

## BOOK REVIEWS

COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION. BY CARL H. FULDA. Boston: Little, Brown & Company, 1961. Pp. xxvii, 533. \$20.00.

*William L. McGovern* †

In recent years, it has become the fashion to believe that regulated industries are ones in which "the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'" <sup>1</sup> Carl Fulda's *Competition in the Regulated Industries* comes as a welcome light to illuminate the role that competition could play as a tool in the administration of regulated industries. As Professor Fulda observes, "It is hardly necessary to add that this emphasis on competition is eminently in the public interest, since it provides a spur to all modes to cut costs and improve service." (P. 375.) It may be "hardly necessary," but as Professor Fulda reflects in his own strictures on the frequent failure of courts and agencies to pay more than lip service to the antitrust laws, concern for the preservation of competition is not a notable characteristic of regulatory agencies.

It is very refreshing, indeed, to have a commentator refuse to get bogged down in the sterile task of "unscrewing the inscrutable" by trying to reconcile basically unsound and utterly irreconcilable decisions in the field of conflict between judicial and administrative law. In trying to pick out some sense in the nonsense that has accreted about the doctrine of primary jurisdiction, for example, Professor Fulda has no hesitancy in categorically asserting that "*Cunard* <sup>2</sup> and *Far East* <sup>3</sup> were wrongly decided." (P. 445.)

*Cunard* and *Far East* probably were "wrongly decided," but these decisions may well reflect the unwillingness of courts of equity to engage in the useless pastime of enjoining under the antitrust laws activities that the agencies may subsequently exempt from those laws with a stroke of the

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<sup>1</sup> *S.S.W., Inc. v. Air Transp. Ass'n*, 191 F.2d 658, 661 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).

<sup>2</sup> *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

<sup>3</sup> *Far East Conference v. United States*, 342 U.S. 570 (1952).

administrative pen. Judge Rodney probably reflected this wariness when he refused in *United States v. Railway Express Agency*<sup>4</sup> to grant the Government an immediate injunction against activities of the Railway Express Agency that had clearly not been approved or exempted by the Interstate Commerce Commission. Instead, he stayed the Government antitrust suit and referred the matter to the ICC—which promptly awarded an ex post facto approval and exemption to Railway Express, as the court probably surmised it would. When the case returned to the district court, Judge Rodney had no alternative but to dismiss it as seeking to enjoin activities which the ICC's approval had exempted.<sup>5</sup> To the same effect are the two airline joint ticket agency cases.<sup>6</sup>

Interestingly enough, Professor Fulda seems to conclude that the effort to stir a soupçon of competition into administrative regulation has worked reasonably well. But this conclusion suffers from the infirmity that it is based upon opinions of the agencies which, like their judicial counterparts, all too often serve to conceal rather than elucidate the real public interest underlying them.

As Jerome Frank was wont to observe, reading opinions, particularly appellate opinions of courts and agencies, is like viewing an iceberg from the surface: 90 per cent of the factual material underlying an opinion is concealed from view. This is the reason why many who have an addiction to the laws of competition as a regulator of their economic fate prefer to take their chances with the antitrust laws. The application of these laws is sporadic, irrational, and uneven. But at least judicial decisions in antitrust cases usually represent a genuine trial by combat from which some slight grain of truth may occasionally be expected to emerge from the record.

Administrative law, on the other hand, moves on a premise of rationality, underpinned by the notion that the collective agency intelligence possesses great expertise and is endowed with the wisdom and capacity to achieve a uniform application of public policy upon a record that represents a careful and discriminating selection of the wheat from the chaff of life. Unfortunately for this illusion, thoughtful practitioners before the agencies are aware that all too often they are compelled to accept "expertise" out of the mouths of ex-pugilists and ex-haberdashers who from time to time grace the memberships of the agencies by virtue of a presidential vagary. Similarly, these same practitioners have moments of truth

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<sup>4</sup> *United States v. Railway Express Agency*, 89 F. Supp. 981 (D. Del. 1950).

