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BOOKS REVIEWED

Business Regulation in the Common Market Nations (Vol. I). Edited by Harlan Morse Blake. New York: McGraw-Hill Book Company. 1969. Pp. xi, 576. \$32.50.

This is the first in a series of four volumes,¹ to be published by the Special Committee on the European Common Market of the Association of the Bar of the City of New York, covering the laws of the Common Market and its member nations regulating restrictive business practices.

Volume I deals with the laws in the Benelux countries. The second and third volumes will deal with the laws of the other member nations. The fourth volume will detail antitrust development in the European Coal and Steel Community, and will make an ambitious and much needed attempt to: "explore ways and means by which conflicts between the laws of the United States and other nations may be minimized, duplications avoided, obstacles to trade and investment removed, and business interests relieved of uncertainties and unfair exposures."²

This series will undoubtedly be of great interest to American lawyers. The increasing importance of the EEC to the United States, politically and economically, must prompt American businessmen to take a greater interest in the practical, operational and legal, as well as the theoretical, aspects of doing business in European Economic Community member countries.

Unlike many volumes on the subject of restrictive practices in the common market, Volume I presents, and subsequent volumes portend to present, a very concise, useful, and understandable background in each country's government, political and social structure, and economic setting, before any in depth discussion of abstract legal and economic theories. Following the background information, each part treats in depth for each country the following subjects: Nature and Structure of the Economy; Laws Dealing with Fraudulent Economic Matters; Laws Applicable to Restrictive Trade Practices and Market Power; and Relationship between National Restrictive Practice Legislation and Community Antitrust Law and Institutions. This structuring of the presentation is excellent, as it provides the reader with a sizeable amount of information tailored to provide the necessary background for the reasoned analysis and discussion of such basic restrictive trade practice laws and cartel legislation as the Belgium law of May 27, 1960 "on protection against the abuse of economic power" or the Dutch "Economic Competition Act."

The authors do not claim that each volume will be an absolute authority regarding economic or legal questions involving each nation, its antitrust laws, and their interaction with the European Economic Community. The series is meant to be a practical guide for American businessmen and lawyers who find themselves involved with both the antitrust laws of the Community and its individual member states. At a time when the regulatory law and procedure of

1. The remaining volumes of this series will be reviewed by the same authors in subsequent issues of this Review.

2. *Business Regulation in the Common Market Nations* viii (H. Blake ed. 1969).

the Community, as well as some individual member states, is often difficult to compile, Volume I, at least, presents all the pertinent statutes in this area, as well as a wealth of procedural and miscellaneous background material.

However, it would have been desirable for the authors to have more strongly emphasized the different attitudes with which Europeans and Americans approach antitrust regulation, and the far reaching consequences these hold for the American businessmen. The fact that a country such as Belgium, Luxembourg, or the Netherlands, with a small home market and relatively small industrial enterprises, is particularly vulnerable to domination by large enterprises achieved through domestic concentration, or the "invasion" of local operations of industries from larger and more highly industrialized countries, not unnaturally plays a large part in the type of monopoly legislation which the Benelux countries have enacted or will enact in the future. This is especially so since these three countries must be strongly export-oriented in order to maintain economic growth. Thus, the outlook of these countries and their governments with respect to group boycotts, market allocations, tying arrangements, and price fixing, which are illegal *per se* in the United States, is that such practices are necessary to enable local industries to compete successfully in the international market, and perhaps even in the domestic market, and are therefore entirely justifiable under many circumstances. Such different attitudes are made more understandable by the background material included in this first volume. However, this basic difference in approach could have been discussed more profitably at greater length.

One also misses a more detailed and exhaustive treatment of current European Economic Community cartel regulation under Articles 85 and 86 of the Rome Treaty; this is especially relevant since Community law now prevails over national law in this area.³ Hopefully, the conflict between the fundamental rationales underlying the competition policies of the European countries and those underlying United States competition policy will be treated extensively in the forthcoming Volume IV. It must be noted that the Rome Treaty provisions on restrictive practices are not the result of strong views on free competition, or of political and social objections to monopolization, such as produced United States antitrust legislation. The competition policy of the EEC countries has traditionally been to allow cartels and then practice "cartel control," rather than to attempt, as does the United States, to enforce the ideal of free competition. It is thus important for American lawyers to realize that the elaboration of the common policy towards private restrictive practices is not merely a question of the best policy toward business agreements and monopolies; it is a part of Community policy on competition generally, including European Economic Community policy toward discrimination, dumping, state aids, and regional economics, the whole of which is based on an evaluation of the best way of uniting Europe. It is well recognized that mergers and concentration of industry to achieve the economics of scale possible in an enlarged Community market entail reduction in competition and might result in monopolies or oligopolies. However, on the basis of a traditional and continuing "European" view,

3. *Costa v. E.N.E.L.*, [1964 Transfer Binder] CCH Comm. Mkt. Rep. ¶ 8023 (1964).

only the "abuse" of monopoly power resulting from size or specialization is contrary to the basic objective of the Rome Treaty: United Europe.

