

BOOK REVIEWS

THE THROWAWAY CHILDREN. BY LISA AVERSA RICHELTE.
Philadelphia: J. B. Lippincott, 1969. Pp. 1, 342. \$6.95.

Justine Wise Polier †

The Throwaway Children expresses the justifiable anger and confusion many lawyers and some judges feel when confronted with the lack of due process and the court delays prevalent in a juvenile court system which ultimately fails to achieve what society expects of it. Drawing on her tour of duty as an assistant district attorney in the Philadelphia Juvenile Court, the author presents case histories with perceptive and poignant concern. Each child's problem points to the same deficiencies in the juvenile courts.

The case histories present children hurt by parents, ignored by schools, and rejected by the community. However, concern for these neglected, abused, or delinquent children does not blind the author to the earlier tragedies of parents who have themselves been objects of parental or community neglect and abuse. Neither does this concern obscure the terrible inadequacy of services available to the court and the prevailing apathy of the community—both causative factors in generational tragedies. In light of these realities the author questions the utility of the juvenile court as an institution and understandably insists that "when the jammings and the breakdowns persist, it is time to take a long, hard look at the system itself."

In doing so, the author comes down particularly hard on the inadequate social services which hobble the juvenile courts. She rightly describes detention facilities as overcrowded jails, sometimes with superficial decorations. Probation is properly presented as the occasional gesture toward guidance by a "caseworker" whose case load makes more than a lick and a promise of supervision impossible. The author's examples of the makeshift operations in public institutions for delinquents, the dearth of foster homes for dependent and neglected children, and the lack of facilities for mentally retarded, mentally ill, and emotionally disturbed children are based on her experience in Pennsylvania. However, they are all too applicable to conditions prevailing throughout the country.

The kindly, wise judge, confronted with services which rarely help and often harm the children they "serve," is regarded by the author

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as someone who can at times prevent injustice and occasionally secure help for an individual child. But more often, he is reduced to impotence because he cannot fulfill the obligations imposed by the rhetoric of juvenile court laws.

While focusing on such failures of the juvenile court system itself, the author also emphasizes that apathy, indifference, and deeply-rooted hostility on the part of the public are significant factors in the conversion of juvenile courts from a rehabilitative agency to a "throwaway process." "Control and punishment, not treatment," she writes, "are what the public really demands." The author fails to see consistently, however, the relationship between these public attitudes and the failures she discerns in the juvenile court system. She is oversimplifying when she analyzes and evaluates the juvenile courts apart from the larger society which nurtures or fails to nurture them.

The author also oversimplifies, as well as overgeneralizes, when she considers the historical development of the juvenile court system. The past, as she presents it, is far too rosy. She asserts that until World War II the juvenile court could summon and receive assistance from budding, idealistic social agencies. At the same time, however, large numbers of poor children and their problems were ignored and excluded from any help whatsoever. Few nonwhite children were considered for placement regardless of need, and those children who were placed generally were sent to segregated and abominably administered state institutions.

Similarly, the author exaggerates the role and effectiveness of the nineteenth century "do-gooders." To be sure, they were dreamers, publicizers, and mobilizers of support for such causes as abolishing slavery, creating mental hospitals, and improving prison conditions, as well as helping abused, neglected children. But they took only the first basic steps toward eliminating the problems they saw so vividly, and much remained to be done when they finished their work. In fact, the tasks they set out are still far from completed. Racial injustice persists. One eminent physician commented recently that the chief difference between our state prisons and our state hospitals is that the beds are somewhat softer in the hospitals. Criminal courts have become ports of entry to prisons where convicts become embittered and hardened rather than rehabilitated.¹ However, the author fails to relate these ultimate failures to the transformation of what she terms Jane Addams's dream of individualized justice into a "nightmare." Rather than exaggerating the achievements of the "do-gooders" or belittling such dreams as individualized justice for children, it is necessary to see the juvenile court in perspective and in relation to other social and judicial institutions of the day.

¹ It is only recently that the courts have begun to ask whether a person who is committed as mentally ill to a hospital is "entitled" to appropriate treatment. *See, e.g., Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (Bazelon, C.J.).

