book, in the opening pages of chapter five, occur two statements that present exactly the scope and necessary limits of the book.

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21. Id. at 67, quoting from Emerson, Some Sociological and Legal Aspects of Institutional and Individual Participation Under the SEC's Shareholder Proposal Rule, 34 U. Det. L.J. 528, 547 (1957).

22. Baum & Stiles, The Silent Partners 74 (1965).

23. Id. at 82.

24. Id. at 126.

The first of these major statements is that "it cannot be said that institutional investors, even as a group, have anything approaching absolute power in the sense of capacity to *control* either the stock market or the managements of their portfolio concerns."[25]

With the question of "institutional investors and corporate control" thus eliminated, this last statement prompts the thought that legal restraints nevertheless restrain the exercise of *influence* over their portfolio concerns. The second major statement, however, quashes that thought. "Save for the antitrust laws, the regulators have evidenced little or no concern over the activities of institutional investors in relation to their portfolio corporations."[26] Not only are the "legal restraints" which are discussed throughout the core of the book irrelevant either to corporate control or influence, but they do not even adequately regulate the internal affairs of the institutional investors. "Finally, the sorry fact also emerging from the description in this chapter is that most of the regulatory bodies have a difficult enough time achieving even the limited goals they pursue."[27]

The introduction to chapter six repeats that of chapter five: "Institutional investors hold the power to check the managements of their portfolio corporations. Yet for the most part they have avoided using that power."[28] Chapter six, as did five, then considers the attempt by the antitrust laws to reduce monopoly within the various institutional-investor fields.

E. *Corporate Control*

In chapter seven, "Power and Responsibility," the word "power" shifts to its third usage, corporate control. Here, for the first time, *The Silent Partners* takes up its announced subject.

Among modern legal problems, corporate control could conceivably command the closest original thinking, and justly so. Fortunately both the courts and the commentators have, particularly in the last five years, recognized the importance and complexity of the control question with a spate of pertinent studies.

Among the commentators, Jennings and Berle remain far in the forefront but some valuable comment, pressed by the recent cases, has radically changed the control thinking from its status in the late fifties.[29]

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25. Id. at 81.

26. Id. at 82.

27. Ibid.

28. Id. at 133. See Baum, op. cit. supra note 5, at 79-81.

29. Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 Harv. L. Rev. 505 (1965); Bayne, A Legitimate Transfer of Control: The Weyenberg Shoe —Florsheim Case Study, 18 Stan. L. Rev. 438 (1966); Bayne, The Sale-of-Control Quandary, 51 Cornell L.Q. 49 (1965); Bayne, The Sale of Corporate Control, 33 Fordham L. Rev. 583 (1965); Bayne, Corporate Control as a Strict Trustee, 53 Geo. L.J. 543 (1965); Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 444 (1965); Bayne, A Philosophy of Corporate Control, 112 U. Pa. L. Rev. 22 (1963); Berle, The Price of Power: Sale of Corporate Control, 50 Cornell L.Q. 628 (1965); Berle, Control in Corporate Law, 58 Colum. L. Rev. 1212 (1958); Boyle, The Sale of Controlling Shares: American Law and the Jenkins Committee, 13 Int'l & Comp. L.Q. 185 (1964); Hill, The Sale of Controlling Shares, 70 Harv. L. Rev. 986 (1957); Javaras, Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews, 32 U. Chi. L. Rev. 420 (1965); Jennings, Trading in Corporate Control, 44 Calif. L. Rev. 1 (1956); Katz, The Sale of Corporate Control, 38 Chicago B. Record 376 (1957); Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725 (1956);

Three recent New York cases have prompted the principal judicial reflection. *Essex Universal Corp. v. Yates*,[30] the *Lionel* litigations,[31] and *Matter of Carter*,[32] all posed problems that remain far from answered, but these notable cases did push control thinking beyond the early landmarks of *Perlman v. Feldmann*,[33] *Insuranshares Corp. v. Northern Fiscal Corp.*,[34] and *Gerdes v. Reynolds*.[35]

The Silent Partners faced a triple disability in attacking such a formidable task as Institutional Investors and Corporate Control.