Despite the noted, and perhaps relatively insignificant deficiencies in Volume I, it must be concluded that individually the first three volumes will be of significant aid to the non-European lawyer involved in counseling enterprises with regard to operations in the common market nations. When combined with each other, and with the proposed overview of the fourth volume, they must be considered an essential addition to any international practitioner's library.

HARRY C. BATCHELDER, JR.*

RALPH K. NICKERSON**

EBERHARD SCHLEYER***

Cardozo and Frontiers of Legal Thinking (Revised Ed.). By Beryl Harold Levy. Cleveland and London: The Press of Case Western Reserve University, 1969. Pp. xi, 365. \$9.95.

This is a revised edition of a work which originally appeared in 1938. At that time the book came to the attention of a number of reviewers, many of whom justifiably praised it for its organization, style and content.¹ Some of the reviewers, however, were disappointed that Levy had not written another type of book, one that would have reflected more Levy and less Cardozo, perhaps.

Well intentioned as these critics undoubtedly were, their darts have fallen awry of the mark. No author can please everyone, and the strengths of a book which appeals to one reader may be just the reasons why another reader finds it unsatisfactory. What Levy has done with this book is to provide a versatile vehicle for the exploration of a number of fundamental jurisprudential issues, using Cardozo as a revered and respected point of reference.

The first part of the book consists of a 117-page essay on Cardozo, the man and his ideas. Here the author, in style as well as in temperament, seems to have absorbed so much of the spirit of the then living Cardozo as to have made himself an extension of Cardozo's personality. But nowhere is there a trace of adulation. Levy's points of departure with Cardozo are clearly defined. At one juncture, Levy criticizes Cardozo for too strongly insisting "on certain tacit moral absolutes."² As an enthusiastic realist, Levy sometimes shows

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1. See, e.g., Arant, Book Review, 17 N.C.L. Rev. 197 (1939); Dillard, Book Review, 25 Va. L. Rev. 256 (1938); Eisenstein, Book Review, 8 Brooklyn L. Rev. 119 (1938); Konvitz, Book Review, 16 N.Y.U.L.Q. 169 (1938); Simpson, Book Review, 3 Modern L. Rev. 76 (1939).

2. B. Levy, *Cardozo and Frontiers of Legal Thinking* 26 (rev. ed. 1969). Can it be that some thirty years later Levy has made up this point of contention with Cardozo? In his "Afterword," written contemporaneously with this revised edition, the author sounds the

himself to be a little impatient with the efforts which Cardozo was willing to make in order to weave a pattern of continuity into the legal fabric, even if he was obviously stitching with an entirely new thread. But if it is possible to discern certain areas where the author and Cardozo were in disagreement, these cases form the exception and not the rule. Throughout, Levy has presented a well balanced and harmonious discussion of some of Cardozo's most significant contributions to the law.

The second part of the book consists of selected cases from various fields of the law in which the opinion of the court was written by Cardozo. In all, there are 22 opinions, all but one of which were written while Cardozo was serving on the Court of Appeals in New York. As time passes, this part of the book will tend to become more valuable. It is one thing to know that Cardozo's opinions may be found in volumes 210-58 of the New York Reports, and in volumes 286-302 of the United States Reports; quite another to have many of the most memorable of these opinions in your hand under one cover.³

The third part of the book represents the author's "Afterword," a contemporaneously written 49-page essay on miscellaneous topics of legal and philosophical interest. Perhaps because of its lack of a rigid thematic approach, the "Afterword" has its own special appeal. Herein Levy has extracted from books and articles certain concepts and institutional developments which relate to the work of Cardozo. We learn that Cardozo, a pioneer and pathfinder on the frontiers of legal thinking during his lifetime, has been overtaken by the surge and dynamism of the ethos of life in the United States. Cardozo's rationalization of the legal basis for the tort immunity of charitable hospitals has been swept away.⁴ Likewise, his conclusion that evidence obtained as a result of an unreasonable search and seizure is admissible in a criminal trial has not been followed.⁵ Too late for the presses came another salvo from the U.S. Supreme Court, and the Cardozo holding in *Palko v. Connecticut* fell to the ground.⁶ Other reverses will inevitably and undoubtedly follow, but no matter. It is not so much for the substantive positions which Cardozo took in the many cases to which he lent his genius that he will best be remembered, but rather for the remarkable analysis which he has given to us of the judicial process. Black letter rules of law will change with the felt necessities of the time, but the techniques of legal reasoning must necessarily remain constant. To neophytes as well as to those more experienced but nevertheless eternal students of the law, Levy's little book has much to

call for judicial decision making in conformity with a "higher standard," one which would realize "the democratic promise of the in-built idealism of American society." *Id.* at 358.

