Maryland Law Review

Volume 32 | Issue 2 Article 7

Book Reviews

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Sentencing in a Rational Society. By Nigel Walker. Basic Books: 1971. Pp. 239. $6.95.

Nigel Walker, University Reader in Criminology and Professorial Fellow of Nuffield College, Oxford, is the author of two prior books[1] dealing with crime in England. In *Sentencing in a Rational Society,* he relies largely on British data, but he also deals with American, Scandinavian and other Continental and scattered experiences. The first words of the preface — "[t]his book is written for a particular sort of society: one which is peaceful, affluent and ignorant, but aspires to rationality" — raise at the outset, for anyone dealing with sentencing in the United States, the need to read this book in the context of our own current problems and attitudes. It may be that the great increase, in frequency and degree, in expressions of man's inhumanity to man, which we are witnessing in the United States, will soon lessen and prove to be a thing of the moment. It may be that some of us view our present society too critically. But a month spent last summer in London's relative calm, walking without fear at night, eloquently presented to this reviewer a striking contrast to an American big city's agony and turmoil which require, for example, judges of the United States District Court sitting in Baltimore to avoid having jurors and court staff walk alone to nearby parking lots after dusk.

Mr. Walker defines *peaceful* as being "[p]eaceful enough . . . to keep order without the help of troops";[2] *affluent* as having the *ability* to devote needed money and manpower to handling offenders; *ignorant* as placing reliance on superstition rather than science; and *rationality* as having the desire to have reason replace superstition and to develop a systematic approach attuned to achieving the ultimate in rationality. We in the United States are sufficiently affluent and probably sufficiently peaceful, and most of us sincerely want the most rationally administered penal system and say so. Whether we will put our money where our mouths speak and hearts yearn is not as clear. Mr. Walker's acute analyses of sentencing aims and limitations paint few absolutes and implicitly caution against complete acceptance or rejection of the validity of any sentencing principle. While we in the United States must of necessity consider Mr. Walker's thinking in the light of our immediate problems, the emotions provoked by those problems render it all the more advisable that we examine what we are doing, thinking

1. N. WALKER, CRIME AND PUNISHMENT IN BRITAIN (1965); N. WALKER, CRIME AND INSANITY IN ENGLAND (1968).

2. N. WALKER, SENTENCING IN A RATIONAL SOCIETY ix (1971).

and planning about sentencing with as few preconceived absolutes as possible.

Noting the general reluctance of lawyers and penologists to explore or to attach relevance to philosophical concepts, commenting that "if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby,"[3] and isolating moral and religious considerations from the sphere of secular penology, the author lists four basic sentencing aims which have been advanced by various writers: (1) "to protect offenders and suspected offenders against unofficial retaliation"; (2) "to reduce the frequency of the types of behaviour prohibited by the criminal law," which the author labels "reductivism"; (3) "to cause the minimum of suffering" ("humanitarianism"); and (4) "to ensure that offenders atone by suffering for their offenses" ("retributivism").[4] Mr. Walker rejects the place of retribution within the penal system and closes his philosophically oriented introductory chapter as follows:

> Let me summarize what I have been arguing. The reduction of prohibited conduct must be the main aim of any penal system, but must be tempered by both economic considerations and humanity if the system is to be practicable and tolerable. . . .
>
> A penal system designed by an economic reductivist, observing limits dictated not by retributive justice but by humanity, would differ in some important respects from our present one. It would be less ambiguous and illogical. It would distinguish less sharply between actual and likely harm, and between intention and inadvertence. It would lay far less emphasis on consistency in sentencing. On the other hand, it would not be either intolerably severe or unrealistically lenient. In short, it is not unthinkable. The rest of this book is an attempt to show roughly what it would be like.[5]

Consistent with the author's reductivist philosophy, the book's treatment of sentencing itself is prefaced by a broad discussion of what a rational society should characterize as criminal behavior and how it can reduce the incidence thereof. The realization that our criminal law has grown like Topsy is brought into focus by the question: What sort of behavior should be classified as criminal? Some crimes have been so denoted as a result of religious pressures; others on the strength of popular feelings of the moment. Mr. Walker notes that many have suggested excluding from the scope of criminal

3. *Id.* at 1.
4. *Id.* at 3–5 (italicized in the original).
5. *Id.* at 21–22.

law behavior which is merely offensive, but not actually *harmful* to others. He notes that some have advocated excluding offenses the punishment for which causes more harm than does the prohibited conduct itself, and refraining from the use of the criminal law (a) to compel people to act in their own best interests or (b) to espouse prohibitions which do not have strong public support. Without detracting from the pragmatic need to establish such negative, conceptual limitations, Mr. Walker suggests the more compelling need to "formulate positive principles to tell us what tasks the criminal law should attempt"[6] — to state positive justifications independent of moral considerations, for making given conduct a crime. The standard upon which such principles and justifications should be based is, the author indicates, the maintenance of "the smooth functioning of society and the preservation of order."[7] Under it, "private homosexual, incestuous or sodomitic acts between consenting adults"; "abortions performed with the consent of the woman by a suitably qualified medical practitioner"; and "bigamy committed without any intention of defrauding, deceiving or seducing a man or woman"[8] would not be classified as criminal behavior.