<sup>5</sup> *United States v. Railway Express Agency*, 101 F. Supp. 1008 (D. Del. 1951).

<sup>6</sup> *Apgar Travel Agency v. International Air Transp. Ass'n*, 107 F. Supp. 706 (S.D.N.Y. 1952),—criticized by Professor Fulda at 447 nn.1 & 4—in which the court referred a per se violation of the antitrust laws, not previously submitted to the CAB for approval, to the CAB with the comment that "with the broad power of exemption possessed by the Board under the Civil Aeronautics Act, we cannot know the extent of exemption until the Board has acted." 107 F. Supp. at 710. When the same issue was again raised before the court, the antitrust case was dismissed as challenging activities that had later been approved and exempted by the CAB. *Putnam v. Air Transp. Ass'n*, 112 F. Supp. 885 (S.D.N.Y. 1953).

when they suspect that that wonderful phrase in an initial or agency decision "there is no substantial evidence in this record" actually belies a tacit conspiracy on the part of the contestants to keep such evidence out of the record lest it disturb the even tenor of the agency's and industry's ways. Perhaps this is to say no more than that the view from the legal bridge will never be the same for the academician and the practitioner.

At the moment, considerable soul-searching is occurring in Washington over the scope and functions of the regulating agencies, and Professor Fulda's book comes at a particularly opportune juncture to contribute an invaluable piece of searching analysis to that reexamination.

LAW AND MEDICINE: TEXT AND SOURCE MATERIALS ON MEDICO-LEGAL PROBLEMS. BY WILLIAM J. CURRAN.\*  
Boston: Little, Brown & Company, 1960. Pp. xxvii, 829. \$12.50.

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Professor Curran's book is written for the lawyer; its aim is to indicate, by use of the cases and of other materials (statutes, articles, committee reports and the like), the areas in which the disciplines of law and medicine overlap. It seeks further to illustrate the difficulties and to cast light on the more obscure problems produced by such an overlapping. It focuses not upon the situation of the physician who must conduct his professional affairs according to the legal precepts of the jurisdiction in which he practices, but upon that of the attorney who is faced in his work by a situation, some part of which involves medical or scientific knowledge or practices. The importance to the lawyer of such a book is readily appreciated when it is realized that more than 80% of the litigation before the courts and administrative agencies in this country—and, almost certainly, an even higher percentage of those disputes which are settled or abandoned outside the courts—involve some medical element.

Forensic medicine, which may be defined as that body of medical knowledge which is used in the administration of law, is of respectable antiquity; four thousand years before 1189, that year which the English common law recognizes as the most remote limit of legal memory, the offices of Chief Justice and Court Physician were combined in the person of the Egyptian Imhotep. Current difficulties have arisen because of the vast distances which both professions have travelled since those far-off days. It may be suggested that the basic problem in all medico-legal relations is the reconciliation not of two different skills or techniques but of

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two fundamentally different attitudes and that these attitudes are inevitable manifestations of the totally unlike roles and functions of the lawyer and of the physician. Man living in complete isolation from his fellows still requires medical knowledge, but such a man has no need for the law; one man and one physician could explore the mysteries of the body physical, but law ministers to the body politic and only grows with the increasing complexity and sophistication of society. The law's methods of "healing" the ills of society—the regulation and reconciliation of opposing claims—are based on adversary relationships, and in this atmosphere the physician, by his training, his outlook, and his purposes, is a stranger.

Thus, in a book which seems to afford weight to various topics in proportion to their importance to the average practicing attorney, a considerable amount of space is devoted to the handling of medical witnesses. Here, as Professor Curran points out, the conflict between the two professions is very apparent; what the physician regards as uncontrovertible fact must undergo evaluation to determine its weight and probative value. Here and throughout, this book is an explanation of the ways in which courts attempt to handle the points of contact between medicine and law.

In order to achieve this explanatory end, Professor Curran has amassed a vast amount of material from widely differing sources; as indicated above, law review and medical journal articles, extracts from trial testimony, office memoranda, statutes and court opinions are all combined to give a panoramic view of many problems, with the author's introductory notes, his comments, and his queries serving to interweave and synthesize the material.