First, the institutional investor as such does not lend itself easily to such a treatment, principally because nothing inherent in the institutional investor as *contrôleur* distinguishes it from any other *contrôleur*. To find the specifics of control referable exclusively to the institutional investor is, therefore, onerous, if not impossible. The authors realized this. Understandably none of their control cases, or discussion, involved factors peculiar to the institutional investor as *contrôleur*.

Second, space limitations inevitably precluded an intensive inspection of such an emerging subject as control. The fifteen pages allotted at best permit a cursory review.

Third, the concentration of control commentary and adjudication in the years after 1958, when their review was written, left the authors in an unmanageable situation. Their resort to trust law as a solution to the control problem especially highlights the predicament, since this commendable proposal was elaborated in later years.

II. The Contributions of the Book

The Silent Partners is primarily a collation and summary of several well-known studies of the five major classes of institutional investor. The resulting factual conspectus, which is comparable to the Tenth Annual Report of the Securities and Exchange Commission, presents to the legal and economic philosopher the broad picture of the perceptible—and predictably accelerating—changes from direct shareholder-ownership in corporate enterprises toward ownership through this second intermediary. Herein lies the worth of *The Silent Partners*. The corporate philosopher can scarcely apply a code of conduct to an unknown problem.

Newman & Pickering, A Premium for Control, 28 Texas B.J. 735 (1965); Sommer, Jr., Who's "in Control"?—S.E.C., 21 Bus. Law. 559 (1966); Comment, Sales of Corporate Control at a Premium: An Analysis and Suggested Approach, 1961 Duke L.J. 554; Note, The Sale of Corporate Control: The Berle Theory and the Law, 25 U. Pitt. L. Rev. 59 (1963).

30. 305 F.2d 572 (2d Cir. 1962).

31. There are two distinct Lionel cases. The first was an action to set aside the election of Lionel directors. Matter of Caplan (N.Y. Sup. Ct.), in N.Y.L.J., Feb. 4, 1964, p. 14, col. 3, aff'd sub nom. Caplan v. Lionel Corp., 20 App. Div. 2d 301, 246 N.Y.S.2d 913 (1st Dep't), aff'd mem., 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964). The second case was a derivative action to recover for Lionel the premium received by Defiance Industries, Inc., in the transfer of control. Gabriel Indus., Inc. v. Defiance Indus., Inc. (N.Y. Sup. Ct. 1964), in N.Y.L.J., June 17, 1964, p. 13, col. 8, aff'd mem., 23 App. Div. 2d 630, 257 N.Y.S.2d 565 (1st Dep't), motion for leave to appeal denied, 15 N.Y.2d 1031, 207 N.E.2d 867, 260 N.Y.S.2d 180 (1965).

32. (N.Y. Sup. Ct. 1964), in N.Y.L.J., May 26, 1964, p. 17, col. 1, aff'd, 21 App. Div. 2d 543, 251 N.Y.S.2d 378 (1st Dep't 1964).

33. 219 F.2d 173 (2d Cir. 1955), reversing 129 F. Supp. 162 (D. Conn. 1952), cert. denied, 349 U.S. 952 (1955).

34. 35 F. Supp. 22 (E.D. Pa. 1940).

35. 28 N.Y.S.2d 622 (Sup. Ct. 1941). Many other control cases are noted in authorities at note 29 supra.