The author breaks down, under the heading of "Techniques of Crime-reduction," those techniques which are classified as "focused," "partially focused" or "unfocused."[9] "Thus for example the sentences which courts impose on convicted thieves are focused, whereas propaganda intended to encourage people to take precautions against thieves is 'unfocused.' "[10] Under the latter heading are included general deterrents, that is, "measures intended to discourage potential offenders by their unpleasantness."[11] "[T]he very existence of a law prohibiting this or that type of conduct is to some extent an unfocused form of prevention, since it declares to the public at large that the conduct in question is not tolerated by the society to which they belong."[12] Admitting that such evidence as is available indicates a certain lack of effectiveness of educational efforts in bringing about crime reduction, Mr. Walker stresses that there has been little effort made in the schools "to explore systematically the possibilities of ethical training"[13] within the educational system aimed at establishing or altering attitudes. As to the use of mass media, he concludes that the "onus of proof

6. *Id.* at 36.
7. *Id.* at 40.
8. *Id.* at 42.
9. *Id.* ch. 3, commencing at 43.
10. *Id.* at 43.
11. *Id.*
12. *Id.* at 45.
13. *Id.*

still lies on those" contending that "mass media which report or depict violence and other undesirable behaviour do not contribute to increases in its frequency."[14] Among "partially focused techniques" are those aimed at identifiable areas or groups. Slum clearance as such, he asserts, has not produced the noticeable reduction in crime which some had predicted. Thus, while a recent Glasgow study established the expected differences between conviction rates of "boys from 'good working-class districts' and [of those] from slums [it] hardly [shows] any difference between those still in the slums and those rehoused from slums."[15]

Techniques focused on individuals include those which are preventive, such as special attention for a juvenile who has been in, or apparently is about to get into, trouble; corrective, such as the elimination or reduction of a person's motives for committing crime; deterrent, such as measures employed because of their unpleasantness; and incapacitative, such as making it impossible for the offender to re-offend (in former days, by branding, amputation of a limb, transportation to a penal colony or corporal punishment; today, usually by confinement).

Another technique involves measures directed toward reduction of opportunity for crime, such as stringent precautions taken by merchants against shop-breaking or, as in West Germany, a law pursuant to which automobile operators who leave their cars parked unlocked are subject to prosecution.

An entire chapter is devoted to the topic of general deterrence. From the outset the author identifies as a key issue the problem of measuring the effectiveness of any particular technique as a successful deterrent. "Deterrence has become a dirty word in penological discussion," he notes, "partly because it has so often been the battle cry of those who support capital or corporal punishment, partly because of a fashionable assumption that it is more enlightened and scientific to talk about social hygiene and reformation."[16] Noting that it is seldom possible, "[w]hile a deterrent is in operation . . . to devise a satisfactory way of finding out the number of occasions on which it has been the decisive consideration in the mind of a person who *rejected* an opportunity for law-breaking,"[17] the author cautions that we are seldom able "to compare a situation in which there is *no* deterrent with a situation in which there is *only that* deterrent."[18]

14. *Id.* at 47.
15. *Id.* at 48–49.
16. *Id.* at 56.
17. *Id.* (emphasis added.)
18. *Id.*

For example, the abolition of capital or corporal punishment has almost always meant replacement by lengthy prison commitments.

In view of the policy of the judges of Maryland's federal district court, in the absence of strongly mitigating contrary reasons, of imposing prison sentences upon those convicted of income tax fraud as a general deterrent to those taxpayers who might otherwise gamble the financial reward to be gained from under-reporting against a fine, but who will not gamble such a reward against the probability of a prison sentence, the following passage is of interest:

> The nearest approach to a sound and successful experiment in testing a deterrent is probably that achieved by Professor Richard Schwartz and Miss Sonya Orleans, with the help of the United States Internal Revenue Service. Nearly 400 taxpayers were divided into four matched groups. Members of the "sanction" group were interviewed, and asked questions designed to remind them indirectly of the penalties which they might suffer if they tried to evade taxes. Members of the "conscience" group were interviewed with questions designed to arouse their civic sense and feelings of duty. The third, or "placebo" group were asked only neutral questions, which avoided both sorts of stimulus. The fourth group were not interviewed at all, in order to test the possibility that even a "placebo" interview produced some effect (which on the whole it did not seem to do). The interviews took place in the month before the taxpayers were due to file their returns for 1962. Without disclosing information about individuals, the Internal Revenue Servce compared the returns of the four groups for the year before the experiment and the year 1962. The reported gross incomes of both the "sanction" and the "conscience" groups showed an increase, compared with small *decreases* in the "placebo" and uninterviewed groups. In other words, the attempts to stimulate both fear of penalties and civic conscience seemed to have had effect.[5]