3. Another convenient source of material on Cardozo is M. Hall, *Selected Writings on Benjamin Nathan Cardozo* (1947).

4. Compare *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) with *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

5. Compare *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926) with *Mapp v. Ohio*, 367 U.S. 643 (1961).

6. Compare *Palko v. Connecticut*, 302 U.S. 319 (1937) with *Benton v. Maryland*, 393 U.S. 994 (1968).

offer. It is currently on the *Deans' List of Recommended Reading for Prelaw and Law Students*. It deserves a high place on the reading list of anyone with an interest in legal philosophy.

JOSEPH J. DARBY*

Double Jeopardy and the Federal System. By Leonard G. Miller. Chicago: University of Chicago Press, 1968. Pp. 152. \$9.75.

Double Jeopardy and the Federal System is a careful case by case analysis of the development of the present position of the United States Supreme Court regarding the constitutionality of successive state and national prosecutions for the same conduct. In the face of the fifth amendment's proscription of placing a person twice in jeopardy for the same offense and the fifth and fourteenth amendments' concern for due process of law, the Court has come to accept the theory that our federal system is based upon two types of limited sovereignties—one the national government, restricted by the tenth amendment;¹ the other the state governments, restricted by the supremacy clause.² Within the limits, each sovereignty may define conduct to be an offense, and one government's having done so does not preclude similar action by the other. Inasmuch as the fifth amendment states that "nor shall any person be subject for the *same offence* to be twice put in jeopardy of life or limb"³ rather than prohibiting successive prosecutions for the *same conduct*, a state prosecution can constitutionally follow conviction or acquittal in a national court (or vice versa). Prosecution for an offense defined by a state is deemed to be different from prosecution for an offense defined by the nation even though the basis for punishment in each system is the conduct punished by the other.

Leonard G. Miller, presently Assistant Professor of Political Science in the Graduate School of Public Affairs of the State University of New York at Albany, wrote the original version of this book as a Ph.D. dissertation for the Department of Political Science of the University of Chicago. Professor Miller not only accepts the dual sovereignty theory adopted by the Supreme Court, but he also feels the need to refute the arguments of detractors, who think that the dual sovereignty theory is a barren conceptualism causative of great injustice.

In his introductory chapter Professor Miller refers to the variety of situations raising a question of double jeopardy, and carefully limits his study to

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1. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI.

3. U.S. Const. amend. V (emphasis added).

successive prosecutions by the state and national governments. The second chapter analyzes the pre-Civil War cases presented to the Supreme Court. Although opinions in those early cases question the fairness of successive prosecutions, it was not until 1922 that the Court was presented a case in which one sovereignty actually prosecuted an individual who had already been tried by another.⁴ The major issue in the early cases is application of the supremacy clause to bar state prosecutions that might interfere with enforcement of the national law.⁵

Chapter three discusses the Supreme Court cases from Reconstruction to Prohibition. The growth of national criminal legislation following the Civil War increased the likelihood of successive prosecutions and the raising of the fifth amendment double jeopardy issue. In those cases presented to the Supreme Court, however, the main concern is the coverage of the tenth amendment; that is, does the national government have the authority to legislate in the area traditionally the exclusive domain of the states? Finally, in 1922, *United States v. Lanza*⁶ presented a national prosecution of an individual for conduct for which he had been convicted in a state court. The Court, in reversing the decision of the lower court dismissing the indictment, repeated the dual sovereignty theory that had been developed in dicta years before. However, the involvement of the eighteenth amendment and the Volstead Act⁷ led some commentators to believe that the decision depended upon construction of those Prohibition provisions, rather than stating a proposition of wide applicability.

Chapter four investigates the cases following *Lanza*, and the statutory construction that obviated some of the difficulties in successive prosecutions. Chapter five discusses the landmark cases that affirm the constitutional basis for the *Lanza* decision. In *Bartkus v. Illinois*⁸ the defendant was convicted of robbery in a state court after he had been acquitted in a national court of robbery of a federally-insured savings and loan association. In *Abbate v. United States*⁹ the defendant was separately tried and convicted, first in a state court for conspiracy to destroy the property of another, and then in a national court for conspiracy to destroy property in the communications systems of the United States. On March 30th, 1959, the Supreme Court affirmed the conviction in each case, making clear that the dual sovereignty doctrine adopted in *Lanza* is not dependent upon its special circumstances, and that a person can constitutionally be convicted twice for the same conduct.