Beyond this, the book reached three factual conclusions in limited reference to corporate control: (1) "it cannot be said that institutional investors, even as a group, have anything approaching absolute power in the sense of capacity to *control* either the stock market or the managements of their portfolio concerns";[36] (2) short of actual corporate control, however, "institutional investors possess . . . [influence] in their portfolio corporations";[37] (3) however, " 'investment companies as shareholders are doing little or nothing toward fulfillment of their obligations as shareholder participants in corporate affairs, either to their own shareholders or to shareholders generally.' "[38]

The institutional investor today, therefore, has not yet moved from mere influence to the ultimate role of corporate *contrôleur*. Whether the institutional investor will soon assume this role remains a fact for the future.

Thusfar, the burden of *The Silent Partners*.

III. The Implications of the Problem

As its subtitle suggests, *The Silent Partners* undertook a study of institutional investors and corporate control. Such a study necessarily poses certain questions: What factors singularize the institutional investor as a *contrôleur*?[39] What control features are peculiar to the institutional investor? What differentiates One William Street Fund from W. R. Grace? Why should there be such a special study at all? Why not two studies—one, the institutional investor, its growth, function and internal regulation; the other, the philosophy of corporate control? These questions—one in fact—form the theme for further analysis.

A. *Size Alone and Antitrust*

Awesome size and frightening growth are not the particular qualities which, in and of themselves, prompt a study of institutional-investor control. The total assets of General Motors, AT&T, and Jersey Standard are comparable to those of Metropolitan Life, Prudential and Equitable Life.[40] Size alone could not suggest such a study.

Antitrust is as much present—or absent—for the institutional investor as for any other complexus. The Antitrust Division of the Justice Department watches Pabst, Consolidated Foods, Genesco and IDS, Continental Casualty, and Crocker-Citizens, with equally unflagging vigilance. The antitrust laws bestow their favors with unbiased largess on GM, GE and United States Steel, as recent decisions attest. The rationale of antitrust law is a valuable inquiry, but not peculiar to the institutional investor qua *contrôleur*. Whether the future will permit concentration of "airline

36. Baum & Stiles, The Silent Partners 81 (1965).

37. Id. at 65.

38. Id at 67, quoting from Emerson, supra note 21.

39. A caution is in order here. Throughout the discussion the exact definition of "contrôleur" must be respected. Thus the present study and analysis concerns that institutional investor which is in the strict sense the contrôleur of its portfolio company. The board of directors of such investor is by definition the ultimate governing power in the policy hierarchy. Should a given institutional investor by a different hypothesis be itself in the custody of a contrôleur (as possibly Manhattan Fund), this variation in the assumption would require a different approach, but would not affect essentially the underlying philosophy of corporate control.

40. The Top of the Top, Fortune, July, 1966, p. 227.

might" in a Pan World Airways as competitive with a Luftfranca is a study for elsewhere. So seemingly is the merger of Hanover and Manufacturers, of Chase and Manhattan. Merger, monopoly, or size are not the distinguishing elements.

B. *"Other People's Money"*

To contemplate $600 billion of other people's money in the hands of the institutional-investor *contrôleur* seems to send some to the ramparts. Yet every *contrôleur*, by definition, controls other people's money. *Ex hypothesi*, ownership must be separated from control. There is no reason, therefore, for alarm simply because some millions of owners have seen fit to entrust their assets to the institutional investor. So, too, it is with GM, AT & T and others.

C. *Conflict of Interest*

Of all apologies for a special control study, the most ready at hand is that latter-day ogre, conflict of interest. On first blush, here is the segregating element. Interjected in a complex of opposing corporate interests is an entirely new tier of conflict—the public shareholders of the portfolio companies.

As *contrôleur*, the institutional investor must impartially reconcile the conflicting interests of its own shareholders and those of the portfolio company. Does this novel conflict not demand a special inquiry? Surprisingly, some short reflection for example, on the complexus of the General Tire and Rubber Company, supplies the answer. General Tire, as *contrôleur*, does not have any less (or more) a problem in adjusting the conflicting interests of Aerojet-General, Frontier Airlines and RKO General than would Chase Manhattan should it suddenly find itself as the *contrôleur* of these same firms. The conflict-of-interest element is no more peculiar to the control relation subsisting between an institutional investor and portfolio companies than to a large corporation and its subsidiaries.