5. See Schwartz and Orleans (1967). [The authors] drew a slightly bolder conclusion:

> that appeals to conscience were *more* effective than threat of sanctions; but this inference assumes that the appeal and the threat were of equal potency, whereas it is conceivable that unintentionally [the interviewers] had made their "conscience" interview a more powerful stimulus.[19]

Mr. Walker's apparent conclusion is a cautionary one — it is as unjustifiable to assume that there is no type of crime against which deterrents are effective as it is to assume the contrary.

Our awareness that we cannot determine with any degree of accuracy the effectiveness of any particular technique as a general deterrent becomes even more important in view of our increased under-

19. *Id.* at 59.

standing that corrective or reformatory measures may hold considerably less promise than was once hoped. Custodial sentences run into the twin difficulties of (a) presenting "conditions so unlike those of real life" that it is hard to tell "whether, and if so when, reformation has been achieved" and of (b) bringing into it "unwanted by-products,"[20] such as loss of job, separation from family and compelled association with other offenders. Those arguments against custodial measures are characterized by Mr. Walker as "hackneyed points . . . first made in the eighteenth or nineteenth centuries,"[21] not justifying the curtailment of the use of custodial measures but, rather, strongly indicating the need for improvement within our confinement institutions. Still, the author concludes that the main function of custody of adults as opposed to juveniles should be to deter and to incapacitate. While he suggests that the concept of "semi-detention" may water down the negative features of incarceration, the author warns of its necessarily limited scope. Semi-detention, such as by night or weekend, is suitable for non-dangerous offenders who do not pose an appreciable escape risk. It is characterized as providing an opportunity for the offender to make restitution and to be placed under supervision without loss of job or complete separation from family, with less contact with fellow inmates, and with less difficulty in making the transition at the end of confinement back to complete liberty.

Mr. Walker suggests strongly that financial penalties may pose the best sentencing alternative provided that the amount is determined on the basis of preventing repetition of the offense rather than on the degree of seriousness of the crime which has been committed, the latter being a retributive aim. Stressing the need for sentences to be selective, the author concludes, after studying mainly British data, that "a fairly simple sentencing policy [should operate] on the following lines":

> If a man's circumstances make it reasonable to fine him, this is the choice most likely to be successful. If a fine is ruled out by his means, discharge him. Reserve prison for those whom you feel you cannot deal with in either of these ways — for example, because the offence itself was of the kind against which people need protection. Use probation only where you have a strong positive reason for doing so — for example, for a house-breaker who cannot pay a fine.[22]

The author admits that the affirmative results obtained by the use of discharge, that is, no sentence, may well be due to the skill of

20. *Id.* at 76.
21. *Id.* at 76.
22. *Id.* at 94–95.

the courts studied in selecting "good prospects," though he notes that "[t]he selective explanation is not quite as plausible when it is applied to the disappointing figures for probation."[23] For example, figures in one Scottish study showed higher rates of recidivism after use of probation than after imposition of fine or discharge, and "for most age-groups worse than the rates for imprisonment."[24] Mr. Walker also suggests that probation, like imprisonment, may be affirmatively wrong and harmful for certain types of offenders.

Recognition of the fact that the foregoing techniques — discharge, fine, probation and imprisonment — cannot be said to be either universally effective *or* ineffective necessitates an attempt to find an effective process for determining *the most appropriate* approach in a particular case. Mr. Walker advocates the use of what we know as presentence reports, with the warning, however, that while they often make it possible to predict more accurately whether the offender will or will not again engage in crime, they do so *"irrespective of the sentence"*[25] and do not provide an accurate guide to the type or details of sentence that would be most appropriate. What does often provide such a guide is the response of an offender in the past to a penal measure. For instance, did he stay out of trouble for longer after a fine or probation or confinement than before? If so, perhaps the sentencer should use the same sentencing technique again. If, on the other hand, the offender has failed in the past to respond or immediately got into trouble again, then another sentencing alternative should, at the very least, be given consideration. The author suggests that often "the prestige of psychiatry, which has to some extent been earned, to some extent borrowed from the successes of physical medicine" has brought into sentencing a certain overuse of the "process of diagnosis, prescription and treatment," and "has become a model for penologists, many of whom have a psychotherapeutic training or orientation."[26] He accordingly warns clearly against over-reliance on the psychotherapeutic approach, noting that it has questionable utility in most cases and that its prohibitive cost warrants its use in only very select instances.

