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Book Review

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BOOK REVIEW

THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS. By Arnold S. Trebach. (New Brunswick, New Jersey: Rutgers University Press, 1964. 350 pages. $10.00.) — Most discussions of the administration of justice in the United States appear either (a) to stress the deficiencies and neglect the strengths, or (b) to insist upon the virtues and gloss over the defects of the American legal structure. Consequently, it was an unexpected pleasure to find that Trebach has produced a stimulating blend of factual analysis and workable ideas for improving the machinery, without slipping into either iconoclasm or apologetics. The author, as Administrator of the Defender Project of the National Legal Aid and Defender Association, is passionately concerned with the problems of unequal justice. However, his is a passion that does not strike out gallantly but blindly, rather it gives life and drive to his collection, analysis, and interpretation of the facts of life in the "constitutional underworld," where poverty, ignorance, and impotence make meaningless officially guaranteed rights and immunities. An overly brief review of pertinent legal and social science materials is combined with some questionnaire and interview data from federal and state prisoners in New Jersey and Pennsylvania, as well as impressions and examples from the writer's experience, to document the extent of injustice in our system, to locate the points at which the system is especially inadequate, and to indicate practical alternatives to current arrangements.

The evidence indicates that ignorance of law, deliberate disregard of laws and procedural rules, and a bias toward cheap and easy rather than thorough and demanding methods for handling criminal cases raise the odds against the accused at every stage in the legal process. Arrests without probable cause and often with little chance of a conviction account for a very high proportion of total arrests, giving many individuals an arrest record that may seriously affect their job opportunities and reputations. Illegal coercion in arrest and interrogation, illegal or at least highly questionable searches and seizures, totalitarian invasions of privacy, and illegal detention are not infrequent police practices. Delay, haste, and a failure to appreciate the helpless confusion of the accused, who is usually without any legal assistance, apparently characterize the preliminary hearing. Tremendous pressure is exerted upon the accused to "cop out," thus saving the law enforcers — and the accused, it should be noted — the trouble and expense of a major test of the case. Since the "criminal court is pre-eminently an institution for the poor,"[1] and since the indigent rarely receive legal assistance — competent or not — until they have been arraigned, the accused is commonly lacking in knowledge of his rights or of how to prepare a defense. Moreover, while the prosecution is preparing the case for guilt, the accused is frequently unable to raise bail and is spending his time in jail with little or no chance to attempt a defense. If counsel finally appears in time for the trial, he often lacks the training and experience needed if he is to be an effective advocate, as well as the time and resources to investigate the facts of the case. These and many other facts leave no doubt that a great many, probably the majority, of those accused of criminal acts lack the protections which are presumably guaranteed by the federal constitution.

That justice and legality can never be safely taken for granted is an old and familiar lesson, but one which is easily forgotten as long as we and ours are secure, and isolated from those who are not. Trebach's book reminds us that realities and democratic ideals are not synonymous at any point in our system — or any other, for that matter — but the gap is particularly wide in regard to (1) protection of the individual from arbitrary and illegal treatment by police, (2) effective checks on the behavior of prosecutors, (3) availability of legal assistance to con-

1 Text at 81.

victs, and (4) resources allocated to enforcement and resources available for defense.

Among other important improvements the author suggests that what is really needed is a "supervisor of rights" patterned after the *ombudsman* of Denmark and similar offices in other Scandinavian nations.[2] Briefly, such an agency has full authority to review and inspect the operations of every part of the legal system and to initiate corrective measures, ranging from advisory discussions with those involved to submission of investigative findings and proposed remedies directly to the highest authority. Recognizing that there would be difficulties in adapting a regulatory device developed in relatively small, homogeneous, centrally governed nations to the needs of a large heterogeneous population with a federal system, Trebach still believes that there "is no substantive reason why agencies with many of the functions of the *ombudsman* could not be created in this country."[3] Unfortunately, the author's own book indicates that the difficulties may be far greater than he appears willing to admit. The fact that federal constitutional rights do not necessarily apply in non-federal cases is going to remain a fact as long as we have any significant degree of state autonomy, despite decisions by the United States Supreme Court. Lower state courts can still ignore such decisions in most cases and expect to get away with it, especially when encouraged to do so by those in control at the state and local levels. The realities of statism and localism indicate that the facile notion of complementary sets of state and federal supervisors and inspectors is dubious. To call a spade a spade, American history and Trebach's evidence says that the federal government has been more effective in the protection of individuals than have the state governments. Unless states, including Mississippi, are transformed into something they have seldom or never been, there is little chance that a federal-state system of *ombudsmen* with separate domains would make much difference for the vast bulk of those who receive the punitive attention of the law. The implication, repugnant to most of us, is that a supervisory system will work only to the extent that a single national office has the power of inspection at every level of government. Repugnant or not, recent trends indicate that there will be some such development at the expense of "state sovereignty" until and unless *each* of the states at least equals the federal government in insuring the rights due every individual according to our national ideology.