D. *The Novelty of the Phenomenon*

With each succeeding generation, tort law, faced with new technological advances, panicked, little realizing that fundamental negligence and intent apply equally to atomic energy and dangerous animals. Here, it is submitted, lies the real reason for the genesis of *The Silent Partners*. A "new *contrôleur*" has appeared upon the scene. The Fords, the Mellons, and the Rockefellers are about to be supplanted (or so the fear is) by the Sears Fund, Metropolitan Life, the Ford Foundation or Investors Mutual. This may be disturbing, but for reasons unrelated to corporate control. Perhaps size should be curtailed; possibly special steps should be taken against conflict of interest. However, none of these is distinctive to the institutional investor qua *contrôleur*.

IV. Epilogue

These reflections lead to one sweeping and important conclusion: except for the novelty, the fiduciary duty of the institutional investor is that of any other corporate *contrôleur*.[41] From this flow several corollaries.

41. The complexus of obligations incumbent on the institutional investor in a position solely of influence but not control would likewise be identified with the duties of any other influential shareholder in his conduct toward the corporation, the shareholders or other parties to the enterprise.

A. *The Necessity of Some Contrôleur*

Since the modern social system postulates central management of other people's money, someone must be *contrôleur*. Nothing intrinsically evil has been found in the separation of ownership from control. No arcane reason, therefore, suggests itself for summarily closing the office of *contrôleur* to the institutional investor. As with others, the portfolio companies require *contrôleur*. To entrust the portfolio company to the institutional investor merely imposes the added duty of reconciling one more set of interests to the many already present, just as General Tire must impartially represent each varied interest of its various corporations, shareholders, creditors, consumers, and employees.

B. *Conflict of Interest*

The conflict-of-interest problem can be misleading. The law continually strives to eradicate conflicts of interest. But what kind—between majority and minority shareholders; between management and labor; between corporation and supplier? Scarcely. Always and everywhere, within and without the corporate venture, interests will and must conflict. This is the lubricant of the competitive capitalist machine. To adjust this very conflict in the most equitable manner is the prime obligation of the corporate steward, the *contrôleur*. His is the role of an impartial referee.

The conflict which is anathema to the corporate venture, however, persists between the *personal* interests of the steward himself and all other interests in his custody.

The millennium will come, therefore, with the elimination of these personal interests of the trustee, whether a simple citizen administering an impecunious trust or a giant corporate *contrôleur* directing millions in assets—or, to the present point, the institutional investor who is suddenly *contrôleur* of a portfolio company. The American economy must rear up a generation of dedicated, professional stewards, custodians of other people's money, who are prepared to forego a personal conflict of interest, and the under-the-table emolument it facilitates.

C. *Trust Law*

At the crucial point where conflict of interest, trust law, and the *contrôleur* meet, a prevalent misconception has added confusion to an inherently subtle subject. This confusion will tend necessarily to becloud the role of the institutional investor as a corporate *contrôleur*. The popular mind, especially when put to the corporate field, conceives trust law as the antidote to every conflict-of-interest poison.

To the contrary, the fiduciary duties of a strict trustee are not imposed on a *contrôleur because of* a conflict of interest. Rather, conflict of interest is outlawed because of the law of a strict trustee.

The trust obligation is founded on the absolute dominion of the steward. Because he has complete custody of all the beneficiary's assets, the *contrôleur* is held to the strictest standards. The utter helplessness of the beneficiary inexorably engenders the protective code of the trust, imposed without inquiry. This is the custodial concept of corporate control. Absent dominion and custody, conflict of interest is obviously permissible. Arm's-length negotiations not only permit, but even postulate by hypothesis an inherent conflict of interest.

