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Book Reviews

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BOOK REVIEWS

LAW AND THE LIBERAL ARTS. Edited by Albert Broderick, O.P. Washington: Catholic University of America Press, 1967. Pp. 229 + xxix. Paper $6.50.

The law and the liberal arts—if one is to accept that there is an adequate distinction between the two concepts even in education—are both hodgepodges, partly because they both have changed continuously as concepts and as realities over millenia, and neither has stopped changing yet. Satisfactory exploration of the links between two shifting and perhaps inadequately distinguishable complexities will tax the most subtle and best informed mind: the reader should not bring to the present bravely titled hodgepodge, *Law and the Liberal Arts,* exptectations too sanguine or hopes too high.

Whatever the subject, on the other hand, perhaps no relatively small book by fifty-four authors can leave the reader altogether satisfied with its movement of thought or the sharpness of its focus; when many of the authors have contributed not as writers but as speakers transcribed, the reader may well begin to think that he has really not had a book in his hands at all, but something disguised as a book. ("Oh God," the late T. S. Eliot is reported to have exclaimed to a publisher—proud of her firm's products—in private conversation at Harvard in the mid-50's, "You called them books. Another word gone.")

The count of fifty-four is rough and not guaranteed. Of the seventy-nine persons who apparently participated in the conference (held at Catholic University in December, 1964) which gave rise to the present publication, a few seem to have remained silent; the majority spoke out, had their words inexorably transcribed, and find themselves just as inexorably fixed in print by an editor whose fidelity to transcription excludes the mending of impromptu grammar or even the correction of the sometimes inept punctuation of the recorder. "The dialog has, where possible, been reported as delivered," is that editor's assertion in his preface, as though someone might find this fact worthy of praise or at the very least

grounds for exculpating him. In view of what he found possible, one cannot help speculating as to whether impossibility lay in some unimaginably shocking solipsism or some gross profanity inappropriate to the place. The most gingery expletive reproduced is "By gum." From the notes to the nine chapters, where references to the transcript are given, it is clear that the editor indeed left out large parts of the conference. He should have left out more.

The eleven sections of "dialog" and discussion demonstrate amply that without the inflections, gestures, pauses, and stresses that can make it both lucid and engaging when spoken, informal English is often uncommonly hard to follow in print, and sometimes unendurable. When entire pages of the stufff lack any pertinent relation to the ostensible subject, the reader has good grounds to curse the editor for including them. "We priests nowadays," one learns on p. 171 from the Dean of Catholic Univeristy's School of Sacred Theology, "have a terrififc problem with seminarians, you just can't let them run loose at every whim. They just want everything without discretion; you give them an inch and they take a yard." To this a Georgetown Jesuit replies, "I agree with you to some extent, but not entirely," and supports his position with an account of his difficulties in reaching seminarians by telephone after 9:30 p. m. This scarcely pertinent exchange is unfortunately characteristic of Chapter VII, misnamed "Activity in Related Disciplines." Here Father Broderick acknowledges "gratefully," as well he might, that another hand edited the text from a full transcript of a "workshop"; the reader would be well advised to pass it over altogether. Anyone with a special interest in the current introspections and household squabbles concerning social awareness or legalism or liberal thought in Catholic education is likely to learn more by reading the letters in one issue of the *National Catholic* Reporter. The end of Chapter VII is notable, however, for having the book's only discussion of the natural and physical sciences, surely a very large part of the liberal arts. That discussion takes less than a page and a half, and ends with this statement—its punctuation gives it an engaging flavor of archaic rhetoric—by Mark S. Massel of the Brookings Institute: "Then are we in agreement that it would be desirable with respect to any future planning to make mention at least of the natural and physical sciences."