Not surprisingly, since the author is not a scientist, the weakest part of the study is the amateurish simulation of scientific data collection. This reviewer was especially unhappy with the performance precisely because he agrees with almost every conclusion reached by the author. It is a disservice to any cause to leave supporting research wide open to the charge of bias, and that is what has happened here. The plain fact is that without a semblance of random sampling nothing found in the 359 questionnaires can be generalized. Thus, we actually have no data on the range and frequencies of experienced injustices, no explicit and systematic checks on the reliability and validity of the convicts' recall and perceptions of their experiences, and no defensible data on federal-state differences in police, courts, and penal conditions. Although "a few"[4] questions on the schedules were open-ended, most were forced-choice. Since one does not know in most cases whether a question was one or the other, an unfriendly critic could use the possibility of bias in the determination of which questions were to be forced-choice and which open-ended to discredit the research. But the most serious deficiency lies in the fact that the federal and state prisoners are clearly not comparable, at least in one extremely important respect and possibly in others. A glance at the distribution of offenses[5] shows that 60 percent of the 245 New Jersey prisoners

2 See SAWER, OMBUDSMEN (London: Cambridge University Press, 1964).
3 Text at 230.
4 Text at 238.
5 Text at 245.

were in for either homicide, robbery, rape and sex crimes, atrocious assault and battery, or burglary, while *none* of the federal prisoners were in for such serious crimes. Major offenders might reasonably be expected to have experienced less considerate handling by law officers, and to exhibit somewhat more hostility toward our legal institutions.[6] In addition, we do not know from the composite data[7] whether the federal convicts differed from the state prisoners significantly in regard to education or occupational background. Nor do we know what might be the significance of the fact that there were higher proportions of nonwhites in both the state and federal samples than would have been expected from the official statistics on the populations from which these samples were taken, or of the fact that the discrepancy is much greater for the federal than for the state prisoners. It could be important, too, that there was no breakdown by "federal" and "state" of the responses to such questions as those asking about knowledge of legal rights,[8] assignment of counsel,[9] and prosecution-defense negotiations,[10] although breakdowns were given for questions relating to police behavior[11] and to prison conditions.[12] In short, poor methodology has wasted a beautiful opportunity to reinforce with hard data conclusions arrived at by legal, journalistic, and commonsensical analysis.

Any reviewer has the duty of ferreting out the defects in a publication, even when he is fully in sympathy with the author's objectives and conclusions. This time the duty has been painful. Despite the failure of the prisoner questionnaires to provide more than illustrative and suggestive data, the book on the whole will be a very useful and readable quick reference for those who are concerned with the problems of American justice but have not the time to study these problems thoroughly.

*Austin T. Turk**

THE ROBINSON-PATMAN ACT: SUMMARY AND COMMENT. By Daniel J. Baum. New York: Syracuse University Press, 1964. Pp. xviii, 167. $5.75. — A society dedicated to the proposition that the production and distribution of goods and services should, in the main, be left to the initiative of private individuals and groups, must of necessity "arrive at prescriptions and proscriptions designed to keep the processes thus unleashed from interfering with the attainment of the fundamental goals and aspirations of the community and, ultimately, from destroying the legal framework in which they operate."[1] Few would question the part played by *laissez-faire* concepts in the dramatic growth and development of the economic superstructure of our society. But times change, and with them the conditions out of which are derived the political and social theories designed for their rationalization and service. Such theories, however, institutionalized in the womb of time, often survive the conditions from which they were generated and assume an independent existence. Exhibiting a tenacity to life as formidable as any attributed by the psychologists to man himself, the old bottles — to use Toynbee's metaphor — of institu-

6 There is research evidence suggesting that such is the case. See, *e.g.*, Mylonas and Reckless, *Prisoners' Attitudes Toward Law and Legal Institutions*, 54 J. CRIM. L., C. & P. S. 479, 482 (Table 1) (1963).