The solution, then, seems simple: (1) the rigid application of the custodial concept of corporate control to the institutional investor as portfolio-company *contrôleur*, and (2) the elimination, wherever possible, of personal conflict in such position, whether of an institutional investor or any other. (The infinity of such conflicts in American business attests to the present idealism of such a goal.)

D. *The Novelty*

The emergence of the institutional investor as the "new *contrôleur*" seems not so frighteningly novel after all. Since the several surveys of *The Silent Partners* have supplied the factual wherewithal to the corporate philosophers, the application of the age-old law of trusts and the modern custodial concept of corporate control[42] should not be a difficult chore.

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Forensic Psychiatry. By Henry A. Davidson, M.D. New York: Ronald Press Co. 2d ed. 1965. Pp. x, 473. $10.00.

Psychiatry currently is experiencing a significant transition reflecting general professional trends in broadening and intensifying its involvement in community problems. Federal support for community mental health services, training, and research has attracted large numbers of psychiatrists and other behavioral scientists to participate in ever-expanding community and social psychiatry programs. Riding the crest of this wave of activity have been those psychiatrists involved in all phases of the legal process.[1] Thus, we are witnessing an increased number of psychiatric court clinics, correctional psychiatric programs and follow-up treatment centers for parolees and probationers.[2]

Since 1954 and the now-classical *Durham* decision of criminal responsibility,[3] literally hundreds of articles have been written by attorneys and psychiatrists on all aspects of the interface of law and psychiatry. Several textbooks of legal psychiatry have also appeared, outlining didactic and academic issues.

With this heightened interest on the part of both lawyers and psychiatrists and the increasing utilization of psychiatric testimony in both civil and criminal cases, the need for a "handbook" of forensic psychiatry is clearly recognized. Dr. Davidson's original text published in 1952, guiding many psychiatrists entering this field, has been brought up to date in a most noteworthy manner. Of all the textbooks on law and psychiatry, this volume serves best to orient the psychiatrist to the nature of the problems involved, and offers him the benefits of Dr. Davidson's long and extensive experience. It is highly recommended as the best practical guide currently available for the forensic psychiatrist.

Dr. Davidson divides the book into three parts: the "Content of Forensic Psychiatry," "The Tactics of Testimony" and the "Appendix," which includes a legal lexicon for doctors, a psychiatric glossary for lawyers and examination guides.

His presentation of the content of forensic psychiatry is highlighted by his outlining a detailed examination of the defendant with appropriate means of reporting the case

42. For a more thorough consideration see Bayne, A Philosophy of Corporate Control, 112 U. Pa. L. Rev. 22 (1963).

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1. Sadoff, Psychiatry Pleads Guilty, 51 A.B.A.J. 48-49 (1965).

2. Sadoff, Polsky & Heller, The Forensic Psychiatry Clinic: Model for a New Approach, Paper Presented Before the Annual Meeting of the American Psychiatric Association, May 1966.

3. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

to the judge. Included also are the essential features of personal injury evaluation, marriage, divorce and annulment, placement and custody of children, last will and testament, appraisal of the sex offender, medico-legal aspects of alcoholism and the laws on addiction. A most enlightening chapter on the psychiatrist in the juvenile court is written with a view to understanding the problems facing the juvenile court judge. A separate chapter, devoted to the difficult task of evaluating malingering is prepared in a meaningful and scholarly way.

