

Thus the major theme of the book, the movement toward complexity and formality, is linked by the author with the struggle for legality in a larger sense. No evidence is offered, however, to show that the political leaders and the lawyers ever differed on this larger question. Presumably most Soviet lawyers are much happier to follow Khrushchev than they were to follow Stalin (although it must be recalled that it was Stalin who, in the mid-1930's, for all his terrorism in the political sphere, promoted "stability of laws" in non-political matters). Yet it is dubious that there was ever a "lawyers' opposition," as some of Professor Hazard's statements in effect suggest. In working for the elimination of revolutionary tribunals in 1922, the leaders of the Commissariat of Justice surely did not think of themselves as opposing Lenin, who, after all, sought the same objective. The struggle to achieve a system of legality which would impose effective restraints upon the executive must be viewed as a struggle within the legal profession as well as within the political leadership, rather than as a struggle between the two.

It is to be hoped that Professor Hazard will treat this book as the first of a multivolume series on the history of the Soviet system of administration of justice, and will take us, with the same painstaking research, through the periods of 1926-1936, 1936-1953, and 1953 to the current reforms.

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THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA. By A. D. Neale. New York: Cambridge University Press, 1960. Pp. xvi, 516. \$7.50.

THIS book, written by a distinguished British civil servant, undertakes to survey the entire body of antitrust law in the United States. Part I treats the legality of price fixing and other agreements among competitors, monopolization and monopolistic practices, exclusive dealing and tying contracts, mergers and acquisitions and price discrimination. In addition, there are chapters on patents and the antitrust laws, international cartels, resale price maintenance, the administration of the antitrust laws and a final chapter dealing with remedies. Part II of the book considers antitrust as an American policy and then briefly discusses the question "Antitrust for Export?"

This comprehensive survey is accomplished within the short confines of about 500 pages. Most of the important appellate court opinions are discussed and analyzed. The result is a complete survey as well as a penetrating analysis of the United States antitrust laws. That this broad coverage has been achieved within the compass of only 500 pages testifies to the care and judgment with which the author went about his task.

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To write any text book on all of the law of antitrust in the United States is an exceedingly difficult task, in view of the breadth of scope of the subject and the volatility of the decisional law. As Mr. Neale points out, the genius of the antitrust laws (except for the Robinson-Patman Act) has been that, like the United States Constitution, the statutes are cast in the most general terms. To the courts has been left the task of adapting the generality of the written laws to the changing requirements of a dynamically expanding economy. Accordingly, any book about antitrust is doomed to be outdated in some aspects almost from the moment of publication. Mr. Neale's volume is no exception. Though just published, it was written in the middle '50s before the campaign of the Antitrust Division and the Federal Trade Commission to enforce Section 7 of the Clayton Act reached high gear. The seven-page treatment of Section 7,<sup>2</sup> in the light of the events of the past three or four years, is wholly inadequate.

On the whole, Mr. Neale's volume exhibits a most sensitive appreciation of the judicial process in antitrust cases. He finds the wellspring of America's vigorous antimonopoly policy in our "distrust of all sources of unchecked power."<sup>3</sup> Mr. Neale observes this distrust in many spheres of American life: "It affects public power no less than private and underlies many of the political and constitutional arrangements of the United States."<sup>4</sup> In Britain, on the other hand, "the possession of power by established authorities arouses a much lesser degree of anxiety . . . the emphasis is much more on the use of power."<sup>5</sup>

In his treatment of single-firm monopolization, the author contends that possession of the power by a single firm to exclude competitors and to fix prices is to be tested by the rule of reason.<sup>6</sup> Otherwise, he states, the putative monopolist may be guilty even though his monopoly was "thrust upon him." This leads him to the conclusion that:

[T]he legal task of the courts under section 2 of the Sherman Act is to apply the Rule of Reason to a diagnosis of the intent of firms which achieve a monopoly position.<sup>7</sup>

Mr. Neale's use of capital letters for the rule of reason would seem to be a step in a direction toward canonizing it. There is danger that it will become, like Saint Paul, "all things to all men" in order that it "might by all means save some."<sup>8</sup> In any event, it is difficult to imagine how the rule of reason could be applied to a "diagnosis of . . . intent" in any antitrust proceeding. If the author means only that reason, as distinguished from Reason, is to be used in analyzing evidence bearing on the defendant's intent, he will hardly have contributed to any reader's understanding of the problem.