This is not, however, a comprehensive study of all the problems which confront an attorney or a court in the field of medico-legal affairs; certain topics receive penetrating analysis at the expense of others. For example, one large section deals at great length with the various medical aspects of personal injury litigation (pp. 201-335), another with insanity as a defense in criminal proceedings (pp. 582-633), whereas there is no specific chapter devoted to the very real problems which are encountered in the areas of industrial diseases or workmen's compensation. Perhaps most surprising of all, Professor Curran, having indicated the tremendous backlog of cases involving medico-legal matters, omits completely any discussion of the possibility or advisability of removing personal injury actions, particularly, for example, those arising from motor vehicle accidents, from the courts and substituting some system of assured compensation, perhaps similar to that which prevails under the Workmen's Compensation laws.

However, it is certainly conceded that to afford to these various topics the space which they may be felt to merit is beyond the scope of any one book. Within the limitations of this work, the author has raised many points of interest. For example, he sheds light on the problems inherent in bringing the physician into the judicial arena by citing the report of the consultants of the Bar Association of New York City on the use of impartial medical experts in the trial courts of that city. (Pp. 355-

60.) Again, Professor Curran suggests that frequently "litigation neurosis" is a very real ailment which can only be cured by settlement or by favorable adjudication. (P. 193.) Also interesting are the indications that increasing medical knowledge is constantly being manifested in the courts by the creation of new presumptions (for example, the effect of the blood tests in paternity suits) and by an acknowledged widening in judicial notice of medical matters.

On the other hand, it is not altogether certain that chapter 3, entitled "An Anatomy of Trauma," is of great value. This chapter deals with problems which are almost purely medical in nature, and unfortunately the articles which make up the bulk of the chapter are from medical journals or textbooks. Clearly, they cannot be, nor are they intended to be, an exhaustive account of current medical knowledge of trauma, but their value as a lawyer's introduction to this area is impaired by the highly technical writing of many of the authors. Perhaps this difficulty could be overcome by an expansion, in subsequent editions, of the glossary of medical terms which, at the moment, is woefully inadequate for the purpose of making the medical materials comprehensible to the non-physician.

These comments apart, however, Professor Curran has performed a valuable service to the legal profession; he has not only formulated with considerable insight the more difficult problems in medico-legal affairs but he has expounded such practical matters as the general system of hospital management and the nature and contents of hospital records. It only remains to add that a companion volume, written for physicians and seeking to acquaint the medical profession with the attitudes and difficulties of lawyers, would be of equal value.

THE GERMAN PENAL CODE OF 1871. TRANSLATED BY GERHARD  
O. W. MUELLER AND THOMAS BUERGENTHAL. South Hackensack:  
F. B. Rothman, 1961. Pp. x, 177. \$4.95.\*

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There can be plenty of room for disagreement on the purposes of the comparative study of criminal law, and the problems are increased, whatever purpose one assigns to the discipline, when one faces the task of examining the criminal law of two markedly different legal systems.

These difficulties and differences in approach are reflected in the preparation of materials for the study of foreign criminal law. One pos-

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\* The publication of the German code is the fourth in a series published under the auspices of the Comparative Criminal Law Project of the New York University Law School. Earlier numbers were the codes of France, Korea, and Norway. All references in this review are to those editions.

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sibly way of providing translated materials for such comparative research is to publish in treatise form a comprehensive guide to the foreign system of criminal law followed by translations of the necessary foreign legal texts. The reasons for such an approach are clear. As a jurist trained in civil law needs guidance to find his way in the sea of case law, so the common-law lawyer needs help in coping with the intricate system of a code. The legal concepts of the two systems, the very juridical atmosphere in which these concepts breathe, are often different, and the safest way to approach the foreign law is to start from scratch. Publications in treatise form are necessary, therefore, since they are tailored to the novice in the field. After such propaedeutic study, the student is in a better position to grapple with the foreign legal texts themselves. Without such preliminary instruction, the study of any foreign legal source would be fraught with the danger that the casual reader might draw wrong conclusions, while the careful reader would find more questions than answers. The preparation of a treatise designed for comparative use is, however, very difficult and calls for exhaustive preparation. Only collaboration between domestic and foreign scholars of comparative law seems likely to yield satisfactory results.<sup>1</sup>

