BOOK REVIEWS


Carl Kaysen †

Oliver Williamson's Corporate Control and Business Behavior is an important contribution to the old but ever-lively examination of how and how effectively competition regulates economic activity. Though he speaks in mathematical language, and addresses himself primarily to economists and theorists of organization and management, Professor Williamson has a broader message for all those concerned with the public policy of competition.

Corporate Control examines how the internal organizational arrangements of business firms affect the efficiency of their operations. It begins with the familiar proposition that the structures of many important markets in our economy are not such as obviously enforce competitive behavior. Large size in relation to markets, large absolute size, legal limitations on entry, and other kinds of restrictive regulation certainly raise the question of the degree to which the thousand or so largest firms in our economy that together produce a major part of total output are compelled by market forces to approximate the efficient behavior of the profit-maximizing competitor of economic theory. Viewed from the inside, all these firms are large enough to require a complex, multi-layer, hierarchical structure of managerial control. For firms in this universe, Professor Williamson analyzes the extent to which the character of internal organization reinforces or substitutes for market forces in pushing the firm toward efficient, profit-maximizing behavior. He treats the questions almost entirely in theoretical terms, using certain simple basic concepts of the theory of organizations as tools for examining the effect of organizational structure on both the firm's definition of goals and its effectiveness in achieving them.

The analysis investigates the properties of two types of organization: U-form (unitary) and M-form (multi-divisional), although the author recognizes that some complex firms—which he terms freeform—are really neither one nor the other. The U-form firm is one that is organized along functional lines, with executives immediately below the chief executive as heads of departments; say, for a typical manufacturing firm, manufacturing, marketing, engineering and research, and finance. The top management of such a firm consists essentially of the chief executive and his cabinet of functional vice

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presidents. By contrast, the M-form firm is organized in terms of a number of divisions distinguished by product line or geographic market area or both, each of which is headed by a divisional executive, responsible for all the division's operations. Under him, the individual division can be thought of as typically organized in U-form. The M-form firm, however, is more than a federation of U-form divisions under a single corporate head. Equally characteristic and significant for it is the existence of a strong staff organization attached to the chief corporate executive, with an appropriate complement of functional specialists, as well as generalist staff officers. The top management of the M-form enterprise consists of the chief executive and the divisional executives. It is thus made up of men who have no functional operating responsibilities, but an overall view of either some subset of markets of the firm, or the whole set. This group of generalists is reinforced by a strong staff, without parochial loyalties and responsive to the interests of top management.

Professor Williamson sees the U-form as in some sense the natural organizational form into which a firm grows as its size increases. By contrast, the M-form is an organizational innovation, which originated in the twenties and thirties (Du Pont and General Motors) but which has begun to spread widely only in recent years.

Professor Williamson's discussion of the large U-form is a restatement with some amplification of his earlier work on the subject, especially The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm. Firms of this type experience two kinds of control problems. The first is simply the general problem of information loss in a hierarchical organization as information is transmitted up the hierarchy and instructions down it. Combined with the limited rationality of the human mind—its finite information processing and storage capacity—information loss sets limits on the efficiency with which a firm can operate. In principle, this phenomenon is no different from others that economists treat in discussing economies and diseconomies of scale. The second control problem is specific to the tasks of inter-functional coordination in the large U-form enterprise, and arises from the nature of its top management. Because it is essentially composed of representatives of functional interests, the top-management group finds it impossible to deal with peak-level coordination problems from the general firm, or profit-maximization, point of view. Rather it seeks accommodation amongst the inevitably conflicting functional viewpoints of its members. Seen in another setting, this is the familiar problem of interservice rivalry, and the consequent limitations of the Joint Chiefs of Staff as a military policymaking body concerned with the total national defense. In Professor Williamson's language we have utility maximization instead of profit maxi-

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mization: in the absence of enough competition in products to enforce the latter, the former is the natural result of the organizational pattern.