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2. Pp. 207-14.

3. P. 422.

4. *Ibid.*

5. P. 475.

6. Pp. 95-99.

7. P. 99.

8. 1 Corinthians, c. 9, v. 22.

Mr. Neale returns to firmer ground in suggesting that the "illegal intent"<sup>9</sup> of a monopolist may be nothing more than an "element of positive drive."<sup>10</sup> And he is careful to warn his English readers of the subtleties in the law on intent in antitrust cases. In fact, he might have risked being more explicit by stating that "intent" in monopolization cases may mean nothing more than that the defendant acted with deliberation.

Mr. Neale concludes his chapter on the law of monopolization by stating:

Thus the test of illegal intent is likely to vary with the degree of danger that the courts see in the alleged monopolist's power as well as with historical shifts in economic and social beliefs. Intent is assessed in the light of power.<sup>11</sup>

In finding that intent is assessed in the light of power, Mr. Neale leans towards Judge Hand's approach in *United States v. Aluminum Co. of America*.<sup>12</sup> On the other hand, if he had concluded that power is to be assessed in the light of the accused's intent, he would have found equally persuasive authority in *United States v. United States Steel Corp.*<sup>13</sup>

It is no doubt a source of distress to those who view Section 2 as primarily an instrument of economic policy to read that the element of intent plays a part in the decisions. The fact remains, however, despite Mr. Neale's confusing reference to the rule of reason, that he has impressive judicial authority to support his thesis.

The author reveals a sensitive ear for the nuances in antitrust in America. In discussing the district court's opinion dealing with remedies in *United States v. United Shoe Machinery Corp.*,<sup>14</sup> in which Judge Wyzanski declined to grant the Government's request for dissolution of the defendant, Mr. Neale writes:

It seems probable that what Judge Wyzanski called the "caution and humility" of the courts in this respect commend themselves to public opinion generally in the United States, for Americans often tend to take a romantic view of the achievements and efficiency of large industrial organizations even while they take a suspicious view of their power. To have the power condemned in the courts as illegal, and its exercise beset by complex injunctions, while the organization itself remains intact, is a solution which reflects this ambivalence of attitude pretty closely.<sup>15</sup>

It seems to me that Mr. Neale has put his finger on the most difficult aspect of the antitrust judicial process. That which he characterizes as an American "ambivalence of attitude," zealots have termed the Achilles heel of antitrust. To these partisans, to paraphrase Mr. Justice Jackson in *International Salt*

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9. P. 129.

10. P. 97.

11. P. 129.

12. 148 F.2d 416 (2d Cir. 1945).

13. 251 U.S. 417 (1920).

14. 110 F. Supp. 295 (D. Mass. 1953).

15. P. 436.

*Co. v. United States*,<sup>16</sup> too often the antitrust enforcement agencies have "won a lawsuit and lost a cause." Yet Mr. Neale believes that in American antitrust exegesis, the courts have exercised a finely tuned selectivity in imposing *per se* rules of illegality in some areas (e.g., price fixing, boycotts), while leaving other forms of business behavior open to assessment, not in terms of economic structure or performance, but in the light of the intent motivating the challenged conduct.

There is, of course, considerable scope for disagreement with Mr. Neale on this point. There is little room, however, to quarrel with the masterfully condensed, yet readable form in which he has summarized the existing case law in America.

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16. 332 U.S. 392, 401 (1947).

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