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Book Review

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BOOK REVIEW

AMERICA REVISITED 150 YEARS AFTER TOCQUEVILLE. By Eugene J. McCARTHY. DOUBLEDAY & COMPANY, INC., 1977. Pp. 256. \$7.95.

There have been numerous changes in America in the past one hundred fifty years. Today America is undergoing change at a faster pace than ever before in its history. *America Revisited* by Eugene J. McCarthy is a very stimulating and insightful look at America one hundred fifty years after *Democracy In America* was written by Alexis de Tocqueville. As a former distinguished senator from Minnesota and former candidate for the presidency, McCarthy has years of experience in national politics and government. McCarthy utilizes this experience in comparing the United States as he perceives it today and as it was perceived by Tocqueville one hundred fifty years ago. He does this by discussing changes in certain areas of our society, including race relations, the prison system, religion in America, government regulation of business, the legal system, first amendment protections, and the change in power of the office of the President.

McCarthy, in discussing the problems of Blacks, recognizes that the lot of Blacks has improved since 1830. Of course, the abolition of slavery has been the greatest accomplishment toward better conditions for Blacks since Tocqueville's day. But in the last ten to twenty years greater strides have also been made by way of government action. As a result Blacks today have become a viable political force. With a realistic viewpoint, however, McCarthy does concede that government action can only do so much and what is really needed is economic equality. Although McCarthy did not have the benefit of the *Bakke* decision when writing his book, he does mention the issue of reverse discrimination and how it too has become an element in improving the economic condition of Blacks in this country.

In turning to examining the prison system, McCarthy asks the basic question — what are prisons for? McCarthy is of the opinion that a very definite purpose of prisons is to punish the offender, and

that rehabilitation and deterrence of the offender are more speculative purposes of our present prison system. As to reforms which should be taken, McCarthy suggests the following: Probation for non-violent crimes and first time offenders; doing away with some crimes (drug abuse, drunkenness, homosexual and other sexual acts — at least as between consenting adults); the shortening of prison terms; and the abolition of the indeterminate sentence which McCarthy believes to be self defeating in its present state. McCarthy also discusses the racial as well as the drug abuse problem in prisons recognizing their adverse effects on the entire prison system, but at the same time recognizing that these problems can hardly be solved in prison if they cannot be solved by society on the outside.

In his analysis of religion in America, McCarthy emphasizes the fact that the United States is unique in that it has a civil religion which can be distinguished on the basis that there is an acceptance of divine providence as having a special concern for America, an acceptance of a special mission to the world and of a covenant, and an acceptance of the idea that religious beliefs serve the state will. This idea of a civil religion may be under-going a change. McCarthy states, “[T]he ‘nation with the soul of a church,’ as the United States was described by Gilbert Chesterton, is less certain today of mission, covenant, and providential support than it was in 1831.”

One area which has changed considerably since Tocqueville’s visit is governmental regulation of business. According to McCarthy this has changed greatly in recent years in that more and more differences between the government and major corporations are not settled by laws which regulate business but rather by negotiation between the government and the major corporations. The major problem of America, in McCarthy’s view, however, is overconsumption. To solve this problem he calls for a continuing moral response, one which would not require great sacrifices, but which would require acceptance of the fact that restraint is needed and that we have a responsibility to nature and the resources of the world.

In discussing the legal system of the United States, Tocqueville believed the United States Supreme Court was the last and greatest protector of liberty. McCarthy believes it still is today. McCarthy explains four reasons why he believes there has been in recent years more and more matters which go to court for settlement. One reason is that social, economic and political

institutions in the United States are not operating effectively. Another reason given by McCarthy is that changes which have occurred in America call for a redefinition of the basic liberties guaranteed by the Bill of Rights. A third reason is that there has been a failure of other institutions of government to meet their basic responsibilities. The fourth reason is that Congress and the Executive have failed to bring old laws up to date and have passed others which are little more than good intentions and are almost impossible to administer.

McCarthy states that there is confusion in the practice of law and in the law itself. However, he believes this to be a reflection of the conflict, confusion, and the changes in American life. According to McCarthy only when American society becomes stable will the law and the practice of law reflect this stability.

At the time of Tocqueville's writing about America the main media was the newspaper. Tocqueville's view was that freedom of the press was essential to American democracy and to the protection of the individual. In the last twenty years television has revolutionized the media. This fact could cause some problems because, as McCarthy points out, television, unlike the press, is dependant on government because of government licensing and regulation of the networks and stations. McCarthy suggests that if there is to be regulation of television it should be direct and open, rather than indirectly through the threat of loss of licenses. The idea of free press was well phrased when McCarthy stated, "free press is certainly the worst kind of press (with all its tensions, conflicts and contradictions) until you consider the alternatives."