Further, competition in the capital market cannot function as an effective substitute for competition in products markets and so produce the desired results. Neither the incentive effects of stock options, insider trading, and the like, nor the threat effects of possible takeovers can be sharply enough focused to induce managements to choose profit-maximizing goals at the cost of other elements of managerial satisfaction. In large part, Professor Williamson sees the "external" character of capital-market controls as the key to the obtuseness of their effects.

The economic significance of these consequences of U-form organization in large firms operating in less-than-competitive markets goes far beyond the technical resource misallocations that departures from competition entail. It is rather the internal inefficiency of the firm—its failure to use factor inputs at the greatest efficiency—that is Williamson's prime concern. This is especially important in a dynamic context, and sluggishness in both searching out opportunities for cost reduction or profitable market expansion and exploiting them are the important costs of widespread departures from competition.

The difficulties of interfunctional coordination in the U-form enterprise and its consequences are characteristically significant only in the large firm. In the small firm, the individual chief executive can himself carry the whole load of interfunctional coordination (with assistance from a personal staff). Therefore his own goal orientation can rule, and if it is a profit-maximizing one, so will be the firm's. But, even at a scale that is small in relation to the range of firm sizes Professor Williamson considers, the one-man show is inadequate to the task, and the typical "cabinet" of functional executives becomes the organ of peak coordination.

Professor Williamson, drawing on the work of Alfred Chandler, Jr., sees the beginnings of the M-form innovation in the response of troubled managements to sharp crises or sustained business difficulties. Its originators saw it specifically as a way to improve central control over the diversified activities of their large enterprises, and to orient them all more sharply towards profit maximization. The essential virtues of the M-form are in its two characteristic attributes: top-management coordination is the task of a group of men each of whom has generalist orientation toward profit rather than a specialist one toward some particular function; that group is reinforced by a strong staff loyal to it and capable of assessing the information that comes up from lower and specialized hierarchical levels of the organization in terms of overall corporate goals. In Professor Williamson's own words:

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The argument can be summarized in the following way: the transformation of large a business firm for which divisionalization is feasible from a unitary to a multidivision form organization contributes to (but does not assure) an attenuation of both the control loss experience and subgoal pursuit (mainly staff-biased expansion) that are characteristic of the unitary form. Realization of these attenuation effects, however, requires that the general office be aggressively constituted to perform its strategic planning, resource allocation, and control functions. Both the form and substance of multi-division organization are required for this transformation to be effective. Expressed in conventional goal pursuit and efficiency terms, the argument comes down to this: the organization and operation of the large enterprise along the lines of the M-form favors goal pursuit and least-cost behavior more nearly associated with the neoclassical profit maximization hypothesis than does the U-form organizational alternative.\(^3\)

Indeed, a properly organized M-form management pushes the operations of its business toward the goal of profit maximization, in dynamic as well as static terms, in just the way the capital market cannot. In such a firm, top management operates chiefly in terms of capital allocation, deciding which divisions and subdivisions to expand, which to allow to shrink or even abandon, and, especially, what potential new markets are worth exploration and development. Because management’s controls are internal rather than external, and its information-gathering activities can be focused sharply and in detail on the specific aspect or segment of a situation under study that most needs elucidation, it can do all these things more effectively than the general capital market operating on the firm from the outside.

The gains of M-form organization are not limited to those internal to the individual firm; there are system effects as well. In particular, a universe in which numerous large, well-managed M-form firms actively seeking profitable new opportunities coexist with a constantly renewed population of small, specialized firms devoted to the technical realization of new ideas provides an ideal arrangement for rapid innovation. The small specialists are often better suited to the task of translating new technical possibilities into products; the large firms to the task of organizing their manufacture at large scale and low cost, and developing the markets that make such manufacture economically possible. Typically, the transfer of the new product from the initial to the subsequent phase will occur through the acquisition of its technical developer by a large, divisionalized, diversified firm. Another positive system effect is the institutionalization of “potential competition” over

a wide range of markets consequent on the systematic efforts of the large M-form firm to search out profitable investment opportunities.