The reaction to the *Bartkus* and *Abbate* cases is discussed in chapter six. Legislation includes four national statutes forbidding re prosecution by the national government in specified circumstances, and twenty state statutes

4. *United States v. Lanza*, 260 U.S. 377 (1922).

5. L. Miller, *Double Jeopardy and the Federal System* 15 (1968) [hereinafter cited as L. Miller].

6. 260 U.S. 377 (1922).

7. Ch. 85, 41 Stat. 305 (repealed 1934).

8. 359 U.S. 121 (1959).

9. 359 U.S. 187 (1959).

generally prohibiting reprosecutions by state governments.¹⁰ In addition, the potential injustice of successive prosecutions has prompted some prosecutors to announce a general policy of not reprosecuting, and consideration by some courts of the first prosecution in sentencing for the second. Various commentators have proposed methods of cooperation between state and national officials that would ensure adequate prosecution but prevent oppressive reprosecution.¹¹

In the concluding chapter Professor Miller claims to have shown that the double jeopardy and due process clauses do not, and should not, forbid successive prosecutions. My interpretation of the previous chapters is that he is analyzing and explaining the views of litigants and of the members of the Supreme Court. Inasmuch as the law expressed by the Supreme Court is not necessarily just, and does not always meet all the issues, I would have found interesting Professor Miller's own defense of successive prosecutions.¹² I am unconvinced by his present efforts in support of the *Lanza* doctrine, but regard it as a tribute to the book that the injustices of successive prosecutions have not been understated by one defending the dual sovereignty theory.

Although *Benton v. Maryland*,¹³ overruling *Palko v. Connecticut*¹⁴ and applying the fifth amendment's double jeopardy clause through the fourteenth amendment¹⁵ to successive state trials, does not itself change the *Lanza* doctrine regarding successive prosecutions by the state and national governments, it does show an encouraging willingness of the Court, at least, to reconsider once settled double jeopardy matters.¹⁶ Although anyone seriously concerned must directly evaluate the sources, he will find Professor Miller's collection of the cases and briefs and detailed analysis thereof (supplemented by extensive bibliography, table of cases, and index) to be a rather clear presentation of the issues and development of the present state of the law concerning successive state and national prosecutions.

Occasional lapses from clear expression; occasional overstatements or emotionalisms;¹⁷ occasional evidence of lack of understanding of elements of the

10. L. Miller at 99, 101.

11. L. Miller at 124.

12. Cf., e.g., J. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* (1969), which combines doctrinal study and policy evaluation. Also of interest is M. Friedland, *Double Jeopardy* (1969).

13. 395 U.S. 784 (1969).

14. 302 U.S. 319 (1937).

15. See also *North Carolina v. Pearce*, 395 U.S. 711 (1969).

16. *Waller v. Florida*, 213 So. 2d 623 (Fla. App.), cert. denied, 221 So. 2d 749 (Fla. Sup. Ct. 1968), cert. granted, 395 U.S. 975 (1969), for example, challenges the validity of successive prosecutions by municipal and state governments.

17. E.g., L. Miller at 81: "After presenting this apologia for placing upon the federal government the bulk of the burden of crime control, Black [speaking of the supremacy clause in his *Bartkus* dissent] threw a sop to the states: '[I]n purely local matters the power of the States is supreme and exclusive. State courts can and should, therefore, protect all essentially local interests in one trial without federal interference.' Yet one is left to ponder

legal system;¹⁸ a tendency to place material in footnotes that could well appear in the text; and occasional unfortunate expressions of repugnance for "technicalities"¹⁹ that might free a defendant and "an oversolicitous regard for the 'rights' of the accused"²⁰ are evidence that Professor Miller is human. His work has, however, been vindicated by his dissertation committee, and I do not suggest that it or any other body retry the issue. Even professors are entitled not to be placed twice in jeopardy.

LEROY L. LAMBORN*

The Rule of Law and The Role of Psychiatry. By Justine Wise Polier. Baltimore: The Johns Hopkins Press. 1968. Pp. xii, 176. \$7.95.