Another possible first step in a comparative law project is to provide translations of the foreign legal sources of criminal law—codes, statutes, cases. Such an approach rests on a belief that one cannot spread accurate information about the law of a foreign country unless one first presents its legal sources. This approach, too, bristles with difficulties. The greatest stems from translation and are further increased in the absence of the kind of vision and guidance which a previously prepared comprehensive treatise can afford. And, ultimately, there is the problem of how to render the translation understandable and useful.

For better or worse, the Comparative Criminal Law Project of the School of Law of New York University has adopted the second approach, following several European and one Latin-American example. In order to provide information on foreign criminal law, the first step in the Project was to publish a series of English translations of foreign penal codes. We are told that the translators were at first inclined to insert explanatory notes to the text, but were discouraged by the impossibility of confining them to reasonable limits and finally decided to leave them out altogether.<sup>2</sup> They probably hoped that the student would find adequate basic information in the bare text and could use it as a reliable starting point for further investigation. Those who seek further illumination are referred to the future when "treatise-like and encyclopedic information" on the translated texts will be published.<sup>3</sup>

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<sup>1</sup> Considering this, the compendium on American law—*Crime and the American Penal System*—published by the American Academy of Political and Social Science in 1962, is a highly successful portrayal of American criminal law for foreign readers.

<sup>2</sup> Moreau & Mueller, *Preface* to THE FRENCH PENAL CODE at xvi (Moreau & Mueller transl. 1960).

<sup>3</sup> Mueller, *Foreword* to *id.* at xiv.

Given the decision not to insert notes explanatory of the text, the value and utility of the editions would have been increased had the original texts of the codes been published along with the translations. This would have provided a partial explanation and check of the translations for those who possess even a smattering of the respective foreign language. Even if, however, financial exigencies made this approach impractical, it seems proper to direct the attention of the editors, with all due homage to their important work, to some imperfections in their product.

There are points in any translation where "traduttore" is in danger of turning into "traditore." Footnotes are the usual resort of translators confronted with treacherous words and phrases. Uncompromising in their decision not to add explanatory notes, however, the translators here developed other means of coping with the danger of semantically misleading the reader. Their basic principle was to translate every foreign "terminus technicus" by means of the closest Anglo-American term of art. This was in effect a Hobson's choice. Only by this technique could the bare translations be understandable to the common-law lawyer. But since very few foreign legal concepts have their exact counterpart in Anglo-American law—and many differ widely—the translators were forced in many cases to measure the degree of discrepancy. When this was so high as to be apt to mislead the reader, they would translate the term by using a non-technical English word.<sup>4</sup>

However, this method was not applied consistently from one translation to another. For example, inconsistencies appear in the translation of civil law concepts of parties to a crime. These concepts vary markedly from their common-law counterparts, and the translators of the Korean Criminal Code, which was patterned upon German law in this respect, rendered some of these concepts into nontechnical English (Arts. 31 and 32 of the Korean Code). On the other hand, the same concepts in the German Code (§§ 48, 49) were translated by their nearest English technical approximation as "accessory before the fact" (*Anstifter*) and "accessory" (*Gehilfe*). Similarly, "*blessures et coups*" in the French Code (Title II, § 2), roughly corresponding to common-law assault and battery coupled with mayhem, was translated literally as "wounding and striking," since it was felt by the translators that the difference between the French and the nearest common-law offenses was too great to warrant any other translation.<sup>5</sup> However, the German offense of "*Körperverletzung*" (§§ 223, 223a, 224, 226) was translated by the common-law "termini technici" as "assault and battery" and "mayhem." To be sure, there are differences between the French and German concepts. Nevertheless, both represent substantially the same crime of "bodily injury," and both differ markedly from comparable common-law offenses.