Readers of this review who are students or practitioners of the public law of competition will by now have noticed a familiar ring to the arguments so briefly summarized above. And indeed, rightly so. They are—in different language and more subtle form—the arguments of defense counsel in conglomerate or even sometimes more traditional merger cases; or of business spokesmen in general when anti-trust issues are discussed in the public forum. And indeed, Professor Williamson does—to be sure, with some caution—draw the policy implications of his analysis. He urges the wisdom of less stringent control of mergers, especially conglomerate ones, and the value of taking organizational advantages explicitly into account in judging them.

That the arguments of the book under review parallel to some extent popular and frequently repeated business arguments on the same subject speaks in no way against their value or validity. Indeed, the contrary is nearer the truth. When an economist of Professor Williamson's theoretical power and sophistication, and intimate practical experience with the enforcement of the antitrust laws, repeats these arguments and provides them with an analytical basis, they should be doubly attended.

Aside from all that, what can we say of the power of Professor Williamson's analysis to support the kind of policy conclusions he suggests, with no matter how much caution or qualification? An answer to this question must begin by reminding the reader of the highly abstract and formal character of Professor Williamson's argument. The leading question is then, how well does the organizational model of the book describe the essential behavior of observable large firms which appear to have an M-form organization, insofar as it concerns the central point of the nature of corporate objectives and the efficacy with which they are attained? To find a convincing answer to that question would require extensive field studies of a large number of M-form firms planned so as to permit an evaluation of Williamson's model. This has not yet been done. But the beginnings of such an endeavor are visible in a number of studies of the management of the investment process in large firms which have been made at the Harvard Business School. One of these, Joseph L. Bower's Managing the Resource Allocation Process (1970), was published recently, and it refers to a number of others, all unpublished doctoral dissertations done in the last several years at the Harvard Business School. None of this work is mentioned by Professor Williamson.

Bower's book reports a detailed case study of resource allocation in a single giant firm, designed to examine the extent to which its managerial processes were effective in guiding investment decisions by profit-maximizing criteria. Bower's sample firm was clearly an M-form organization. Equally clearly, its behavior did not conform to Professor
Williamson's model. The discrepancy lay precisely in the failure of the control structure to provide a strong linkage between high level criteria of return on investment by which investment opportunities were supposedly judged, and the operating level criteria by which they were actually judged. These Bower termed "strategic" rather than rate-of-return criteria, centering on forecasts of market share and other indices of competitive position. Frequently, though not uniformly, the use of these criteria was "rigged" to serve the segmental interests of the operating unit, in a way that was proof against the review processes of higher levels.

This case study shows no more than the possibility that an enterprise organized in M-form can fail to provide the drive to long-run profit-maximizing behavior that Williamson's model embodies. A large number of similar studies might both show how often such failures occur and point to what aspects of organization explained them. Yet even the single instance suggests the level of abstraction at which Professor Williamson argues is too high to catch the phenomena he seeks to explain.

Nonetheless his argument is important. Its central proposition that examination of the internal structure of the large firm is an indispensable element in understanding its relation to the markets in which it operates cannot be dismissed and should not be ignored.

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Not too long ago, the typical law school offering entitled "Accounting for Lawyers" consisted of a cursory study of double-entry bookkeeping. If the neophyte lawyer could tell a balance sheet from an income statement, a debit from a credit, and, in rare cases, an accrual from a deferral, not much more could be or was expected. Accounting was regarded as a quasi-mechanical art conducted by people with green eyeshades and quill pens who periodically produced financial statements at which lawyers occasionally looked.