Mr. Walker's adherence to the reductivist aim in sentencing is nowhere more apparent than in his statement that the "over-riding question" for the sentencer is: " 'Which of the choices will result in non-reconviction?' "[27] This reviewer agrees that no type of sentence is either "universally effective" or "universally ineffective"; that some

23. *Id.* at 95.
24. *Id.*
25. *Id.* at 102.
26. *Id.* at 103–04.
27. *Id.* at 105.

offenders will be repeaters and will not respond to any sentence, and others, perhaps fewer, will go straight regardless of what the court does or does not do; that further historical research into what has happened and is happening to individual offenders is needed; and that for the present the sentencer must employ "strategic reasoning," that is, he must make his choice rationally with a view toward "the greatest probability of successful outcomes in a situation in which, because of the intervention of chance or other [variable factors] or both, the chooser cannot make certain of the outcome."[28] Such a strategic approach to sentencing, the author argues, is the only practical one and is far more helpful than the currently popular "diagnostic" approach.

The need for flexibility in choice of type of sentence — for second thoughts after a sentence has been pronounced and before it has been completely served, so as to enable someone to alter a sentence which is working out badly — for participation in sentencing by more than a single sentencing judge — are variously discussed and emphasized. Once again, there is an admirable lack of statements of conclusory absolutes, though an exception in that connection is the view that "sentences of a few months are not only an administrative nuisance but often serve only to convince the offender that imprisonment is more tolerable than he had thought; and in some cases even introduce him to criminal associates for the first time."[29] Perhaps that is true of the offender who requires rehabilitation. But it may not be true of an income tax defrauder, who is generally able, if he desires, to conform his behavior to societal norms, and whose sentence is largely dictated by considerations of general deterrence. The very thought of being locked into a cell may strike sufficient fear into an about-to-be tax evader to keep him in line. For him, reading about a three-month or even a one-month sentence which has been meted out to another may be all that is required.

The need to protect society against certain kinds of offenders is stressed throughout the book, leading to the suggestion that, as a means of prevention, some sentences should require custody for extended periods beyond what would otherwise be prescribed, provided that any decision to impose a longer sentence is made rationally and as freely as possible from retributive thinking. The question is thus posed: "Why should we not use long sentences to prevent serious harm which is the result of recklessness, negligence, incompetence or even accident-proneness?"[30] The response given by Mr. Walker is that "[h]istorically the answer lies in the emphasis which is placed on

28. *Id.* at 109.
29. *Id.* at 125.
30. *Id.* at 137.

culpability: someone who did not intend to do what he did cannot be blameworthy enough to justify long imprisonment."[31]

In other words, the length of sentence is explicable only in terms of retributive thinking. The need for further study of repetitive crime and the nature of precautionary detention is apparent. The possible need to shake out and identify the idea of blame and to confine those who are dangerous to society, regardless of why they repetitively commit, or can be expected to commit, offenses, crops up throughout the book. At the very least, such an approach does highlight the need in our federal system for insuring that, if a person is found not guilty after trial by reason of insanity, that finding will be separately entered and will subject the defendant to treatment and confinement or to supervision until the threat posed by him to others has been brought under control. The only excuse for letting such a person walk out of a courthouse free is that he is blameless. And that excuse, and its concomitant negative result, can only be justified by strict adherence to the philosophy of retribution.

All through the book Mr. Walker, to use his own word in the first sentence of chapter 11, "hinted" at the problem concerning the advisability of controlling sentencers and the degree of such control. All judges in this day and age are limited as to maximums with regard to the periods of confinement and amounts of fines they can specify. I know of no judge who would want it otherwise. On the other hand, few judges favor mandatory minimum sentences. If there is a need to guard against excessive judicial leniency, indeterminate sentences up to a maximum would seem to provide a better answer. Certainly, as Mr. Walker urges, prison or parole officials, who have continuing contact with a sentenced offender and his ongoing problems, should have a great deal of flexible and discretionary power to determine how much, if any, of that part of a period of a sentence prescribed for precautionary purposes should be served. As to probation, I would agree that probation officers, who themselves must deal most intimately with the probationer-offender, should have an important voice in determining whether an offender should be placed on probation. Whether, however, one or more probation officers should have the power to veto a judge's use of probation, as suggested by Mr. Walker, I find more doubtful.