In fairness to the author, the book evidences an awareness of the complex reasons for tragedies suffered by the parents and children she describes. She strikes out at ghettos, the inadequacies of the welfare bureaucracy, poverty which depresses initiative, schools that fail to teach, and the lack of services for care and rehabilitation. Unfortunately, here again the author paints with too broad a brush, and in-depth material is too scanty. Thus the author proposes reforms which in the light of the problems she has perceptively identified and described in her case studies, are simplistic, inadequate, and inappropriate. Reforms she suggests, such as voluntary action by labor unions to end discriminatory practices, women's clubs sponsoring individual children, voluntary programs in which bright "with it" young fashionables can serve, self-imposed coordination between voluntary agencies, and aggressive policies by "Y's," churches, and settlement houses to reach children in trouble, provide no answer to the basic problems the author recognizes in other parts of the book. Furthermore, the author's confidence in the benefit of neighbors helping to supervise "failing families" is not counterbalanced with appropriate concern for the potential dangers of community vigilantism and invasion of privacy.

There is such an unfortunate lack of central philosophy and consistency in the author's approach to broad basic issues that the book seems to be the product of two different persons. At one point the author recognizes the indifference and hostility of Americans to those who do not "make it"; yet, at another, she optimistically speaks of America as a humanistically oriented society, ready to be called to serve the very people it now treats with indifference and hostility. Other inconsistencies are troubling. While recognizing the need for vast funding to meet the problems of "throwaway children," the author proceeds to speak of "a plethora of federal projects." Then, while hailing the protection of constitutional rights through *Gault*,² the author supports a mandatory cooling-off period for divorces and would empower judges to grant or withhold divorces on the basis of their judgment about what is in the "best interest of children."

Apart from some recommendations for improving court procedure, the author relies for her proposals on the recommendations of President Johnson's Commission on Law Enforcement and the Administration of Justice.³ In doing so she speaks over-optimistically of the response to the *Kerner Report*⁴ and states, "We seemed willing enough to listen when the race issue was the topic. Why then, are we so reluctant to face the realities of crime." The hard fact is that this country has not responded in any substantive fashion to the problems presented by either report. To do so would require both a different

² *In re Gault*, 387 U.S. 1 (1967).

³ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

⁴ NATIONAL ADVISORY COMMISSION, REPORT ON CIVIL DISORDERS (1968).

concept of the responsibility of government toward those who have not been included in the opportunities of an affluent society and a far greater investment in health, education, welfare, and economic opportunities.

In light of the case histories eloquently presented by the author and the findings of the Commission on Law Enforcement, it becomes clear that the juvenile courts, like the criminal courts of first instance, reflect the values of American society today and the extent to which it is unwilling to face the problems of its troubled members. The present drive for "law and order" without justice, the desire for cheap solutions to human problems, and the rejection of difficult tasks (including the appropriation of resources to meet essential needs of people) are trends which must be reversed before "throwaway" children and adults cease to belie the "American dream."

CHINA AND INTERNATIONAL AGREEMENTS: A STUDY OF COMPLIANCE. BY LUKE T. LEE. Durham, N. C.: Rule of Law Press. 1969. Pp. 231. \$7.10.

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Despite recent studies of the politics and law, both domestic¹ and international,² of Communist China, Western opinion remains divided over the policy which should be followed towards that country. Some voices call for continued isolation of the Communist regime, emphasizing evidence of its open hostility to the international status quo. Others, however, seek an end to isolation and argue that China has indicated a willingness to accept aspects of the existing international system. A review of Communist China's twenty-year record in international law is imperative if this issue is to be resolved satisfactorily.

The official United States view is that Communist China has shown little interest in, and no real intention of, complying with international agreements or assuming international obligations. In 1958, for example, a Department of State memorandum announced that Communist China "has shown no intention to honor its international obligations. One of its first acts was to abrogate the treaties of the Republic of China, except those it chose to continue."³ Moreover, it is the State Department's opinion that China "has failed to honor various commitments entered into since [the establishment of the regime]."⁴ The Soviet Union reached a similar conclusion in 1967, when it charged that China's anti-Soviet activities violated the 1950 Sino-Soviet Treaty of Friendship, Alliance and Mutual Aid.⁵

Having concluded that in the past China has shown little interest in complying with international agreements, western nations, particularly the United States, need answers to several important questions to evaluate the efficacy of isolation: Is it worthwhile to make treaties with Communist China? Will Communist China adopt the same law of

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¹ *E.g.*, J. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA: 1949-1963* (1968).