Perhaps his two best chapters are his newest—"Mental Illness and Civil Rights" and "Malpractice and the Psychiatrist." Too many textbooks on forensic psychiatry omit discussions of these two timely topics. His presentation of mental illness and civil rights is apparently aimed at rebutting some of the arguments posed by Dr. Thomas Szasz.[4] Davidson refers to Dr. Karl Bowman's concept of the importance of medical rights of the patient as distinct from his legal rights, and polarizes the issue by stating: "Either the compulsory hospitalization of the patient is a medical problem to be disposed of without the flavor of courts, without sheriffs, due process, subpoenas, judges, juries, and charges. Or it is a legal problem, in which case the patient is entitled to due process down to the last iota—to his day in court, where he is confronted with all who would say he is sick."[5]

I cannot accept the reality of this extreme view and feel that a balance must be sought to protect both the medical and legal rights of the individual where feasible. It is conceivable that Dr. Davidson would agree with this position in a larger sense as he states later: "In facing these civil rights dilemmas, it must be remembered that there are two levels of sophistication. The glib way is to say that civil liberties are absolute. But at a higher level of sophistication, there will be concern for the rights of peaceful citizens. In this imperfect world not every problem is capable of a simple solution."[6]

Currently it has become quite important to safeguard an individual's legal rights. Recent decisions of the Supreme Court with regard to confessions, for example, have highlighted this concern. In a similar vein, I would consider the medical rights of the individual to be as crucial and in need of legislative or judicial safeguards. Generally there is a fairly high consistency in the consideration of one's legal and medical rights. However, it is conceivable that situations might arise that would compromise either one's legal rights or his medical rights (needs). In the event of such a conflict, it is my feeling that medical needs supersede legal rights. Denying one his legal rights may lead to loss of liberty, but denying him his medical needs may lead to loss of life.

The optimal balance suggested above appears to be approaching reality in the form of combined medical, custodial facilities wherein an individual may be legally incarcerated and yet provided his medical needs. A combined institution of this nature was recently born in Philadelphia. This State Maximum Security Forensic Diagnostic Hospital is a 100-bed state hospital facility housed in a maximal security institution (Holmesburg County Prison) staffed by Temple University professional personnel. Defendants and inmates in need of ninety-day observation and psychiatric evaluation are committed to this unit by the Quarter Sessions Court of Philadelphia. These individuals formerly were sent directly to Philadelphia State Hospital from which they often escaped and frightened the community. Thus, this unit serves both to safeguard the individual's medical and legal rights while also protecting society.

Another aspect of this conflict was raised by Mr. Albert B. Logan, executive direc-

4. Szasz, Law, Liberty, and Psychiatry (1963).

5. Davidson, Forensic Psychiatry 282 (2d ed. 1965).

6. Id. at 286.

tor of the North American Judges Association.[7] He refers to the problem of alcoholism and addiction and the means by which these problems currently are being handled by our courts. This issue is as yet unresolved—there are many who feel alcoholism is a medical problem and just as many who see it as a social problem to be handled by social-legal controls rather than purely medical ones. The Fourth Circuit, for example, recently stated that "when [chronic alcoholism] . . . is the conduct for which [a person] . . . is criminally accused, there can be no judgment of criminal conviction passed upon him."[8]

Dr. Szasz has repeatedly commented on the medical usurpation of legal rights in the individual by hospitalizing the "sick" person, rather than incarcerating a "maladjusted" individual who commits a crime.[9] His argument is one of semantics and has little relevance in a post-mortem investigation.

The series of situations in which the psychiatrist may be open to a malpractice suit is presented in an imaginative but realistic sense. Dr. Davidson presents a series of sixteen hypothetical situations which are likely occurrences in a routine psychiatric practice. His comments with respect to the possibility of a law suit and how it can be handled and prevented in each of these situations are invaluable. Illustrative of the special problems which a psychiatrist faces is the treatment of "incompetent individuals" whose consent for operative procedures is defective. This is most likely to occur when the patient is "consenting" to electroconvulsive therapy for severe depression.

In addition, the psychiatrist treating severely depressed individuals is faced with the possibility of suicide in his patients and must communicate this possibility to a responsible family member. Suicide, however, is often quite unpredictable and may occur without expectation. Furthermore, the psychiatrist deals with patients who often live in a fantasy world and whose grasp of reality is tenuous. The fantasied expectations of cure may be unrealistic and need to be properly considered and dealt with by the psychiatrist.