7 Text at 246.

8 Text at 250, 258.

9 Text at 259.

10 Text at 260-61.

11 Text at 250-57, 262-63.

12 Text at 264.

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1 Riesenfeld, Book Review of ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, 50 CALIF. L. REV. 915 (1962).

tionalized theory endeavor desperately to contain the new wine of different social conditions.[2]

Historically, however, the "unseen hand" simply proved ineffective as the sole regulator of economic life in this country. Business growth in the latter years of the last century meant power, and power meant the opportunity for abuse.[3] Further, new social demands were made and new political goals were fashioned in response. As society became more complex and pluralistic, competing and often contradictory, values had to be assessed one against the other.[4] Thus, the farmers' demand in the 1870's for an end to railroad rebates and long-haul/short-haul price discriminations had to be weighed against the freedom of the railroads to operate their businesses as they saw fit. The resolution of the problems of competing values and demands and of the pressure which they inevitably imposed upon the framework of our free society, called for a great deal of ingenuity. And, ingenuity there was — "ingenuity in the development of pragmatic solutions to problems."[5] This, indeed, was the origin of our antitrust and trade regulation laws. "The extremists who called for a complete *laissez-faire* approach, a sort of economic law of the jungle, were wisely defeated. Those, on the other hand, who called for outright federal ownership and control have never succeeded. A balance was struck, resulting in the growth of economic individualism and the fostering of free and fair competition."[6]

As ingenious as the solution has proven to be, however, all did not end with the 1890 Act.[7] New conditions continued to generate new problems, and new problems brought new laws.[8] The pragmatic American approach to legislation of meeting new needs as they arise with specific new or amendatory statutes is not without its problems. In responding only to specific measures and needs as they arise, the law may seem to grow like Topsy, resulting in what may often appear to be an illogical and incoherent quagmire of specific prescriptions and proscriptions only generally related and often contradictory.

Of all the provisions of the antitrust laws, the one most vulnerable to this criticism has proven to be the Robinson-Patman Act.[9] As summarized recently by a leading commentator:

> Twenty-six years after its enactment the Robinson-Patman Act remains as the most controversial of all the statutes labelled "antitrust laws." The classification of the statutory prohibition of price and service discrimination as "antitrust" legislation has long been seriously questioned and criticism of the act has mushroomed until it is exceedingly difficult today to find an ardent defender among academicians or other objective observers. Inept draftsmanship, erroneous basic precepts, class protectionism, and *inconsistency with Sherman Act policies* are among the many fundamental faults found with the legislation itself. Confusion in interpretation, vacillation in policies, lack of guiding strategy in enforcement (or misguided strategy) and *failure to perceive the need for harmonizing its interpretations with Sherman Act policies* stand out as some of the more cogent criticisms of the enforcement and administration of the act.[10]

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2 *Cf.* Nichols, "Federalism *versus* Democracy," in FEDERALISM AS A DEMOCRATIC PROCESS 50-51 (1942).

3 See generally JOSEPHSON, THE ROBBER BARONS (1934).

4 Even the dean of American *laissez-fairers*, Professor Jacob Vinar, has recently acknowledged that modern society cannot forego providing for "other ingredients of the good life not consistent with laissez-faire." Vinar, *The Intellectual History of Laissez Faire*, 3 J. L. & ECON. 45 (1960).