² *E.g.*, Chiu, *Communist China's Attitude Toward International Law*, 60 *AM. J. INT'L LAW* 245 (1966). For a discussion of new developments in the field of Chinese law, see Cohen, *New Developments in Western Studies of Chinese Law: A Symposium*, 27 *J. ASIAN STUDIES* 475 (1968).

³ 39 *DEPT OF STATE BULL.* 388 (1958).

⁴ *Id.*

⁵ *See* Pravda, Feb. 10, 1967, as translated in 19 *CURRENT DIGEST OF SOVIET PRESS*, No. 6, at 6 (March 1, 1967).

treaties accepted by western nations? Will China comply with her international obligations? Luke T. Lee intends to answer some of these questions in *China and International Agreements*. In pursuit of his investigation of China's future behavior, Mr. Lee carefully reviews Communist China's record of compliance with boundary treaties (chapter 4), the Korean Armistice Agreement (chapter 6), various fisheries agreements (chapter 7), trade agreements (chapter 8), and its behavior in ambassadorial talks with the United States (chapter 5). He concludes that China has compiled a commendable record of treaty compliance, and suggests that no evidence exists of noncompliance with treaties actually concluded by the Peking regime. According to Lee, Western scholars fail to differentiate clearly between compliance with treaties and compliance with rules of international law: "The consensus appears to be that, while negotiations with Peking is not always an easy matter, once an unambiguous agreement is reached, compliance likely will follow."⁶ Lee then raises the following questions:

In the absence of evidence concerning Chinese noncompliance based on a review of observable and selected treaties and informal agreements, and in view of at least one instance of Chinese renunciation of special rights derived from unequal treaties, would it not be in the world interest to place Peking under the regime of as many treaties as possible, including the Charter of the United Nations, the many multilateral conventions concluded under United Nations auspices such as the Geneva Conventions on the Law of the Sea and the two Vienna Conventions on Diplomatic and Consular Relations and the prospective disarmament treaties including one to prevent the spread of nuclear weapons? In the face of Peking's emphasis on treaty-centered international law, would it not be desirable for China to participate in the progressive development of international law and its codification in the International Law Commission? Would not international law be made more effective if it were accepted and complied with by a state whose population constitutes a quarter of humanity? Indeed, can "international law" be properly so-called if a quarter of the world's population is outside its pale? Of more immediate relevance, what would be the impact, if any, of a treaty-bound China upon future policies in Viet-Nam?⁷

One can hardly contest that it is vital to study in depth the international treaties to which Communist China is a party before a sound

⁶ L. LEE, *CHINA AND INTERNATIONAL AGREEMENTS: A STUDY OF COMPLIANCE* 119 (1969).

⁷ *Id.* 122-23.

conclusion can be reached about China's record of treaty compliance. Mr. Lee's book represents a first step toward such an analysis. Nevertheless, one must remember that treaty failure involves many aspects, only one of which is compliance. It is also concerned with a variety of ways in which a treaty may cease to serve the purposes for which it was intended. In addition, a study of China's compliance with official commitments is relevant to understanding her fundamental attitudes toward the world community. Thus it is clear that the scope of Lee's study is unduly narrow, concentrating as it does on China's "compliance with agreements actually concluded by it."⁸

Moreover, there are other pertinent factors that should be considered in an attempt to predict the treaty behavior of a country. For instance, some account of the dramatic effect of the Cultural Revolution with its concomitant internal disorders is necessary. The domestic economic situation is also one of those factors that tend in varying situations to affect a government's policy and practice, and it takes on particular significance in appraising China's international behavior. For instance, in those years when the economic record was poor (1958-60), China was unable to meet its export commitments to the Soviet Union or to Indonesia.