The author concludes that run-of-the-mill sentencing should be left in the hands of judges, subject to certain controls, and that more complicated sentencing functions should devolve upon a body of highly selected and specially trained sentencers. I respectfully disagree. No

31. *Id.*

judge I know enjoys his sentencing duties. But, to paraphrase Mr. Walker in other contexts, I suggest that experience with sentencing authorities in certain of our states and in other countries places the burden of proof upon those who would take that function totally or partially from judges. I buy completely the need for sentencing review, though perhaps preferably by trial judges rather than by appellate judges. I subscribe to the author's espousal of requiring sentencers to state reasons for their sentences, either by saying the sentence is a "normal one,"[32] "[i]n which case . . . [the sentence reviewer] could be asked . . . to declare that the sentence was not, or should not be, normal,"[33] "or to justify its abnormality."[34] The Norwegian practice in the latter regard is enlightening. The statement of reasons by sentencers — the participation of more than one judge in finalization of choice of sentence including semi-detention, work release and the like — the granting of authority to prison and parole officials, with or without the full approval of the sentencing judge, to vary the sentence within a defined range, as experience with the individually-sentenced offender dictates — and the willingness of all exercising sentencing authority, in each case, to move up and down and backwards and forwards throughout the gamut of all available possibilities — together could provide a more flexible approach to sentence pronouncement and administration than is followed today in most, if not all, parts of the world. Perhaps, in the end, removal of all sentencing responsibilities from judges will be advisable. Perhaps, also, as Mr. Walker suggests, some special types of offenders should be referred to a sentencing authority, with all other sentences handled by judges. For myself, I suggest that, as a starter, attention be focused on trying to see how we can bring about improvements within the framework of sentencing as it is currently being administered by judges in most of the civilized world, before we largely or even in part scrap that system and go to another.

Mr. Walker's book is packed full of provocative comments, probings and illustrations. Anyone participating in or particularly interested in sentencing will perforce find it not only very well worth his while to read, but will gain ideas and insights from so doing. For myself, as a sentencing judge, I found it fascinating, and will surely return to a number of its pages as varied and varying sentencing problems concern me in the future.

*Frank A. Kaufman**

32. *Id.* at 158.
33. *Id.* n.8.
34. *Id.* at 158.

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The Closed Enterprise System. By Mark J. Green, with Beverly C. Moore, Jr. and Bruce Wasserstein. Grossman Publishers: 1972. Pp. 437. $8.95.

The Closed Enterprise System,[1] the latest of the Nader Study Group reports, is a study of the failure of our antitrust laws and institutions to adequately safeguard and maintain an open economic system.[2] Massively researched and generally well documented, full of both scholarly references and invaluable data extracted from interviews with numerous persons connected with enforcement of the antitrust laws,[3] the book is a compendium of case histories and proposals for reform laced with scandal enough to satiate any palate. Because *The Closed Enterprise System* is an argumentative "report" or "brief," and not a detailed legal and economic analysis of antitrust problems, it will be of most interest and use to those venturing into the field for the first time; however, it does contain a good deal of material that anyone in the area will find interesting.

I.

The touchstone of *The Closed Enterprise System* is the maintenance of free and open competition. Operation of such a system is the Study Group's Holy Grail and the starting point for its analysis; there is no inquiry into the desirability *vel non* of competing economic models.[4] The Study Group head describes the Group's "operating premises" in this way:

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1. *The Closed Enterprise System* is the first of two volumes by Ralph Nader's Study Group on the nation's antitrust policies and problems. Scheduled for release later this year is the second volume, a study of the Government acting as regulator.

2. At present, perhaps the main challenges to that system are posed by conglomerate mergers and "shared monopolies" (that is, an oligopolistic industry which behaves more or less like a one-firm monopoly).

It should be noted that enforcement of the antitrust laws could by no means be styled a complete failure. One recent success, for example, has been in the field of horizontal mergers.

3. Of necessity, the book contains a number of anonymous quotations. The number has, however, been kept surprisingly low.

The Study Group also sent questionnaires to the nation's 1000 largest industrial enterprises and to federal district judges. Responses were received from 110 of the former (eleven per cent) and forty-three of the latter (thirteen per cent).

4. *See, e.g.,* J. GALBRAITH, THE NEW INDUSTRIAL STATE 206 (paperback ed. 1967), contending:

> The mature corporation has taken control of the market — not alone the price, but also what is purchased — to serve not the goal of monopoly but the goals

> The maximization of consumer welfare was our talisman . . . . Before all else, the economic system must deliver a diversity of quality goods at low prices. . . . Second, we opted for the private, competitive economy . . . as the most efficient and equitable mechanism to serve consumer welfare. . . . Third . . . it is anti-competitive *structure* more than *conduct* which cripples industrial performance and which should be the emphasis of rational anti-trust policy. . . . And fourth, there was the suspicion of excessive economic power, *either* public or private.[5]

Although these premises represent a curious admixture of nineteenth century Liberal and Populist thought with the latest in antitrust theories,[6] such a combination is appropriate, for the harm caused by economic concentration (absent the adoption of an alternative legal economic model) is great indeed. As we all learned in Economics I,[7] monopolies and oligopolies can lead to overpricing, lower output and inefficient resource allocation;[8] inflation and underemployment;[9] and

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of its planning. Controlled prices are necessary for this planning. And the planning, itself, is inherent in the industrial system. It follows that the antitrust laws, in seeking to preserve the market, are an anachronism in the larger world of industrial planning.