5 KINTNER, AN ANTITRUST PRIMER 15 (1964).

6 *Ibid.*

7 The Sherman Act, 26 *Stat.* 209, as amended, 15 U.S. Code, §§ 1-8.

8 *E.g.*, the Clayton Act, 38 *Stat.* 730, as amended, 15 U.S. CODE, §§ 12-27, 29 U.S. Code, § 52; the Federal Trade Commission Act, 38 *Stat.* 717, as amended, 15 U.S. Code, §§ 41-58; the Robinson-Patman Act, 49 *Stat.* 1526, 15 U.S. Code, §§ 13, 13a, 13b, 21a.

9 *Ibid.*

10 Weston, Book Review of ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, 60 MICH. L. REV. 1020 (1961). (Emphasis added.)

There can be little doubt but that the Robinson-Patman Act is controversial and complex. That criticisms are plentiful, however, is not to suggest its repeal. The act, just as all the other antitrust laws, was a response to a definite need, *i.e.*, to place some curb on the power of large buying groups, particularly the chain grocery stores. Extensive investigation had shown that chain grocery stores were able to secure favored pricing treatment from suppliers by virtue of their large-volume purchases. Price reductions to chain stores were reflected in a lower retail price to the consumer, thus placing the independent grocery stores in an unfavorable competitive condition. There resulted broad public support for legislation which would compel suppliers to treat all buyers on a fair and equal basis in order that the small independents would not be prejudiced by their lack of purchasing power.[11]

Further, the act has proven impervious to amendment. It must thus be recognized that though defects abound, the definite need which prompted its passage is still "felt" at least to the extent that a broad consensus supports its two primary objects:

> 1. To prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among buyers; and
>
> 2. To prevent unscrupulous buyers from using their economic power to exact discriminatory prices from suppliers to the disadvantage of less powerful buyers.[12]

If the act is thus to remain with us regardless of criticisms of inept draftsmanship, erroneous basic precepts, inconsistency with Sherman Act policies, etc., at the least it might be made more orderly and understandable. The tremendous amount of precedent which has developed around the act[13] is a step in this direction. To be meaningful, however, as a basis of predictability the numerous FTC complaints and orders, as well as Justice Department cases and private actions, must be synthesized and clarified. Professor Baum's book, *The Robinson-Patman Act: Summary & Comment,* is the most recent effort in a series of works directed to this end.[14]

Professor Baum's little book, which numbers only 167 pages, is not, nor does it purport to be, an exhaustive scholarly treatise in the mold of Rowe, *Price Discrimination Under the Robinson-Patman Act,* which when added to the 1964 supplement comprises 860 pages. It is purely and simply a "summary and comment."[15] Concise and readable, Professor Baum's book has utility "for the law student and the business student as well as the general practitioner and the antitrust specialist."[16] In accomplishing the objective as stated, Professor Baum has performed a singular service to antitrust literature.

Appropriately, the first four chapters deal with the provisions of the Robinson-Patman Act itself, *i.e.*, price discrimination (§ (2a)), meeting competition (§ 2(b)), brokerage (§ 2(c)), merchandising allowances (§§ 2(d), 2 (e)), and inducing a discriminatory price (§ 2(f)). In each, the statutory language is analyzed, the case-law discussed, and a commentary calls attention to the remaining and resulting problems. Also included are short chapters on unreasonably low prices (§ 3), unfair methods of competition (§ 5 of the Federal Trade Commission Act), combinations in restraint of trade (§ 1 of the Sherman Act), and orders under the Robinson-Patman Act. Finally, and probably most enlightening is the chapter on

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11 KINTNER, *supra* note 5, at 59-60.
12 *Id.* at 60.
13 Weston, *supra* note 10.
14 Other such works include ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), and the 1964 Supplement; EDWARDS, THE PRICE DISCRIMINATION LAW (1959); and the Report of the Attorney General's National Committee to Study the Antitrust Laws 155-221 (1955).
15 Text at vii.
16 *Ibid.*

the relationship between the Department of Justice and the Federal Trade Commission in selecting cases. There are also a number of valuable appendices.

In his selection of materials from the plethora of Robinson-Patman cases and writings, and in the organization of his presentation, Professor Baum's careful and informal analysis will be a valuable reference tool for any serious antitrust student or practitioner interested in this much-maligned but little understood Federal law. His sympathetic, but fair and realistic treatment, constitutes a vital step in bringing order and understanding to this complex and confusing area of the law.

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