However, Lee unfortunately narrows his scope even further by dealing only with those treaties which support his conclusion that China can be trusted. The book reads as though the conclusion began as an hypothesis which was then confirmed by omission of inconsistent material; many treaty violations that have inevitably occurred are ignored by the author.⁹ For example, the discussion is limited to non-political treaties, which substantially diminishes the value of Lee's observations; any informed scholar knows that Communist China's record with treaties of nonintervention fails in a comparison with its performance of nonpolitical agreements.¹⁰

But the failures of the book are not merely those of omission. The author also discusses inadequately several important incidents. The Sino-Burmese boundary negotiations, for instance, were actually much more difficult than they appear as described in the book.¹¹ Similarly, the ambassadorial talks proved to be far more complicated than Lee indicates.

Furthermore, a study such as Lee's should not lose sight of China's theory concerning the law of treaties. The Chinese deny that international organizations such as the United Nations are subjects under international law, and they therefore maintain that such organizations

⁸ *Id.* 11.

⁹ See, e.g., J. COHEN & H. CHIU, *THE PEOPLE'S REPUBLIC OF CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (forthcoming, 1970); H. CHIU, *THE TREATY LAW AND PRACTICE OF COMMUNIST CHINA* (forthcoming, 1970).

¹⁰ See *C.P.C. Greets 28th Anniversary of Burmese C.P.*, 10 *PEKING REVIEW* 5 (1967); *N.Y. Times*, March 22, 1969, at 5, col. 1.

¹¹ See, e.g., H. HINTON, *COMMUNIST CHINA IN WORLD POLITICS* 308-16 (1966).

do not have the capacity to conclude treaties in their own right. Those like Lee who assert that Communist China would comply with treaties or agreements concluded by the United Nations, when it actually denies that organization's capacity for making treaties,¹² bear a heavy burden in justifying their position.

Communist China's distinctive view of treaty law is also reflected in its attitudes toward certain international declarations. For example, it insists that the Cairo Declaration and the Potsdam Proclamation are not broad policy statements, but rather, binding legal commitments.¹³ Consequently, compliance with these agreements should, in China's view, dictate that Taiwan be restored to Communist China immediately.¹⁴

It is reasonable to conclude from Mr. Lee's work that any attempt to find a fixed "Chinese style" of treaty practice in order to predict China's future behavior in the international community can yield only doubtful results of limited value. A proper study of Communist China's treaty practice demands an understanding of her ideology, political situation, and internal problems, as well as factual research in all of the treaties (political or otherwise) in which China participates. This approach would encompass a variety of factors, all of which tend to affect a nation's decision-making, foreign policy, and international behavior. Adequate analysis of the problem of treaty compliance requires a wider perspective than that taken in the author's book. While Lee's work represents a first and important step toward the study of Communist China's treaty law and practice, a reliable prediction of China's future behavior awaits more precise observation and description.

¹² See Chiu, *Certain Legal Aspects of Communist China's Treaty Practice*, 1967 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 117-19; Chiu, *The Theory and Practice of Communist China with Respect to the Conclusion of Treaties*, 5 COLUM. J. TRANSNAT'L L. 1, 3 (1966).

¹³ See U.N. Doc. S/1715 (1950) (statement by Chou-En-lai); Shao Chin-fu, *The Absurd Theory of "Two Chinas" and Principles of International Law*, 1959 STUDIES IN POLITICS AND LAW (CHENG-FA-YEN-CHIU), No. 2, at 14.

¹⁴ For a discussion of the Western views on this problem, see Jain, *The Legal Status of Formosa*, 57 AM. J. INT'L L. 25 (1963).

THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE. BY STUART S. NAGEL. Homewood, Illinois: The Dorsey Press, 1969. Pp. xv, 399. \$8.50.

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Inherent in the traditional approach to study of the legal process was a commitment to the status quo and a disinterest in the empirical study of the causes and effects of legal policies. Holmes and Pound, among others, began attacks on this traditional approach, and with the encounter between the social forces generated by the Depression and the intransigence of a largely conservative judiciary, a more radical group of so-called legal realists emerged. Their credo was, in the words of Karl Llewellyn, to examine all aspects of the legal process to "see it as it works," and using mostly crude and simple analytical tools, they systematically gathered empirical data. However, the influence of these legal realists on the law schools and legal scholarship waned as the 1930's came to a close.