Proper analysis of such competing models would, of course, have made the book too lengthy and complex for easy digestion. And, given the existing statutory pronouncements on antitrust, it is perfectly proper to focus on the manner in which those laws are enforced. Still, it would seem that a study of the "closed enterprise system" should devote some space to analyzing whether we do indeed want that system "opened."

Interestingly, only ten per cent of business respondents to the Study Group questionnaire believed "American industry would function better without any antitrust laws." THE CLOSED ENTERPRISE SYSTEM at 473.

5. THE CLOSED ENTERPRISE SYSTEM at xviii–xix.

6. One example is the attack on "shared monopolies." *See, e.g.*, Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

7. *See* P. SAMUELSON, ECONOMICS, chs. 25–26 (8th ed. 1970). *But see* B. BOCK & J. FARKAS, CONCENTRATION AND PRODUCTIVITY (1969). *Cf.* D. WATSON, PRICE THEORY AND ITS USES, chs. 23–24 (2d ed. 1968).

8. These problems are perhaps more acute with oligopolies than monopolies, for excess capacity is more often associated with the former. *See, e.g.*, SAMUELSON, *supra* note 7, at 493.

9. For a proposed solution to the inflation cycle focusing on structural causes see Slawson, *Price Controls for a Peacetime Economy*, 84 HARV. L. REV. 1090 (1971).

lack of product innovation;[10] furthermore, political and social pluralism are apt to suffer as economic diversity decreases.[11]

If evils of such magnitude result from failure to enforce the antitrust laws properly, why, then, has enforcement been so lax? The most obvious reason is, of course, political pressure.[12] This can take many forms: pressure on the Executive Branch to drop a case, pressure on influential Congressmen to threaten loss of funds if an investigation is not dropped and "Old Boy" network pressures stemming from close ties between the agencies and the businesses they regulate. Yet, the authors warn, political influence as an impediment to enforcement can easily be overstated: "[i]nfluence peddling, corruption, and politicking occur, often on important cases, but in sum they occur on only a minority of cases."[13]

Other problems of antitrust enforcement are both more open and more subtle. Problems such as lack of funds[14] can, given the proper political climate, be overcome. On the other hand, certain problems inherent in the operation of any governmental bureaucracy are more difficult to resolve. How, for instance, can a President who is genuinely interested in antitrust enforcement be sure that his Antitrust Division Chief, even though possessed of impeccable credentials, will behave as vigorously as his past actions would indicate? Eminently qualified men

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10. Although it is often asserted that a high level of innovation needs large size and market power to sustain the necessary effort, empirical studies do not support that assumption. *See, e.g.*, Scherer, *Firm Size, Market Structure, Opportunity and the Output of Patented Inventions*, 55 AM. ECON. REV. 1097 (1965). *See also* Judge Wyzanski's dictum in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954): "Industrial advance may indeed be in inverse proportion to economic power; for creativity in business as in other areas, is best nourished by multiple centers of activity, each following its unique pattern and developing its own esprit de corps to respond to the challenge of competition." 110 F. Supp. at 347.

11. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 427 (1st Cir. 1945) (L. Hand, J., for the court): "It is possible, because of its indirect social or moral effect, to prefer a system of small producers . . . to one in which the great mass of those engaged must accept the direction of a few."

12. The book notes that "nearly all enforcement officials" discounted the impact of politics on antitrust. THE CLOSED ENTERPRISE SYSTEM at 31. Businessmen are more realistic (or honest) — over seventy-five per cent of all business respondents to the Study Group questionnaire thought "political considerations" played a factor in governmental decisions to sue. *Id.* at 471.

13. *Id.* at 62.

14. For fiscal 1972, the proposed budget for the Antitrust Division of the Department of Justice was $11,417,000. The Division at that time had 354 professionals on its staff (316 attorneys and thirty-eight economists), an increase of only forty over 1950. In fiscal 1971, the Federal Trade Commission's budget was $21 million. The Study Group recommends a $100 million budget for the Antitrust Division. THE CLOSED ENTERPRISE SYSTEM at 130.

such as Lee Loevinger and Donald Turner, for instance, in the opinion of the Study Group, failed to live up to advance expectations[15]. How can a Congress concerned over industrial concentration insure that expanded agency funding is not frittered away on trivial suits against the makers of such products as kosher hot-dog rolls, or dispensers of bull semen?[16] Or how can a Congress which has recognized a problem and passed a statute to deal with it insure that the statute will be used? Although Congress in 1950 amended section 7 of the Clayton Act in an effort to stem the wave of mergers which had swept the nation in the late 1940's, and despite the broad statutory language contained in the new section 7, *no* suit was filed by the Antitrust Division under the new act until 1955.