Since about the end of World War II there has developed a growing awareness among legal educators that terms like "net profit" and "book value" cannot be adequately presented as mere arithmetical representations of facts but, like so many other legal concepts, must be exposed as the products of judgment, opinion, negotiation, and, unfortunately, a fair measure of confusion. When substantive matters of heroic proportions turn on financial statements, it is essential that the lawyer have an understanding of the assumptions and conventions, i.e., the accounting principles, upon which such statements are based. The existing teaching materials are well-designed to communicate that understanding in order that the lawyer can properly evaluate the extent to which the accountant's product can be relied upon and the extent to which it cannot. For example, a lawyer drafting a shareholders' cross-purchase agreement must be able to exercise an informed judgment whether a price based on book value of the stock of that corporation is a fair expression of the parties' intent or a trap for the unsophisticated.

A continued source of wonderment to the uninitiated student (and a fountainhead of classroom drama for the teacher) has been the immense range of possibilities embraced within the ambit of "generally accepted accounting principles." During the past two decades the accounting profession has diligently devoted itself to the task of narrowing that range within more acceptable limits. Almost every pronouncement of the American Institute of Certified Public Accountants (AICPA) has promulgated rules which diminish the possibility that a given set of facts can be portrayed in more than one way. There is, of course, a long way to go in that direction; but an eminently acceptable approach to the teaching of accounting in law schools is to keep up to date with the latest opinions of the Accounting Principles Board of the

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AICPA and to delineate the areas in which new ones are needed. That attitude is succinctly stated in a quotation presented in this book: “What the accountant tells us may not be true, but, if we know what he has done, we have a fair idea of what he means.”

Professors Fiflis and Kripke are not content with that approach. They maintain that accounting principles are, in no small measure, matters of law. These principles fix the limits of distributions to shareholders under the corporate law. They are the heart of the disclosure process under securities law. They play a crucial part in determining the rates paid by the public to regulated utilities. They affect the public revenue under the tax laws. They are incorporated in a wide variety of private contracts. Since they are law, say the authors, lawyers, to perform their traditional role, should have a hand in their formulation. And to perform that task adequately lawyers must do more than merely understand what the accountants are doing. They must be able to evaluate whether what they are doing is right.

To help the lawyer achieve that ability, this book is intended to convey a pervasive understanding of both the practices and the philosophy of accounting. It contains, throughout, excerpts from both the legal and accounting literature which not only explain what the system is but criticize its failure to provide information useful to those whom it is presumably designed to serve. New and sometimes revolutionary approaches are suggested. Any resemblance to the “Accounting for Lawyers” texts of thirty years ago is purely coincidental. This is a law book—and a very good one.

Since one cannot read the literature without first learning the language, this book begins with a chapter on bookkeeping. Like its counterparts in similar works, Chapter I is the product of the authors’ individual teaching styles and experiences. The process by which facts become journal entries and, subsequently, financial statements is one which each teacher should communicate in the manner best suited to himself. It is my view, however, that Chapter II, which, in eleven rich pages, discusses the relationship of law to accounting, the underlying conventions and assumptions, and the respective roles of management, the accounting profession and government agencies, might profitably be assigned as reading during the period in which Chapter I is being covered in class. The drudgery of journal entries and work sheets can be somewhat assuaged by a concurrent attempt to demonstrate their relevance.

The authors’ analytical approach is most clearly evidenced by Chapter III, in which they explore the threshold question of income recognition, properly described as “the single most important and pervasive problem of accounting.” Through descriptions of presently sanctioned exceptions to the normal requirement of realization, e.g., the

valuation of securities by investment companies and percentage-of-completion accounting for long-term contracts, they subject the near-sacred realization concept to critical evaluation. The three chapters that follow deal with the allocation of costs—intangibles, depreciable tangibles, and inventory—in a manner made more meaningful by the prior discussion of income recognition. The net result is a perception of accrual and deferral as a series of policy decisions rather than a collection of mechanical rules.