Judge Polier is on the bench of the New York State Family Court and the author of four other books on law and the family. She has been a member of the Bar for more than 40 years, a judge since 1935, and a lawyer in state government—labor, municipal, and welfare law. She is a volunteer board member and supporter of social agencies in her home state of New York, and a consultant on the problems of children at every level of concern, from New York City to the White House. (She also has four children of her own). She is a member of the American Orthopsychiatric Association and in 1964 was given the Isaac Ray Award of the American Psychiatric Association. The present book is an expanded version of lectures she gave in connection with the Isaac Ray Award, at the Johns Hopkins School of Medicine. It is an angry, astounding, sophisticated cry for the oppressed in America—and no ordinary volume of outrage, either, but an expert's book, by an expert whose interests range over all of the law, all of judicial administration and all of behavioral science.

Judge Polier's chapters (lectures) begin with a behavioral survey of law and what it means in the mid-20th century, followed by a perceptive criticism of the "chasms between new concepts and present practices," a chapter on social courts, a chapter on the "War against Poverty" as it relates to the courts and to mental health, and a finale with two new concepts of her own, community law and community psychiatry. With a reviewer's license, I think of the author's essays as presenting three inter-disciplinary views of social deviance in America—first, that the law of deviance is a behavioral science; second, that

what, consistent with his previous remarks, could be termed 'purely local interests' or how state courts could adequately 'protect' them." (footnotes omitted).

18. E.g., L. Miller at 99: "On the other hand, unlike a judicially articulated pronouncement invalidating successive prosecutions on constitutional grounds, a legislative prohibition enjoys the advantage of self-limitation, that is, it reflects the considered deliberation of the representatives of the people." Id. at 100: "An acquittal because of, say, a hung jury or a technically defective indictment would similarly be inconsequential."

19. E.g., L. Miller at 119: "But, as has been pointed out, it would at the same time impose an absolute bar where retrial would not be improper, for instance, where the accused has escaped deserved punishment on a technicality or has received an excessively light or nominal fine or sentence."

20. E.g., L. Miller at 130: "It is fair to say that justice should not be reduced to an oversolicitous regard for the 'rights' of the accused."

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law is open to other behavioral sciences; and third, that law has been a behavioral failure.

The Law of Deviance is a Behavioral Science. “[L]aw,” Judge Polier says, “can modify not only behavior but attitudes and interpersonal relationships.”¹ Law is more than a potency; it is Sartrean and acts whether it means to act or not. It *does* modify attitudes and relationships, even when its diffidence causes it to affect people for the worse. Men are changed by what happens to them in the courts; they are made better or worse, their attitudes are brightened or depressed; their families, as relevant non-parties in the courts, are affected and even coincidentally destroyed by the judiciary. The law Judge Polier writes about here is, of course, judge’s law, but within that limitation she predicates both an ideal set of what Dr. Jerome Frank would call “assumptive systems”² and a keen appreciation of the shabbiness of reality.

Criminal punishment is an example; Judge Polier’s ideal punishment would be therapeutic. Judges should be able, like doctors, to diagnose and then prescribe for cure when they sentence (or commit) defendants (or the mentally ill). Instead, the judiciary—often willingly—accepts a role as jailer and whip-wielder; judges either cannot or will not accept one of this century’s “new concepts”—that deviance is something to be cured. The new concept candidly denies Justice Holmes’ aphorism about the difference between being tripped over and being kicked. It fudges—on pretty good evidence—the mythical line between guilt and insanity.

Instead, present patterns of criminal punishment are what psychiatry would call *projections*. A judge vents his rage on a child arrested for auto theft, partly because he feels frustrated at the growing incidence of auto theft (and the low rate of apprehension for it) and partly because his vindictive treatment of someone totally subject to him releases aggressive impulses and anxieties of his own. I cannot help thinking, as Judge Polier makes this psychological point, of the growing severity of federal sentences for Selective Service violations. These are an ironic phenomenon in the midst of a hated war, a war which has been condemned as immoral by presidential candidates, by national leaders as high as the Majority Leader of the United States Senate, and by almost anyone’s favorite moralist. Is it possible that these sentences express frustration and anger and uncertainty in judges, more than they express any need for either confinement or rehabilitation of the disaffected young? “The unconscious helps explain not only why criminals behave as they do,” Judge Polier quotes Dr. Weihofen, “but also why the rest of us behave as we do toward criminals. Our righteous indignation against wrongdoers is more often than we consciously realize an expression of our own strong but repressed aggressive impulses.”³

Law—the judiciary and the administrator primarily—has not had enough confidence in its own instincts and insights on human behavior. It has delegated to medicine and the psychological allies of medicine a non-delegable duty—the community’s responsibility for its weakest and most corruptible. Part of