How can Congress and the Executive be sure that the courts will take cognizance of antitrust needs? Here it is the behavior of lower courts which has been most egregious. Section 3 of the Sherman Act, for example, makes conspiring to monopolize a misdemeanor; section 5 of the Clayton Act permits such a criminal conviction to be introduced in a later treble damage civil action as prima facie evidence of wrongdoing. Exposure to a possible jail sentence and severe civil damages would seem, in theory at least, a good deterrent to antitrust violations. Yet *no* businessman was sent to jail for price fixing until 1959. And widespread judicial (and governmental) acceptance of nolo contendere pleas in criminal cases undermines the possible deterrent effect of section 5, since a nolo plea, unlike a criminal conviction, cannot be used as prima facie evidence of wrongdoing in later civil actions. On the other hand, when the courts do give the agencies new remedies or new powers the agencies are often reluctant to make use of them. In *FTC v. Dean Foods Co.*,[17] for example, the Supreme Court, resolving a long-debated point, made clear that the FTC could petition a court for a preliminary injunction to stop a proposed merger. Since then, however, the FTC has made use of that power only once.[18]

Moreover, even if a case has been litigated and even if a sweeping victory has been won, there is no assurance that the Government will not compromise the victory by entering into a consent decree with the defendant.[19] Thus, after the Supreme Court held the merger be-

15. The blame in both cases, the book suggests, must be shared to some extent with the Attorneys General, Robert Kennedy and Nicholas Katzenbach, respectively.

16. Trivial suits are, of course, one way to "do something" without running any significant political risk.

17. 384 U.S. 597 (1966).

18. THE CLOSED ENTERPRISE SYSTEM at 357.

19. Nor is there any assurance that the courts will do their part to enforce antitrust policy. *See* Cascade National Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), wherein the Supreme Court found the district court decree to

tween Continental Can Company and Hazel-Atlas Glass Company illegal in 1964,[20] Continental was allowed to keep the two most profitable of Hazel-Atlas's eleven plants and eight of the nine other plants were sold to Brockway Glass Company, making Brockway the second largest producer of glass containers. In the words of the book, "the divestiture sale *itself* constituted a clearly illegal horizontal merger."[21] Finally, and perhaps worst of all, even a stringent decree gives no assurance that the victory will be meaningful, for there is *no* systematic review of the extent of compliance by the defendant with the decree. In the early 1960's, the FTC reviewed fifty-six "carefully selected" consent decrees for the Antitrust Division and found that *"one-third* of the decrees were being either violated or evaded."[22] In response to the Commission's recommendation that the Division bring contempt actions or seek decree modifications against the violators/evaders, the Division filed two new antitrust suits and just one contempt action. A sorry record, indeed.

II.

What, then, can be done? *The Closed Enterprise System* suggests a good number of changes which would aid in the enforcement of the antitrust laws. To remedy certain defects in the arsenal of weapons available to the Antitrust Division, for example, the Study Group proposes that an Economic Information Center be established,[23] and that the Division be given the power — now lacking — to take oral depositions of "potential" antitrust defendants prior to filing a case. If the Government is provided with sufficient economic data it will be much easier for the Division to determine which mergers, for instance, should be attacked. More substantively, the book recommends that the Division be notified of *any* merger in which one of the merging parties has assets in excess of $5 million. The Division would then have sixty days in which to decide whether to sue; if suit is not brought within that time the merger can proceed. If the Division does decide to

be the "opposite" of what the Supreme Court had previously mandated [*id.* at 142]; the case was remanded with instructions "that there be divestiture without delay," and that a different court judge be assigned to the case. *Id.*

20. United States v. Continental Can. Co., 378 U.S. 441 (1964).

21. THE CLOSED ENTERPRISE SYSTEM at 185.

22. *Id.* at 180.

23. "All publicly and privately held corporations would report sales and profit along divisional lines, as well as general data ranging from their investment accounts to advertising expenditures, to one computerized central information-storage system . . . . Quickly, and with far less expenditure of resources, the Antitrust Division could tell what the market shares are, what an industry's concentration ratio is, what the actual economic effect of past cases has been, and, partly as a result, could decide what future cases should be filed." *Id.* at 135–36.

sue, a restraining order, good for sixty days, will *automatically* issue. At the end of the second sixty-day period there will be a preliminary injunction hearing, after which the court can enjoin the merger pending trial if the Government has made a prima facie showing of the illegality of the merger.[24] Such a procedure would reduce the often difficult problem — created by the inordinate length of antitrust litigation — included in divesting one company of another company with which it has been working closely for a number of years. In addition, the problem of measuring compliance with decrees imposed on defendants could be alleviated by inserting provisions in all decrees requiring regular submission by the defendant of detailed reports of its activities to the Antitrust Division, enabling easy monitoring of the extent of compliance by a court-appointed special master, whose fees would be paid by the defendant.