So much for *that* part of the liberal arts. Literature is mentioned in at least one sentence (in Chapter III); history is referred to, usually vaguely, perhaps six or seven times; the communicative skills are given a nod by more than one contributor, sometimes with the traditional lament that law students are not better equipped than they are to speak or write honest and effective English, a

lament that would come with more grace in a decently written book. There is some talk about the behavioral sciences, especially psychology. Music and art and theatre may be mentioned, but if so, it is not in any memorable way. Philosophy fares somewhat better, since several contributors find ethics important, and particularly because the only Frenchman at the conference, M. Michel Villey of the Faculte de Droit et des Sciences Economiques of the University of Paris, chose to use the occasion for a diffident defense or Aristotelianism and an uncertain attack on nominalism, both delivered as though he were not quite sure that anyone was attacking the one or preparing to defend the other. (In passing, M. Villey seems to want to credit William of Ockham with inventing the word *modernus*, but this odd attribution may be nothing more than a Francophone turn of phrase.)

The explanation for the uneven concern with the liberal arts lies in the circumstance that the conference had a title different from and more fitting than that of the book: "Law in the Liberal Arts: the Social Dimension." There is in the book no hint why the preposition was changed to a conjunction and the specific focus dropped from the title.

With the right title, without Chapter VII and the remaining nine sections of transcribed improvisation, this would be a valuable (and much smaller) book. The reader then would regret principally that the substantive papers are themselves not longer: they come from some very subtle and well informed minds.

In the Introduction, Dr. Gustave Arlt's "Historical Survey of Interdisciplinary Studies" ought to be ten times its length; the learned president of the Council of Graduate Schools provides in the two pages allowed him too brief a review—but a good one—of the progressive breakdown since about 1940 of rigid departmental and disciplinary lines in universities.

In Chapter I, "Law, Society and Values," Mr. Adolf Berle rhapsodizes humanistically—it all seems rather sad four years later —over the promise of the Great Society, and, as usual, Mr. Berle's words deserve respect and attention. M. Villey of Paris, as has been noted, flees in the traditional manner of Aristotelians when no man pursues, but still provides a useful insight into the realist postulates of French legal theory. Mr. Robert McDonald, a New York lawyer, affirms the attitudinal, and hence moral, element in the education and practice of the lawyer, who must, he maintains, be a generalist. He may be right in suggesting that specialists need not or cannot be quite so moral.

Chapter II has four men describe briefly and informally the graduate study experiments in law and the social sciences supported

by the Russell Sage Foundation at Northwestern, Denver, Wisconsin, and Berkeley. Professors Victor Rosenblum, Robert Yegge, Harry Ball, and Philip Selznick (from the four universities, in the order named) tell enough about the respective programs to stimulate the reader's curiosity to the point that he will want to seek more detailed and later accounts of these interdisciplinary undertakings.

The place in the undergraduate liberal arts curriculum of law courses or courses with legal content is the subject of Chapters III through VI, with some twenty variegated teachers modestly defending one or another position, none of them at sufficient length or with enough conviction to convince—or perhaps even really inform—a reader not previously informed and convinced. But if diffidence and brevity uniformly weaken the presentations, these remain interesting for both collective breadth and individual elements or reportage.

Chapter VIII is all improvisation, but not as long or as embarrassingly parochial as Chapter VII. It goes under the ambitious title of "Faculty Training, Area Planning, the Small Colleges." One could summarize it by saying that the members of the conference saw difficulties under these three headings, but thought there would be solutions. Professor Harry Ball of Wisconsin does some good propagandizing for the then recently incorporated Law and Society Association, and the reader observes with satisfaction (as though he were at a play) that Professor Steven Frankino of the Catholic University Law School was moved to seek membership on the spot.

In Chapter IX the conference chairman, Mr. Mark Massel, presents two summaries of proposals arising from the conference, the first done right there and the second apparently put together afterwards. The second is, of course, more inclusive, to the point that it appears to summarize things not said at the conference. A dramatic afterword by the editor alleges at once that liberal arts educators do not see law as "that most dynamic social and moral system where fact and value meet," and that they should see it that way.