In many respects, a psychiatrist acts as a depriver of freedom because of his involvement in commitment procedures. In this sense, we approach the balance of medical and legal rights of the individual. If the individual's legal rights are transgressed, and his medical needs unwarranted, the physician may be in a very difficult legal position. Psychiatrists must be aware of the basic elements of malpractice, as Dr. Davidson has stated, and also must be aware of the individual's legal rights. The art of medicine in psychiatry often involves the art of determining the priority of medical needs within the framework of civil liberties.

The second part of this text deals with the tactics of testimony and is recommended reading for any psychiatrist preparing to testify in court. In this day of increasing utilization of psychiatric testimony, it behooves the psychiatrist to be aware of the nature of medical testimony and the role of the physician in court, including "courtroom etiquette."

Most unique and especially helpful to both lawyers and psychiatrists is the "Ap-

7. Logan, May a Man Be Punished Because He Is Ill?, 52 A.B.A.J. 932 (1966).

8. Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966). This case, as well as the problem of chronic alcoholism in general, is discussed in Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

9. See Szasz, Mental Illness is a Myth, N.Y. Times, June 12, 1966, § 6 (Magazine), p. 30. Dr. Szasz has stated his extreme position as follows: "I do not believe that insanity should be an 'excusing condition' for crime. Lawbreakers, irrespective of their 'mental health,' ought to be treated as offenders." Id. at 91.

pendix" which includes pertinent definitions of legal and psychiatric terms and a series of examination guides. These guides are complete, well-structured and a great help to the psychiatrist initially entering the field of forensic psychiatry.

Perhaps Dr. Davidson's greatest contribution is his completely pragmatic approach to the problems of forensic psychiatry, presented in clear, direct language. He usually avoids lengthy discussion of the areas of conflict between law and psychiatry and appears to present an attitude of experienced resignation to the authority of the law. Whereas more polemic writers have emphasized the inconsistencies between psychiatry and law, Dr. Davidson teaches his fellow psychiatrists that they must conform their psychiatric testimony, their attitudes and their examinations to the requirements demanded by the law. He repeatedly states that if the psychiatrist is unable to do this, his testimony or his report is of no help to the court. It seems that Dr. Davidson has made a personal reconciliation of his role within the legal structure and appears quite comfortable in presenting his material in this manner, without inflaming negative or hopeless feelings, as others have done.

The book is not filled with academic and didactic issues, as may be found in other textbooks of law and psychiatry, and I am sure it was not designed to be. However, for completeness, a textbook of forensic psychiatry for the psychiatrist ought to point out the areas of inconsistency which need to be clarified, reworked and better-instituted by lawyers, judges and psychiatrists. Thus, the frontiers of forensic psychiatry are not presented in the most didactic manner but only as they appear within the existing legal structure. For example, Davidson states: "It is poor policy to present to the court, prosecutor, or jury a dynamic explanation of the offense."[10] Generally, this is true, but preliminary exploration of judges' attitudes and desires at Sentencing Institutes indicates that they are interested in psychodynamics and dynamic patterns of behavior. The frontier area here is educating the judiciary to the importance of dynamics, their value and validity in specific cases, and not remaining content with only a partial explanation of the defendant's maladjustment to society. The psychiatrist must share in a meaningful way with the court how he arrives at his conclusions. In this manner he may be of increasing aid to the court in making a proper disposition.

A chapter outlining these "frontier areas" with suggestions of future resolution of difficulties would be a valuable addition based on Dr. Davidson's vast experience. The absence of such a chapter, however, does not in any sense detract from the value of this "handbook" of forensic psychiatry. In summary, with the current trend of expanding community involvement by psychiatrists in many and varied situations, Dr. Davidson's excellent guide to forensic psychiatry is a most worthy contribution.

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10. Davidson, Forensic Psychiatry 137 (2d ed. 1965).

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