1. J. Polier, *The Rule of Law and the Role of Psychiatry* 4 (1968) [hereinafter cited as J. Polier].

2. J. Frank, *Persuasion and Healing* 20-35 (1961).

3. H. Weihofen, *The Urge to Punish* 13 (1956), quoted in J. Polier at 27.

Judge Polier's point is that the law should be more informed about its own behavioral science. The courts have, for instance, been too much and for too long in thrall to the expert, both for prediction of behavior and for treatment. She points out that psychiatry's control of mental hospitals has resulted—not *altogether* because of public neglect—in a prison system which is worse than prison, in confinement without treatment and without hope of release. "The whole program sounds like a sociologist's dream and a physician's nightmare" in which the only therapy attempted is by fellow patients—"a picture of democracy gone mad."⁴ Doctors—despite their scandalously inadequate funds—are *capable* of humane treatment of the mentally ill, and of treatment which is effective and short and not dependent on indefinite confinement. Her point in all of this is that the legal profession should be more concerned, more expert on its own, about the kind of treatment which is best for the mentally ill and about the length and nature of confinement in mental institutions. "The hospitals are all but saying that they can do nothing, that the situation is potentially dangerous, and that the responsibility rests with the courts."⁵ Which it does.

Law is Open to Other Behavioral Sciences. One of my discoveries as a lawyer reading behavioral literature is that the sciences of psychology and sociology have ignored the law. Judge Polier has apparently come to the same conclusion, and she suggests that part of the fault lies with us lawyers. We are responsible, as much as scientists are, for the fact that the daily work of the courts has not been touched by experiment and measurement. The courts expect science to confine itself to the narrow and necessary task of predicting what deviants will do:

In the field of correction and rehabilitation of human beings whose behavior is deviant, limited psychiatric services are being weakened and fragmented by two contradictory forces. We find increasing demands on mental health workers to provide the treatment that will make the individual whole, productive, and a functioning member of society. At the same time society demands that mental health experts shall diagnose and prognosticate, if not prophesy, which individuals engaged in deviant behavior should be walled off or sealed up indefinitely so as to protect the community.

. . . .

It sometimes seems as though we feel justified in ridding ourselves of any threat from such people once they have been identified and given numbers. Certainty is demanded in areas where certainty is not yet possible, and fear restricts thoughtful and meaningful progress in treatment and rehabilitation.⁶

This is a projection, too; our shadow-selves have been locked away, out of sight, and we are relieved. Judge Polier quotes the Joint Commission on Mental Illness and Health: "People do seem to feel sorry . . . but . . . not . . . as sorry as they do relieved to have out of the way persons whose behavior disturbs and offends them."⁷

4. J. Polier at 79.

5. *Id.* at 107.

6. *Id.* at 75-77.

7. *Id.* at 77 (emphasis omitted).

The differentiation which is important in treating—for example—juvenile offenders is not applied scientifically. Confinement is used when the number of open “beds” in institutions permits confinement, or when the peculiar facts of the case, for some unconscious reason, arouse judicial ire. And “treatment,” once assigned, is less a matter of care than it is of either restraint or loose supervision:

The periodic attacks on the social courts for “coddling” young criminals and the allegations that the increase in delinquency proves that “treatment” does not work should be restated to acknowledge the fact that “treatment” has rarely been tried. In the limited number of cases in which a judge can secure skilled services for a child we can see what might be accomplished through “individualized justice”; they pose a challenge to those who are concerned with the welfare of children.⁸

(Judge Polier does not mention, as she might have, the impressive record which differential treatment of juveniles has built in California.⁹ In this instance and in some others her anger may have caused her to underestimate the rare sign of hope for humane treatment of deviants.)¹⁰ The judge cannot avoid the necessity for sophistication in “disciplines that are usually unknown to him when he ascends the bench. The expectation that he can do so” she adds, “reflects the assumption that, while expertise is necessary in all other aspects of the law, anyone and everyone can wisely determine what is best for other human beings.”¹¹ This assumption is prevalent, even dominant, with respect to juvenile courts:

[T]here is a widespread assumption that anyone and everyone can be an expert on children, on their treatment when they become delinquent, and on matters of custody and care. For the most part the specialists are regarded as a mop-up squad essential only if the label of either physical or mental illness is first attached to the child. The notion that anyone can be an expert also extends to the treatment of adults. Only recently J. Edgar Hoover cited an ex-convict as his authority for the doctrine that longer sentences serve as a deterrent to crime, since “only fear keeps people in line.”

While intensive and expensive research is pursued in some aspects of family life and child care, the vast majority of dependent, neglected, and delinquent children and troubled families are handled by untrained staff in public welfare departments, courts, and institutions. In this country the idea that a judge who decides on the

8. *Id.* at 93.