This should have been a much better book: some of the parts are transcendently better than the whole, and suffer from their setting. But then they would perhaps not have come into being without the conference, or been made available to general readers without the publication. And there is much information and light to be found here, if the reader is willing to pay a certain price for it.

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THE JURY AND THE DEFENSE OF INSANITY, by Rita James Simon. Boston: Little, Brown & Co. Pp. 269. $10.00. 1967.

This is the third book-length report to come out of the University of Chicago Law School's Jury Project.[1] Its purpose, like that of its predecessors and the Project as a whole, is to get some facts to contribute to the apparently interminable, often exasperatingly theological debate over the jury as a decision-maker in the judicial process. The theme is stated in the preface to the first of these reports, *Delay in the Court*: "The study, like that of the jury project generally, has a special emphasis: the partnership of the lawyer with the social scientist in a fact-oriented inquiry." That book began as a study of the role of the jury in creating or perpetuating one of the most pressing problems of judicial administration, and became finally an exhaustive study of all the factors contributing to delay in a single judicial system. The second report, *The American Jury*, was a comprehensive study of the functioning of the jury in criminal cases. This book investigates the functioning of the jury in that numerically small but theoretically and systematically crucial portion of criminal cases involving the defense of insanity.

The lawyer-social scientist partnership in the project is evident and pervasive: Harry Kalven, Jr., co-author of *Delay in the Court* and of *The American Jury*, and co-director of the project, is a lawyer and Profefssor of Law at the University of Chicago; Hans Zeisel, also co-director and co-author of the first two reports, is a sociologist and Professor of Law and Sociology at the University of Chicago; Rita James Simon is a sociologist and Associate Professor of Sociology at the University of Illinois. Those assisting in the project include lawyers, sociologists, social psychologists, administrators.

The three reports illustrate the variety of approaches which can be subsumed under the heading of "social science methodology": *Delay in the Court* utilized primarily court records and statistics compiled by the courts for their own administrative purposes, subjected to intensive factorial analysis; *The American Jury* analyzed answers to a long and complex questionnaire filled out by judges sitting in actual criminal jury cases, showing their own view of the case and trying to explain why the jury reached the decision it reached; *The Jury and the Defense of Insanity* alone used an experimental method, playing recordings of simulated cases to juries and analyzing verdicts, questionnaires and deliberations. There can be no doubt that Mrs. Simon's book, quite as much as its predecessors,

1. ZEISEL, KALVEN & BUCHOLZ, DELAY IN THE COURT, Boston, Little, Brown & Co., 1959; KALVEN & ZEISEL, THE AMERICAN JURY, Boston, Little, Brown & Co., 1966.

makes a contribution to the literature which no serious discussion of the subject in the future can afford to ignore.

As a sociologist, Professor Simon is concerned with understanding the factors which influence the decision of the jury, and the book attends to a wide variety of them. Of greatest interest to the legal profession generally, however, is her attempt experimentally to test one of the key assumptions in a debate which today is absorbing the attention of the bar, the judiciary and the legislatures in many American jurisdictions, namely, that over the formulation of the insanity defense in criminal cases.

It is assumed by nearly all participants in this debate that the abstract formulation is important and that how it is formulated will influence the decision in particular cases, especially where the jury decides. Does it actually make any difference to the jury how the defense of insanity is formulated? Does the juror's understanding of a particular formulation differ in any significant respect from the judge's or the lawyer's? Which formulation most closely corresponds to the juryman's own conception of the just disposition of such cases? Which formulation permits the greatest latitude for the professional analysis and opinion of the expert psychiatric witness who is now becoming the keystone of any criminal trial in which the defense of insanity is raised? Is the jury able to understand and utilize expert testimony in its freest form, or is it necessary, as some have argued, to force expert testimony into relatively simple molds in order for the jury to be able to make use of it?