Several distinct accounting problems are dealt with in a single chapter. Of these, bad debts, bond discounts, and surplus reserves are surely each worthy of an hour of class time, and many teachers may choose to explore them in greater detail. The authors have elected to give them short shrift in order to reserve valuable page space for in-depth studies of problems which are the subjects of more current debate. Among these are interperiod tax allocation, discussed in the context of the normalization/flow-through dispute in utility rate regulation, lease financing, and the purchase-pooling imbroglio with its attendant problems concerning the amortization of acquired goodwill. The timeliness of these problems and their intimate relationship to the concepts of income recognition justify devoting a chapter to each of them, even at the expense of curtailing the attention allotted to the more familiar teaching vehicles.

Three chapters are devoted to problems of fair presentation. The by-passing dilemma is discussed in the context of four fact situations which include the sale by two giant corporations of their controlling interest in Ethyl Corporation and the statements issued by Westec on the eve of its bankruptcy. The compulsive fixation of the financial community on earnings per share is demonstrated and criticized, with particular attention to the effect on reported earnings of changes in accounting methods. Finally, the authors raise the basic and intensely disturbing question whether modern cost-based accounting merely fails to inform or affirmatively misrepresents.

My first reaction to Chapter VII was that its discussion of price-level and fair-value accounting was heady stuff designed for consumption by economists, financial analysts and accounting theoreticians. Certainly, I thought, it had nothing to do with lawyers. Upon reflection, however, the connection becomes clear. Recently authorized departures from traditional cost-based accounting, like percentage-of-completion, have been at least tacit recognition that, in some instances, the value of the certainty of historical fact is outweighed by its tendency to mislead. Fair-value accounting may never be adopted for general use, but surely some aspects of its approach will be reflected in future proposals for change. If lawyers are to play a role in the development of accounting principles, as the authors insist they should, they must be familiar with the theories expounded in Chapter VII. Though this book would be complete without Chapter VII, it is a better book for having included it.
Particularly praiseworthy is the final chapter, *Legal Liability of Accountants*—a comprehensive review of the development of that topic from *Ultramares*\(^2\) to the modern trilogy of *BarChris*,* Yale Express*\(^4\) and *Continental Vending*.\(^5\) If the student is left with the impression that the law in this area is far from clear, he has at least been brought up to the level of the practicing bar. However one might view the participation of lawyers in the formulation of accounting principles, the matter of accountants' liability is surely lawyers' law and cannot be properly appreciated without an understanding of the environment in which the accountant operates and of the tools at his command.

Perhaps the most significant of the many strengths of this book is its intimate connection with business reality. As early as the first chapter the authors describe that "piece of business sophistication" known familiarly as the "inventory cushion" and how it can be translated into an appealing earnings record in anticipation of a public offering. The first week of classes is not too soon for the student to learn that financial statements and the truth are not invariably synonymous. The book is liberally sprinkled with examples of actual business practices: the sale of equipment to franchisees;\(^6\) the tax-sheltered depreciation deal;\(^7\) the compensating-balance requirements of lenders;\(^8\) the acquisition price contingent on future earnings;\(^9\) and the sale and leaseback\(^10\)—to mention just a few.

While the authors are forceful advocates of the positions they favor, they are sometimes less than objective in presenting those they oppose. Whatever one might think of the merits of LIFO, it is clearly a widely used practice of inventory pricing in American business. Despite that fact, the authors confine their discussion to an eleven line description\(^11\) and a three page condemnation.\(^12\) There are, after all, some respectable and reasonably persuasive arguments in favor of LIFO. But even if the reader is to be deprived of those, he is entitled to the opportunity to develop his understanding and make his own evaluation on the basis of a more complete discussion than the authors provide.