Americans today, like Americans at the time of Tocqueville's visit, have a disposition to organize and form associations. Tocqueville was of the opinion that freedom of association was the most natural right of man, after that of acting on his own. There is one major difference between the associations described by Tocqueville and today's associations. According to McCarthy most of the groups described by Tocqueville had positive purposes, while many organizations today are set up to prevent, stop, or reverse something which is already organized or has organized support.

In writing about the office of the President Tocqueville had the view that the presidency was not an office of great power or glory. The presidency has changed since Tocqueville visited America. One change has been the great increase in number of presidential advisors whose distinctive mark is that they control the political and

governmental environment of the President. Another change is that in the last twenty to twenty-five years there has been a progressive personalization of the office of the President.

McCarthy, in *America Revisited*, not only points out problems, but goes one step further and offers solutions to those problems. Although McCarthy's book is an excellent comparison between the America as seen by Tocqueville and America today, McCarthy cautions that any judgment of America similar to the one made by Tocqueville requires recognition of five major institutional changes, no one of which was anticipated when Tocqueville looked at American democracy, its principles and institutions. These institutional changes include the change in the power of the presidency, the rise of the military, the rise of corporations, and the development of political parties, which was observed by Tocqueville in its early stages to be a problem for a democratic society. The fifth serious challenge to the working of American democracy is presented by government agencies, popularly labeled the bureaucracies.

America Revisited 150 Years After Tocqueville could only have been written by someone, such as Eugene J. McCarthy, who has had years of experience in politics and government. McCarthy offers an informative and concerned look at the institutions and problems in America today, and the changes which have occurred in the past one hundred and fifty years. Anyone who is interested in reading an insightful, but perspicuous, examination of America will enjoy reading *America Revisited*.

LAWRENCE D. DUBOIS

CROSS-EXAMINATION IN CRIMINAL TRIALS VOLUME I. By F. Lee Bailey and Henry B. Rothblatt. The Lawyers Co-operative Publishing Co., Rochester, N. Y., 1978. 561 Pp. \$45.00.

According to the Chief Justice of the United States Supreme Court, Warren Burger, one-half of all present-day trial lawyers are walking violations of the Sixth Amendment. Even distilling out the hyperbole, there undoubtedly is a significant lack of trial advocacy

skills among some part of the lawyer population in this country. And nowhere do clients tend to suffer in greater proportion to their lawyers' lack of skill than in the criminal trial arena where the stakes can be the highest in terms of loss of liberty and property. This highly-publicized trial incompetency on the part of some unknown percentage of the bar may be due to inadequate training in law school, lack of relevant experience, and to some degree, a lack of emphasis in the legal literature on so-called practical skills.

The authors aid in closing the void by their textual treatment of cross-examination. F. Lee Bailey and Henry B. Rothblatt, at least one of whom is a widely-known criminal trial attorney, have collaborated on a timely treatise that could be quite useful to any practitioner involved in criminal defense work.

Cross-Examination in Criminal Trials, is printed in relatively large type and is written in a concise, highly-readable style. It covers many phases of cross-examination, from the demeanor counsel should assume — such things as proper attitude and where to stand — to the intricacies of cross-examining a psychiatrist, to dealing with the prejudicial conduct of a trial judge. It delves into coping with commonly-encountered types of witnesses such as policemen and experts, and how to deal with the lying or evasive witness. The authors have also included good, concise chapters on the hearsay rule and criminal discovery. The appendix goes into greater detail on cross-examining common witness categories.

The volume is organized along a traditional treatise-style format. Each chapter contains a detailed outline of topics and numbered subtopic-sections. The general principles covered are often followed by short question/answer examples. Unlike many treatises however, the footnoting is rather sparse, which is either good or bad depending on the reader's temperament and needs. The index included is fairly comprehensive and provides easy access to the particular topic sought. There is also a slot for pocketparts, presumably indicating an intent to keep the volume current.

There are a few readily observable drawbacks, however. The first is cost. This volume lists at \$45.00, and at about 8¢ per page, may be a bit over-priced even for tried and true Baileyisms. In some cases the cross-examinations included tend to be drawn out, seemingly violating the rule to use cross-examination sparingly. Also since the book deals mainly in general principles, there are attendant problems of applying them to the actual situations faced by the trial attorney.

More books of this type are likely to surface if the push for increased competency in trial skills continues, as is likely. Regardless of the trendiness of this issue — like the legal ethics issue following Watergate — it is important that the level of trial competency be raised if rights of criminal defendants are to be adequately protected and public confidence in the adversary system is to be maintained. Use of written works, such as *Cross-Examination in Criminal Trials*, is one way to accomplish this by providing a conceptual background for the effective use of cross-examination in court. And cross-examination is undoubtedly one area ripe for improvement.

JOHN J. FOX