As in any experiment, the method is crucial, and no doubt much of the discussion of this book which is bound to ensue will center around the method used. Two basic criminal cases were constructed: One a housebreaking case adapted from the famous *United States v. Durham*,[2] and the other an incest case, adapted from another actual case from the District of Columbia. Trial transcripts of each were then prepared, varied according to the experimental variables sought to be tested, produced for tape recording (apparently by law students and professors) and played before juries drawn from panels serving normal jury duty in Chicago, St. Louis and Minneapolis. The jurors each filled out a questionnaire before the trial showing background and attitudes toward issues involved in the cases; another questionnaire was filled out immediately following the "trial" and before deliberations; deliberations were tape recorded; group verdicts were taken; and a post-deliberation questionnaire was filled out by each juror. Each variation of each trial was played to anywhere from 5 to 30-odd juries, so that statistical analysis of a crude but useful sort was possible. The

2. 214 F.2d 862 (D.C. Cir. 1954), opinion by Bazelon, J.

experimenters are confident from their observations that the jurors took their jobs seriously, so that what they did can be taken as indicative of what a jury would do with a "live" case of similar content.

There were two major variables in the experiment: the formulation of the insanity defense in the judge's instructions, and the scope and depth of the expert psychiatric testimony on the issue. A third variable used only in the incest case was whether or not the jury was informed in the instructions that the defendant, if found guilty by reason of insanity, would be committed to a mental institution rather than simply set free. Two additional variables were present in the cases, but not fully tested in the experimental design: first, the nature of the crime charged—the relatively unexceptional offense of housebreaking compared with the rather heinous crime of incest; and second, the nature of the mental illness involved—the housebreaker was diagnosed as psychotic and delusional, while the defendant in the incest case was diagnosed as a psychoneurotic who loses control only over specific urges. Both of these last are important, and presently much speculated over: the more heinous offenses are supposed to raise more strongly the conflict between the desire for revenge and the feeling that a person who commits such a crime must be sick; and it is widely assumed that the distinction between psychosis, usually involving a cognitive "break with reality," and neurosis, involving a loss of emotional control, is psychiatrically valuable one which also happily corresponds to the "knowledge of right and wrong" criterion thought to be the keystone of *M'Naghten*. To have incorporated these variables fully into the experimental design here reported would no doubt have unreasonably complicated the already impressive task performed by Professor Simon and her co-workers. We can hope, however, that these tantalizing questions will soon be subjected to the full experimental treatment.

Three different formulations of the insanity defense were submitted to juries in the instructions. One was based on the formulation established by the House of Lords in *M'Naghten's Case* in 1843, since that time the most widely-adopted rule in the Anglo-American legal world:

> . . . [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong.[3]

3. 10 Clark & Fin. 200, 210 (1843), 8 Eng. Rep. 722.

Another formulation utilized was that expounded by the District of Columbia Circuit in *Durham v. United States*, which in turn dates back to the 1869 New Hampshire case of *State v. Pike*:[4]

> The rule we now hold is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.[5]

These are, in the author's view, the two formulations which are presently functioning competitors for favor in the Anglo-American legal world. The third formulation utilized in the experiment is designated by Professor Simon as the "uninstructed" version: "If you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." With this instruction the author sought to test the capacity of the jury to reach a sensible conclusion without the assistance of an authoritative formulation off the relationship between responsibility and mental illness. Such a rule, non-existent in Anglo-American jurisdictions at present, is apparently followed, for example, in France.[6]

A reader might wonder why the experiment did not include a third actual competitor in the list of alternate formulations, which was formulated in 1955 (a year after the *Durham* case) by the American Law Institute:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.[7]

This formulation is proving a more successful competitor than the *Durham* Rule; only Maine and the Virgin Islands have adopted the *Durham* rule in addition to New Hampshire, while The American Law Institute formulation has been adopted in at least 5 states (Illinois, Vermont, Missouri, Massachusetts, and Maryland) and at least two federal circuits (the 2d and the 10th), as well as in part by New York and the 3rd federal circuit.[8]

The A.L.I. formula is mentioned only in a footnote to a "postscript," and no explanation is given for the failure of the