In a similar vein, while extolling the theoretical virtues of fair-value accounting, the authors have failed to convey, at least in a way

\(^2\) *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).
\(^6\) T. *FiFLis & H. Kripke*, *supra* note 1, at 136.
\(^7\) *Id.* 226.
\(^8\) *Id.* 329.
\(^9\) *Id.* 344.
\(^10\) *Id.* 518.
\(^11\) *Id.* 246.
\(^12\) *Id.* 264-66.
that came through to me, a full appreciation of the enormous difficulties of appraisal once the cost concept is abandoned. Fair value, whether used in the Internal Revenue Code, the Bankruptcy Act, or in financial statements, is perhaps as subjective a term as there exists in a lawyer's vocabulary. It may be that the split of opinion between the academicians and the practitioners in the accounting profession rests squarely on the fact that the former may never have seen first-hand the strange things that can happen when one asks an "expert" to appraise something at its "fair value." Surely, Professor Kripke knows the score, but nowhere in this book does he get around to telling it like it is. The good work of the AICPA during the recent past in improving the objectivity of financial statements would be eclipsed by the wide adoption of fair-value accounting with the present state of the appraiser's art.

I do not disparage the continuing search for truth in financial statements which the profession is carrying on assiduously and which the authors heartily commend. I despair, however, of ever finding the answer. In one excerpt reprinted in the book it is stated that "[t]he only satisfactory solution is for the accountant to accept the challenge of producing statements that come as close as possible to meeting the economist's requirements." 13 Perhaps that is the only satisfactory solution for economists. But there are other groups whose requirements may be quite different from those of the economists, and no less important. The tax collector, the lender, the labor union negotiator, the selling shareholder, the investor, and the executive with an incentive-compensation plan are all users of financial statements. In my opinion, Professors Fiflis and Kripke do not sufficiently emphasize the fact that no matter what principles are ultimately adopted the job of interpreting financial statements from the users' divergent points-of-view will always be imposed on the users and their lawyers.

Accounting for Business Lawyers is appropriately titled. It is a book which every business lawyer might profitably read and from which even the most sophisticated can learn. It is a book which ought to be read by every teacher of business law—not just teachers of accounting, but teachers of corporations, securities regulation, creditors' rights and even contracts. It is a book which law students with a particular interest in business law should be encouraged to read, not only for the accounting learning, but for the insights into the business environment which the authors so amply provide.

Whether it is a book appropriate for every law student who can be enticed into electing a course in accounting is a harder question. I do not believe, as the authors suspect some will, that "the book is over the heads of many law students." 14 It may, however, go a great

13 Id. 313 (emphasis added) (quoting H. Ross, THE ELUSIVE ART OF ACCOUNTING 15 (1966)).
14 Id. XII.
deal deeper than many care to venture and I am frankly fearful of discouraging the many students who want to know something about accounting for the sake of those who want and ought to know a great deal. Perhaps the only way to answer the question is to spend some time in the classroom with Fiflis and Kripke and a mixed bag of history majors, political scientists, and business administration graduates, all one-third on their way to becoming lawyers.
NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY.

Joseph W. Bishop, Jr.†

I have very little fault to find with Professor Taylor's exposition of the law, both our own constitutional law and the international law of war, applicable to the hostilities in Vietnam. It appears accurate, lucid, and reasonable—an extraordinarily good summary, for the lay as well as the legal reader, of some extraordinarily difficult legal problems. In particular, I am in complete agreement with his conclusion that the law of war, as difficult as it may be to apply and enforce, is very much better than no law at all. Its existence has averted a great deal of suffering in the wars which have afflicted our species during the last half century or so.¹

I have, of course, a few caveats about some of Professor Taylor's suggestions. For example, while agreeing that it might well be preferable to try the American soldiers accused of war crimes in the Song My incident before special military commissions composed of civilian lawyers and judges, instead of before courts-martial, I have some doubt whether that could legally be done. Certainly, if I were counsel for one of the accused, I could make a strong argument that under the Uniform Code of Military Justice² he is entitled to trial by general court-martial, with all the protection that implies.