9. Remarkable results in the differential treatment of delinquents are evidenced in three mimeographed booklets arising out of a project sponsored jointly by the California Youth Authority and the National Institute of Mental Health: T. Palmer & M. Warren, Community Treatment Project, An Evaluation of Community Treatment for Delinquents, Sixth Progress Report, pt. 1, The Sacramento and Stockton Experiments, C.T.P. Rsch. Rpt. No. 8, pt. 1, Sept. 1967; *id.* at Part 2, pt. 2; M. Warren, Interpersonal Maturity Level Classification; Juvenile Diagnosis and Treatment of Low, Middle and High Maturity Delinquents (1966).

10. The author notes at p. 91 n.11 a report by Dr. Henry Makover which purportedly demonstrates that diagnostic studies have no effect on what judges do in disposition hearings. The California experiment appears to have made treatment dependent on expert, administrative determination, rather than upon judicial discretion.

11. J. Polier at 91.

removal of a child from his family, on custody questions, or on adoption should have special training has hardly been considered.¹²

She gives her fellow judges a tough assignment—that they be open not merely to expert opinion from doctors and behavioral scientists, but that they master the sciences to be applied in treatment. “The social courts” especially “must stop functioning as lids to contain troubled people, as screens to conceal problems, or as institutions whose façades reveal little of their real capacity.”¹³ Courts should do what clinically oriented psychiatric services have advertently failed to do—consider the members of the deviant’s family, as well as the deviant himself. Courts should commandeer an array of services which will rebuild environments and reorder lives; judges must eschew the assumption that they, “like the little Dutch boy, can put . . . [their] thumb in the dike and by an order hold back the sea of troubles that have submerged, or threaten to submerge . . .” all of the families and communities who are involved in domestic, juvenile, mental and criminal litigation.¹⁴

This is even more radical than it sounds. The social court of Judge Polier’s vision renounces the prevalent system of casual arrangements in foster homes for abandoned or mistreated children. She renounces even the sacredness of the parental relationship. “Surely the reading of the biographies of both Lee Harvey Oswald and Jack Ruby . . . should have shocked this country out of its complacency about the failure to intervene on behalf of neglected children . . .”¹⁵ Too long, she says, have family courts ignored the well-documented fact that children who are mistreated by their parents stand a 50-50 chance of being mistreated again if they are returned to parental custody. Too long has our society ignored the direct and impressive correlation between recidivism in juvenile offenders and the size of the institution in which they are “treated.” “[O]ccasional eyedropper doses of tender loving care are not enough. . . . This goal will require . . . a determination to end methods of care recognized as destructive to children.”¹⁶ Her vision would sacrifice sacred cows, and cause judges to study well into the night, and cost millions of dollars; but she is obviously not the sort of lady who is silenced by the weight of the demands she makes on society, or on her fellow judges, or on herself.

Her last chapter is somewhat more optimistic on the future symbiotics of the legal and the mental-health professions. She invites psychiatrists to follow her own profession’s lead and to develop a sub-specialty that deals with the deviant poor. Psychiatry, as much as law, tends to apply middle-class, white-man’s solutions to the problems of the poor; in the mental-health professions, especially, funds find their way into “areas of personal interest, in inflated research projects, or in the buttressing of old institutions in which such groups feel at home and from which they derive power or prestige.”¹⁷ She demands more of psychiatrists, I think, than she demands of judges. Lawyers, after all, have always had the poor—even though we often treat them shabbily. Psychiatry has

12. *Id.* at 100-01

13. *Id.* at 94.

14. *Id.* at 111.

15. *Id.* at 121.

16. *Id.* at 124.

17. *Id.* at 163.

been a middle-class profession.¹⁸ Lawyers are probably ten years ahead of psychiatrists in tackling the problems of the poor with an awareness of our middle-class assumptions. Judge Polier's invitation to psychiatry is, if overdue, inspiring. It demands a full-scale, humble front-line professional effort by members of both callings:

The notion that the community psychiatrist or the lawyer concerned with the discovery and assertion of the rights of the poor can become a general in the rear after developing a chain of command, that he can feel confident that the work will be done adequately by individuals in the field with less and less training, may be attractive but is surely illusory. Such a structure, while safeguarding the personal well-being of the generals, is all too likely to result in avoidance of the direct and challenging experience which should modify concepts and methods. It will leave those who most need services in the hands of those least experienced. It will deprive the community of the highest type of experimentation and exploration of new methods and will reinforce the long-standing separation of first-rate talent and experience from those who most need them. One cannot expect every professor, scholar, physician, or lawyer to engage in community planning or action. Yet the new challenge requires that the creative person should, like the artist or musician, continue to work in the medium that is his, if great masters as well as good artisans and craftsmen are to be developed.¹⁹