4. 49 N.H. 399 (1869). A leading influence on this decision was the Maine psychiatrist, Isaac Ray, whose remarkable pioneering treatise THE MEDICAL JURISPRUDENCE OF INSANITY was then in its 4th edition. The first edition, (1844) edited by Dr. Winfred Overholser and supplemented by portions of later editions (the 5th came out in 1871), was reprinted by the Belknap Press of Harvard University Press in 1962.
5. 214 F.2d 862, 874-5 (1954).
6. French Penal Code § 64: "If the person charged with the commission of a felony or misdemeanor was then insane or acted by absolute necessity, no offense has been committed." THE FRENCH PENAL CODE 39 (Mueller Ed.) (London, Sweet & Maxwell, 1960.
7. AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01(1) (Official Draft 1962).
8. See GOLDSTEIN, THE INSANITY DEFENSE 88 (1967).

experiment to include it. The explanation may lie in a feeling that it is really nothing more than a refinement of *M'Naghten* as modified by the so-called "irresistible impulse test" (here "substantial capacity . . . to conform his conduct to the requirements of law"), and therefore not worth testing separately. This assumption may have been strengthened by part (2) of the A.L.I. rule, which seems to be an attempt to exclude the controversial psychopathic or sociopathic personality from the ranks of the mentally ill, as does the strictest *M'Naghten* approach: "As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Whatever the intention, however, the category as described seems to be an empty one from the psychiatric point of view, since other symptoms are almost always found in persons diagnosed as psychopathic personalities. Another possible explanation is that the basic design of the experiment seems to have been fixed prior to 1960, and that the A.L.I. formula did not look then as lively as it does now.

In any case, the utilization in the A.L.I. proposal of the vaguer but more functional terms "substantial capacity," "appreciate," and "conform" to avoid the supposed rigidities of the *M'Naughten* rule would make it a prime candidate for the kind of testing undertaken here, to see whether any practical advantage is gained by such modifications. This would be particularly so since the author seems to have been attracted by the polarity of *M'Naghten* as the layman's view and *Durham* as the more advanced psychiatrist's, and could therefore have made use of an attempted compromise for comparison.

The variation in psychiatric testimony took two forms: first, the content of the testimony had to vary at least in the conclusion reached according to the formulation of the insanity defense under which the trial operated; second, the experimenters utilized two different styles of testimony, which designated "model" and "typical," the model testimony including a much more extensive history of the patient/defendant's illness, the typical testimony on the other hand merely a classification of current symptoms according to accepted diagnostic categories. About half of the juries hearing each variety of legal rule heard model testimony and about halff heard the so-called typical testimony.

For the lawyer, at least for the lawyer who has been involved in insanity defense cases and/or has expended an appreciable amount of intellectual energy reflecting on the problems, theoretical and practical, which the insanity defense raises, there may be relatively few surprises in the experimental data produced in Professor Simon's book. If it can be taken as a farily reliable criterion for

identifying the well-designed, conscientiously executed experiment on large social questions that the results are undramatic or inconclusive, and it seems to this reviewer to be the case, this experiment merits praise. The objective and detailed analysis confirms that the problem is real and the solution not obvious, and this confirmation is of considerable value. Perhaps even more importantly, from the point of view of one not yet thoroughly familiar with the issue, a study of the experimental design and of the author's analysis of the information gleaned from it provides a new approach to understanding the problem, for it translates a thorough analysis of the theory into a prescription for developing further data. That the prescription is not immediately filled does not exhaust its worth.

Professor Simon's book, indeed, contains more than a mere description of an experiment. It begins with an historical sketch of the development of the law on the subject, adds a helpful and enlightening discussion of the problems involved in constructing a test, and concludes with a scholarly report of the actual experiences of the District of Columbia with administrating the *Durham* rule. A hawk-eyed lawyer can detect signs that the author is a sociologist and not a lawyer, and there a few errors in reporting (e.g., the assertion that Vermont has adopted *Durham,* rather than A.L.I.); but these chapters are valuable aids to the reader's basic understanding. A useful bibliography on the insanity defense is also appended.