Likewise, I have greater doubt than Professor Taylor as to the validity of the so-called "Nuremberg defense," a concept which in essence would permit an individual lawfully to refuse to obey orders to participate in training for combat in Vietnam, to go to Vietnam, or even to report for induction, on the ground that compliance with such orders would put him in a position in which he would be compelled to commit violations of the law of war.³ My trouble with the concept is that I do not believe its basic premise. With few exceptions, the only violations of the law of war for which people have been punished have been deliberate, voluntary acts which the perpetrators must have realized were war crimes and which they were under no real compulsion to commit. An American soldier of ordinary intelligence and ordinary moral courage certainly can refrain from committing war crimes without fear of legal punishment, and he probably can do so without fear of extralegal penalties. Indeed, it seems obvious that the great majority of American soldiers do so refrain.

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³ T. Taylor, supra note 1, at 15.
But even on these matters Professor Taylor's position and mine are not very far apart. Overall this is a commendable book. I would feel much happier about the world if such a work could be published, or even read, in China or Russia or North Vietnam.

I agree also with Professor Taylor's conclusion in his chapter on Aggressive War that the "crimes against peace" principle of the Nuremberg Charter cannot usefully be applied to the fighting in Vietnam, any more than it can be applied to the Arab-Israeli conflict. One of the many unique things about Adolf Hitler was that he scarcely bothered to claim that the Third Reich was the victim of aggression. World War II was one of the very few wars in history in which it could be said with something like certainty which side started it. On the evidence available, I incline toward the opinion that North Vietnam bears the major part of the responsibility for the breach of the 1954 Geneva Accord and the initiation of violence in South Vietnam; but the situation is sufficiently tangled so that I am left with that reasonable doubt which, under our system of criminal law, forbids a conviction.

The core of the book is devoted to breaches in Vietnam of the conventional law of war. There can be no doubt that American soldiers have sometimes—far too often—been guilty of violations of those provisions of the Geneva Conventions which are clearly applicable, particularly in the mistreatment and killing of noncombatants and prisoners of war who were not in a position to commit hostile acts. The Song My massacre, whoever was responsible for it, is an example of such a clear violation, although as Professor Taylor recognizes, it seems to have been an extraordinary and perhaps unique episode. And, as Professor Taylor says, even it "pales into . . . insignificance" when compared to some of the atrocities committed by the enemy.

Indeed, it may be that the root of the problem is exposed by Professor Taylor when he points out that North Vietnam and the Vietcong simply refuse to be bound by the conventional law of war. Professor Falk, like their other champions, argues in substance that military necessity justifies that refusal. As a practical matter, this argument cannot be lightly brushed aside. It is clear that if they, or the Palestinian guerrillas, were to adhere to the Hague Regulations, the Geneva Conventions, and the rest of the conventional law of war, particularly the fundamental principle that combatants are to be dis-

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5 See, e.g., conventions cited note 13 infra.

6 T. TAYLOR, supra note 1, at 139.

7 Id. 171.

8 Id. 135-36, 173.


11 See, e.g., conventions cited note 13 infra.
tistinguishable from, and as far as possible separated from, noncombatants, they would have small chance of military success. The difficulty is that if military necessity justifies the tactics of the guerrillas, it may also justify at least some of the tactics employed against them. Professor Taylor seems to incline toward the opinion that there should be a strong presumption against involvement in hostilities against an enemy whose tactics and strategy make it exceedingly difficult to resist him without endangering people whose deepest desire is to take no part at all in the fighting. 2 But the logical end of this reasoning would be that an aggressive power, determined to subject other people to its rule by force, cannot be resisted, if only it is sufficiently unscrupulous—that is, if it is willing to create conditions in which resistance will inevitably bring suffering upon innocent people. It is in essence the problem of the airplane hijacking.