Law is a Behavioral Failure. This is a pessimistic book. Judge Polier believes there is value in analyzing failure; here are some slides from the autopsy:

Firstly, the distinction between mental illness and guilt—even if it has validity—is functionally unimportant because mental institutions are at least as bad as prisons, and the “patient's” tenure in them is less definite, and longer, and more hopeless. The author quotes deGrazia in viewing “efforts to distinguish the ‘mad from the bad’ as a Pyrrhic victory so long as the mad are treated as badly as the bad.”²⁰

Secondly, behavioral expertise is used mainly to predict future deviance, and therefore to confine people; its ability to assist in differential disposition,²¹ in the administration of penal institutions, and on questions of release, is untried. “Surely the time has come to place less emphasis on definitions in the law and more emphasis on what happens to defendants after conviction.”²²

Thirdly, scientific treatment for convicts, for the mentally ill, and for deviant children, has never been tried. The reasons are complacency in the face of evidence that responsible public institutions are ineffective or worse; a shortage of competent psychotherapists; and “the community attitude or non-attitude toward the individual who troubles it and does not conform to its rules.”²³

Fourthly, law is seen as a maintainer of order, when perhaps it should be, as Charles Morgan, Jr. recently put it, a maintainer of “law against order”²⁴:

18. J. Frank, *supra* note 2, at 6-7, suggests it creates cures without diseases.

19. J. Polier at 165.

20. *Id.* at 24.

21. See notes 10 & 18 *supra*.

22. J. Polier at 25.

23. *Id.* at 29.

24. Powledge, *Something for a Lawyer to Do*, *The New Yorker*, Oct. 25, 1969, at 63 (quoting an address Mr. Morgan gave at The University of Mississippi School of Law): “[T]he struggle is not a matter of law and order. We've had order in the South for hun-

Among the debators on correctional legislation one still finds persons to whom punishment and retribution provide the only correctional answer. Thus, prior to the hearings on the Prisoner Rehabilitation Act of 1965, J. Edgar Hoover criticized the high rate of recidivism of persons on probation, suspended sentence, parole, or conditional release. He referred to all such procedures as "leniency" and gave figures designed to frighten people into opposition to the expansion of such measures. He gave no figures on the recidivism rate of those who were denied such "leniency." As one read his statement, the unspoken premise seemed to be that if every person who committed an offense were immediately jailed, convicted, sentenced, and held in prison the maximum term, no offenses would be committed (at least while the defendant was in prison), and that the percentage of recidivists would thus be lowered. No concern was indicated for the price that would be exacted from the defendant, his family, or the community by such a Draconian application of "the law." No regard was paid to the earlier failures of this punitive application of law or to the promise of rehabilitation through methods concerned with the potential functioning of the individual.²⁵

Fifthly, our society is willing to denounce the deviant as sick but not to admit that his deviance is the symptom of a sick society—this is especially true in reference to drug addiction, alcoholism and sex offenses.

Sixthly, both law and the mental-health professions are captives of a bureaucratic system which leaves neither room for effective social reform. "It sometimes seems," for instance, "as though the mentally ill child is made a shuttlecock bounced back and forth through the courts by physicians as they attempt to score points against each other."²⁶ Doctors tend to be captivated by the moralistic (and unreal) finality of court decrees, and judges by psychiatric guesses which lead them to assume that a man's conduct—or a boy's—will remain unchanged for half a lifetime.

Seventh, the broader society's mood toward deviance is ambivalent; it is ready to relieve misery, but it doesn't want to see misery—a point so potently put by Judge Polier that this review should end with it:

[O]ur society has become so dehumanized that it is not moved by the miseries and wrongs done to people whom it does not see, and at the same time humanized to the degree that it is disturbed from time to time by the disclosures of the legal perpetration of cruel punishment or of the withholding of treatment from the mentally ill. We are unwilling to pay for great programs of change and yet are made uncomfortable by our sins of omission. We want to get rid of the threatening individual and also be assured that getting rid of him is in his best interest. As we begin to look more closely at what we do and fail to do, we find ourselves ill prepared for great plans or for the initiation of programs to meet newly recognized necessities. We weave and waver. The result is an irrational deployment of existing services away from those who are in greatest need and distraction of attention from the preventive measures that will be most effective.²⁷

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dreds of years. The struggle in the South is a struggle of law against that order. It's new law against the harsh old order . . ." *Id.* at 64 (emphasis omitted).

25. J. Polier at 41.

26. *Id.* at 83.

27. *Id.* at 84-85.

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