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<sup>4</sup> It would seem that this same appreciation of degrees of difference could have provided a criterion for the inclusion of a limited number of footnotes.

<sup>5</sup> Moreau & Mueller, *op. cit. supra* note 2, at xvi.

At present, these and similar inconsistencies do not seriously impair the value of the translations, but they may prove to be more important when the "treatise-like and encyclopedic information" is available. It will then become apparent that quite a few legal concepts of the continental criminal law are almost identical in their broad outline and possess a common core, particularly when viewed from a common-law perspective.<sup>6</sup> This common core could easily be obscured should substantially the same legal doctrines and concepts be translated in varying ways. Moreover, the fact that the Project intends to publish a series of treatises should affect the choice between technical and nontechnical rendering of foreign law concepts. For example, when the need arises to explain the complex continental law of complicity, terms like "instigation" and "aid," rather than the roughly corresponding common-law terms of art, will have to be used in the explanations. It seems obvious, therefore, that where technical terms were used to translate the civil law concepts of complicity in the German Code, these translations will not jibe with future ones.

Yet another example of the difficulties in the translation which is a potential source of difficulties may be found in the translation of the German procedural concept of "*Strafantrag*" as "private charge" in the general part of the code (§§ 61, 63) and as "petition" in the specific part (e.g., § 193).<sup>7</sup> Since both of these translations convey to the Anglo-American reader a rough idea of the procedural concept in question, some explanation of the source of my objection seems in order at the risk of digression. On the European continent, criminal prosecution generally can be instituted in three ways. The usual one is for the prosecutor to act irrespective of the will of the aggrieved party. The second, reserved for specific crimes, is to make a complaint by the injured party a prerequisite for the commencement of the public prosecution—the German "*Strafantrag*," Italian "*querella*," and French "*plainte*." It is designed for cases in which the injured party may be expected to have a strong interest opposed to the public prosecution.<sup>8</sup> Finally, in some European states there are certain minor offenses which are prosecuted only by the aggrieved party, who files accusatory pleadings with the court and is responsible for the prosecution—"private accusation." Thus, to return to the point, it will be necessary in the treatises to explain the difference between the "private accusation" in its strict sense and prosecution upon the complaint of the injured party. When this is done, the translation of "*Strafantrag*" as "private charge" will become perplexing and possibly misleading. To be

<sup>6</sup> This common thread is a result of similar principles in the "science of criminal law," or, as Helen Silving would put it, to a similar "systematic structural conception of criminal law." Silving, "*Rule of Law*" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 99 (1961).

<sup>7</sup> The difference is probably due to an oversight. Still another translation ("complaint") is found in art. 306 of the Korean Code.

<sup>8</sup> In this type of case, a public prosecution might disrupt family or other important social relationships. In common-law countries, the decision to prosecute or not is made by the public prosecutor. In most civil law countries, this decision is left to the aggrieved party.

sure, the German concept of "private accusation" (*Privatklage*) differs from that which I have described as used in some other European countries, since it serves as a check on the abuse of nonprosecution by the public prosecutor and not as the normal means of prosecuting certain crimes. Nevertheless, even in German law "*Strafantrag*" and "*Privatklage*" must be distinguished, and the translation of the former as "private charge" therefore leaves much to be desired.

These marginal remarks on the translated codes should not be permitted to obscure a warm welcome for the whole Criminal Law Project.<sup>9</sup> Eventually, the work of the Project will shed light on an area which until recently received too little attention on either side of the Atlantic—to the detriment of all concerned. This detriment consisted not only—and perhaps not principally—in the absence of a source of ideas for creating an ideal criminal law as in the lack of a perspective from which a lawyer can achieve a better understanding of his nation's legal system. Nor is the future of the Project of concern only for the Anglo-American scholar; the bridge which the Project is building between two legal systems is by no means a one-way street.

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<sup>9</sup> More specifically, in teaching a course in comparative criminal law at the University of Pennsylvania Law School in the spring of 1962, I found the materials made available by the Project very helpful.