At the same time that legal realism was beginning to flourish, the political science profession experienced an analogous intellectual upheaval. In contrast to the short-lived effect of the legal realists, the innovators in the political science profession guided the transformation of their discipline from its traditional and institutional focus to one that is behavioral and empirical. Political scientists involved in public law were slower than their colleagues in other sub-fields of the discipline to utilize the behavioral perspective and to develop quantitative techniques, perhaps because of their cross-disciplinary ties to conventional legal analysis. But by the mid-1960's an impressive array of public law political scientists had brought public law into the mainstream of the profession.

As a result of these developments in political science and a growing awareness of America's manifold social problems and the relationship of the legal system to those problems, the empirical approach of the legal realists began to find new acceptance in the law schools in the 1960's. A new trend of legal scholarship was evidenced by numerous empirical studies of jury decision-making, bail, plea-bargaining, police practices, the law and the poor, and compliance with Supreme Court decisions. It is within this context of developments in legal and political science scholarship that *The Legal Process From a Behavioral Perspective* by Stuart S. Nagel, a practicing lawyer and professor of political science at the University of Illinois, ought to be considered.

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I. STRUCTURE AND PURPOSE

Professor Nagel's book is derived from twenty-five of his research papers published over the last decade, primarily in law journals, but also in leading political science periodicals. The studies are linked together by short introductory essays, an epilogue, and a conceptual framework which is founded on the stimulus-response paradigm. In Nagel's words, "law is viewed mainly as the responses to prior stimuli, and as stimuli to the subsequent responses of law appliers and law recipients" (p. vii). This behavioral perspective also represents a commitment to the systematic study of empirical phenomena and the use of statistical tools to analyze the data.

It is clear that a basic purpose of the book is to demonstrate how the behavioral perspective can be used to study a variety of research questions which are of interest to scholars in both law and political science. Among the questions Nagel considers are: Do disparities exist in different courts concerning the administration of criminal procedure and the sentencing of defendants of different backgrounds? Is there a relationship between the characteristics of attorneys and courtroom results? Is it possible to forecast judicial decisions? Does the fact that a judge was elected or appointed make any difference in his decisions? What are the attitudes of judges in terms of "liberalism-conservatism" and how do their attitudes differ from those of legislators and administrators? What are the factors that account for the apparent success or failure of congressional attempts to curb the Supreme Court? What have been the effects of excluding illegally seized evidence from courtroom proceedings?

In a general sense the book is a synthesis of the recent trends in both law and political science. For the practical legal scholar, Nagel intends to present the methods he has used and to demonstrate their application to concrete questions of legal policy. For the social science-oriented political scientist, he intends to present findings with theoretical import for the study of judicial behavior, and which are relevant to an understanding of the judicial system in the context of the American political system. But his success in these endeavors is incomplete.

It should be emphasized that Nagel is an extraordinarily creative, innovative, and productive scholar. The scope of his research interests and the ambitious objectives of his book are impressive. Both political scientists and legal scholars ought to become acquainted with Nagel's substantive findings and methodology if they have not already done so through his original publications. Furthermore, while it has become fashionable in some legal circles to be enthusiastic about empirical investigation of juries, lawyers, police practices, and legal procedures, when judicial decision-making is subject to a similar quantitative analysis, these same enthusiasts resort to the glib quip "thinkers don't count and counters don't think." Nagel demonstrates the inconsistency of this position. Nevertheless, with all these compelling points in his

favor, in this reviewer's opinion, the author does not entirely succeed. At the risk of giving aid and comfort to the thinkers-don't-count school, a brief discussion of some reservations follows.