To help make the treble damage civil action a more effective deterrent, the book recommends that a nolo contendere plea be admissible at later civil trials as prima facie evidence of wrongdoing. It is also suggested that, in order to enhance the effectiveness of consumer class actions, bifurcated trials should be utilized: the first part of the trial to determine the question — and extent — of the defendant's aggregate liability to the class, and the second part to determine what portion of the recovery should be given to each member of the plaintiff class.[25] Such an approach simplifies the difficult problems of management presented when the class of plaintiffs is large and, to some extent, unknown — the typical consumer class action situation.

The most important suggestion, however, involves not new procedures or legislation, but education of the public with respect to the common societal benefits that could be reaped from vigorous antitrust enforcement. Consumer awareness of the evils of "closed enterprise" behavior, coupled with communication of that awareness to elected officials, is the best way to insure restoration of a system of free and open competition. *The Closed Enterprise System* is a meaningful contribution to that goal.

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24. The idea is not entirely original. *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY 258 (1959).

25. The second of these suggestions has been approved by at least one court. *See In Re* Coordinated Pretrial Proceedings in the Antibiotic Antitrust Actions (Consumer Class Actions Opinion, 333 F. Supp. 278 (S.D.N.Y. 1971), *mandamus denied,* 449 F.2d 119 (2d Cir. 1971), in which the court stated:

> [T]he question of liability is clearly predominant over the damage issue.
> . . . It is far simpler to prove the amount of damage to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants.

Id. at 281. For a criticism of that decision *see* Handler, Twenty-Fourth Annual Antitrust Review, 72 COLUM. L. REV. 1, 34–42 (1972).

III.

It should be noted that *The Closed Enterprise System* is not without faults. The style is often sarcastic and barbed to the point of being distracting,[26] and is, at times, apocalyptic. There are also some internal contradictions. Thus, the 1968 Merger Guidelines promulgated by the Justice Department are criticized:

> The Guidelines hurt enforcement by telling savvy businessmen and their lawyers how close they can get to the line of illegality; such help will encourage brinksmanship, line-crossing, — and quibbling over percentage points. . . . The Guidelines freeze antitrust law, inhibiting flexibility as situations change.[27]

On the other hand, the FTC is chastised for not using its guidelines *more*.[28] And in its zeal the Study Group has a tendency to over-read, and over-rely on, particular scholarly works in support of a point,[29] sometimes ignoring those which might challenge some of its conclusions.

Yet even with these faults, the book, by bringing together in one volume a wealth of information for the general reader on the history and procedure of our antitrust efforts along with an analysis of what has gone wrong and suggestions on how the defects can be corrected, is a useful book,[30] hopefully, advancing in some small measure the restoration of the free and open economy.

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26. For example, in referring to former Senator Eugene McCarthy's intervention in a grand jury investigation of Minnesota banks the book makes a point of referring to the Senator as "'Clean' Gene." THE CLOSED ENTERPRISE SYSTEM at 35.

27. *Id.* at 86–87.

28. Admittedly, the FTC guidelines lauded by the book were for a *single* industry (cement), and promulgated after intensive research. Such industry guidelines, however, would still "inhibit flexibility" and encourage "quibbling" and "brinksmanship."

29. Donald Turner is roasted, for example, for not proceeding against oligopolies ("shared monopolies") while in charge of the Antitrust Division, especially since he had, in 1959, "recommended a major deconcentration effort." THE CLOSED ENTERPRISE SYSTEM at 252, referring to C. KAYSEN & D. TURNER, ANTITRUST POLICY (1959). Yet the thrust of the 1959 Kaysen and Turner recommendation was for legislative action against shared monopolies. *Cf.* Posner, *supra* note 6, at 1565–66 (1969). Turner did, however, within a year of leaving office, write an article which concluded that shared monopolies *could* be attacked under existing legislation. Turner, *supra* note 6, at 1216–17 (1969).

30. The legal profession, in particular, will find interesting the section on the antitrust laws and the bar. THE CLOSED ENTERPRISE SYSTEM at 270–73. *See also* Comment, *The Bar as Trade Association: Economics, Ethics, and the First Amendment*, 5 HARV. CIV. RIGHTS-CIV. LIBS. L. REV. 334 (1970); Comment, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WISC. L. REV. 1237. *Cf.* Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

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