For the lawyer, the most fascinating part of the book might nonetheless be the first appendix, setting forth a transcript, only slightly edited, of the entire deliberation of one of the juries which heard the incest case under the "uninstructed" version of the defense with the full or "model" version of the psychiatric testimony. The author supplies it to us not as typical, but as interesting; and it is most assuredly interesting. Whether this deliberation, along with Professor Simon's chapter generally describing the juries' deliberations, leaves the reader heartened or discouraged about the jury as a decision-making body will probably depend on his own predilections about the necessity of scientific expertise and scholarly detachment in reading fundamental social decisions. That the jurymen took their job seriously, and that they made a real effort to bring the information given them to bear on their decision, and that the deliberations do in fact involve an accommodation of conflicting attitudes and prejudices, seem to this reviewer to be amply confirmed.

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PRIVACY AND FREEDOM, by Alan Westin. Atheneum, New York. Pp. 487. 1967.

Alan Westin's book could be a landmark. Some of his reviewers think it is. Already PRIVACY AND FREEDOM has made the major leagues of the book review columns. It covers a wide spectrum, some sociology, a little bit of anthropology, a lot of good reporting and a lot of law. So far most of the reviews have treated it as a book of general interest. I have tried to appraise it as a book for lawyers.

Even a lawyer can like a book for its good reading. This one will not make the best seller list on that score. Much of it is tough going with repetition, summarizing and restating. A reader is never likely to forget the general plan of the book. Nevertheless, there is fascinating stuff on eavesdropping, camera spying, psychology tests and the pervasive effects of computer data gathering on individuals and reputations. My guess is that non-lawyer readers will concentrate on Part Two of the book, "New Tools for Invading Privacy". Perhaps most of us want to believe that some day we shall do all of our buying with credit cards. It could be fun to live without money, but it will not be fun to live with character analysis by machines.

I can be exaggerating the picture Westin draws in these fascinating chapters of the using of detection machines and the giving of psychology tests to employees and applicants for employment. All kinds of people use all of these devices, crime stoppers, private detectives, business men, politicians and curious people who are just plain nosy about their neighbors. What can we do about it, and what are we trying to do? The author thinks we can do much through legislation, administrative supervision and court decisions, all of which can add up to an accumulation of ground rules that can be worse than the irritants.

I am thinking of an experience of mine many years ago in Wisconsin, where the judges boast that they do not recognize a right of privacy. Someone snapped a picture of me in a nightclub. I wanted to propose a legislative scheme for the licensing of camera users. There would be a code of regulations. On the showing of a violation the user's license would be revoked. Criminal sanctions would be imposed against anyone using a candid camera without a license. Multiply all that by other kinds of gadget using that should be licensed. What a system! Ground rules for the sake of ground rules. I see a little bit of that in Westin's proposals for combating the using of tools that can invade privacy.

Nevertheless, the problems Westin describes are real. They need discussion and exploring. We can count on some old-fashioned

common law analogies to help, and we can add some administrative supervision over the using of machines in public agencies. Bugging, camera spying, computer analyzing is dirty stuff. It can be rejected as evidence in criminal and civil cases. It is such dirty stuff that it can be like high-pressure debt collecting, the using of pictures for commercial purposes without consent and the digging up for publication of salacious rubbish that is no longer news. Bugging and camera using can be torts. If we have to settle for legislation, let it be specific. Let the legislature put its finger on what it would proscribe, and let the sanction be a civil suit for damages.

All of what we are suggesting and all that Westin suggests will not erase conditions that are imminent in a world where all of us live close to our neighbors' back yards. We are all used to living under conditions that are never more than approximately good. Two possibilities can help to make the world and its communities better for everyone: drastic population control and an ecumenical movement even more comprehensive and simple than the vision of Pope John. Presently I think we will have to settle for more newspaper reporting, more law talk by lawyers and some simple common law restraints.

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