II. CRITICISMS AND RESERVATIONS

Perhaps the major difficulty with the work lies in the fact that it is not the "coherent whole" that the author has attempted to present. Even in its revised form it is still, to a considerable extent, a collection of twenty-five articles written at different times with different objectives, and at different stages of Nagel's career. Despite his attempt to provide suitable transitions, and his occasional extensive revision of articles, Nagel has not satisfactorily integrated his studies into a smooth, logically coherent text. Several of the studies are awkwardly placed—for example, those in the three chapters in part two, section one of the book. A further consequence of attempting to integrate what might more appropriately be labeled an anthology is that footnotes in many of the chapters are repetitive and outdated. The data base in at least one article, for instance (on political party representation of judges), is out of date. Furthermore, with few exceptions, the chapters contain no consideration of the relevant research and writing developed after the original publications of the articles, although the introductory material and the epilogue do briefly mention much of the recent literature.

The conceptual scheme that Nagel presents in the first chapter also deserves critical comment. Although the scheme is based on the stimulus-response paradigm of psychology, he does not present a detailed psychological explanation of his adaptation of that paradigm. There is no specification of either the nature or kind of interrelationships of variables. His scheme does not suggest, for instance, what background variables are more important than others, or the relationship, indeed the crucial distinction, between backgrounds and attitudes. His scheme therefore is less than a satisfactory contribution to the theory of judicial behavior. For the same reasons, his scheme is weak as an over-all organizing framework. Nagel rejects the alternative organizing framework of systems analysis because he claims it is too institutional. Yet his own scheme is of the legal process and not of actual decision-making. In fact Nagel uses the systems concept of feedback in his framework and hints that input-output systems analysis is really identical to his stimulus-response analysis (which is not entirely true). In short, the fact that the conceptual scheme is not as well developed as it should have been decreases its theoretical contribution.

Nagel's main concern is to enable the practicing lawyer, the legal policy-maker, and the legal scholar to predict judicial response in a variety of situations, and his focus is on applied research. However, both lawyers and political scientists would have found the work more useful had Nagel devoted a portion of his book to the methods and

findings of others in this field. Although sections of the text and footnotes explain various methodological approaches and statistical concepts, the book would have profited from a greater consideration of prediction and its limits in social science research. Readers might have also benefited if the more sophisticated methods of later studies were used to reanalyze the findings of the earlier articles. Finally, although Nagel's concern with "the application of the scientific method to building . . . a little better legal system than might otherwise be the case" (p. 317) is commendable, his insistence that "an imperfect policy study is more likely to offer more social and theoretical benefits than no policy study at all" (p. 386) needs to be qualified. Surely an empirical analysis that is inadequate, because of inadequate data or analysis, may be grossly misleading and do more harm than good. The problem, of course, is deciding where to draw the line between "imperfect, but adequate" and "imperfect *and* inadequate."

Some of the studies themselves give this reviewer minor qualms. For example, Nagel's major finding concerning party affiliation and decision-making in criminal cases (chapters fourteen and eighteen) is based on a study of fifteen bipartisan supreme courts. But the results from only 10 of the courts confirmed the hypothesis, while the results from 5 courts disconfirmed it. The correlations between backgrounds and decision-making are all low, and only four of the twelve correlations presented are statistically significant. In these background studies, Nagel could well have used multivariate, rather than bivariate, analysis. Additionally, when reporting the results of an attitudinal questionnaire sent to state supreme court and federal judges, and to a sample of state and federal legislators and administrators (chapter sixteen), Nagel claims that the judges were "substantially more conservative" (p. 206) than the two other groups on the free speech issue. Yet the results show no real difference among the groups on what seems to be the key free speech item, relating to one's attitude on unrestricted freedom of discussion. Finally, in the study of editorial reaction to four church and state cases (chapter 22), Nagel constructed a scale which is suspect because the large number of nonresponses and unavailable editorials (21 of 24 on *Everson*, 18 of 24 on *Zorach*, and 14 of 24 on *McCollum* were not classified) precludes an accurate determination of scale scores and positions. It is therefore inaccurate to claim, as does the author (p. 288), that the editorial responses form a perfect Guttman scale.

III. CONCLUSION

Nagel's book appears at a point in time when the trends in legal and political science scholarship overlap substantially, at least in terms of research interests. Because of this overlap Nagel's book is relevant to students and practitioners of both professions, who should find it instructive and suggestive for further empirical research. On balance, this book is a major contribution to both disciplines.