Nevertheless, I do not think, and Professor Taylor does not think, that a civilized power, or one which wishes to be civilized, must or should scrap the laws of war simply because its enemy does so. At a minimum, it can comply with the very basic provision of article III of each of the Geneva Conventions, which provides that in the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, “[p]ersons taking no active part in the hostilities, including members of the armed forces who have laid down their arms . . . shall in all circumstances be treated humanely . . .” 3 and which provides that such persons shall not be subjected to violence, murder, or the carrying out of executions without previous judgment pronounced by a regularly constituted court. More broadly, it can refrain from violence which serves no military purpose or which bears no reasonable proportion to the military end in view. This is, of course, the declared policy of the United States and its allies, who assert that the Geneva Conventions are fully applicable to the war in Vietnam.

As Professor Taylor points out, these policies are already adequately implemented by regulations, orders, directives and so forth. 4 The problem is adequate enforcement of those orders, particularly those requiring reporting, investigation, and prosecution of violations of the laws of war by American troops. Although there is little evidence that higher commanders had any direct, affirmative responsibility for what

12 T. TAYLOR, supra note 1, at 172, 173.
14 T. TAYLOR, supra note 1, at 168-69.
happened at Song My, there is some evidence to suggest, at least, that as high as division headquarters there was little interest in investigating and prosecuting those who may have been responsible. Professor Taylor is clearly right in saying that the legal principles of In re Yamashita are as applicable to American as to Japanese commanders; it is their duty under both American and international law to take such steps as are reasonably within their power "to insure compliance with the law of war or to punish violators thereof." I would hope, however, that no commander, American or foreign, will ever again be convicted on such evidence as that in the Yamashita case, or the similar case of In re Hirota.

This principle in turn requires that those whose personal morality does not forbid such acts must be deterred by fear of punishment. If investigation develops evidence of such clear-cut violations of the law of war as seem to have occurred at Song My, there should be courts-martial not only of those directly responsible but also of those who condone such conduct or fail to take reasonable measures to prevent it. I emphasize again that I have not as yet seen convincing evidence of such condonation or acquiescence at higher levels of command. And such trials should not be propaganda trials; like other courts-martial for serious offenses, they should ensure the accused all the protection to which he is entitled under the Uniform Code and the Constitution.

Such a course is not politically easy. Although the Army may seem to be doing less than it should to prosecute violations of the law of war committed by its own forces, it is doing more than has ever been done by any other belligerent during hostilities. As Professor Taylor makes clear, in the past the trial and punishment of war criminals has almost invariably taken place after defeat and in the courts of a totally victorious enemy. It is to the credit of the United States that even prior to the breaking of the Song My story it had court-martialed and convicted some of its own soldiers for crimes committed against noncombatants and prisoners of war. We should continue this policy, and more vigorously than we have in the past. A very large section of the public will, as Professor Taylor points out, ask the very human question why we should punish our own people for acts which the enemy commits much oftener and more brutally, when that enemy not only does not discourage such conduct by his own forces, but boasts of it. The only possible answer, I think, is that we have been, and wish to remain, a relatively civilized nation—I emphasize the word rela-

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tively—with a tradition of respect for law, and that if we emulate the enemy’s brutality we lose not only the respect of other civilized nations, but our self-respect.

The broader question raised by Professor Taylor, too broad to discuss now, is whether it is possible to devise some minimum, fundamental law to mitigate the brutality of what Chairman Mao calls “wars of national liberation.” To have any chance of observance, such laws must be acceptable even to belligerents like the Vietcong or the Arab guerrillas in Palestine. (North Vietnam, of course, is in a different position; I can see no military or political purpose of that government which is served by its refusal to comply with the Geneva Prisoner of War Convention.) It will not be easy to work out even such minimal rules. And yet even the Palestinian guerrillas have little to gain from firing rockets into school buses and killing children. At any rate, lawyers and soldiers ought to give more thought to the shape of the laws which might govern even the hit-and-run guerrilla wars which have become common in many parts of the world in the last quarter of a century.