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Review of *Minding the Law*, by Anthony G. Amsterdam and Jerome Bruner

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against the maintenance of any double standard in the area of sexual ethics" (p. 289). Regarding witchcraft, it is interesting to note that the Kirk sessions dealt harshly both with the sorcerer and with those who solicited the sorcerer's services. By punishing the former, the Kirk sessions made it clear that their behavior was socially unacceptable and that they would be accountable.

When Graham compares the consistorial practices of Scotland with those in France, we see two very different practices emerging from a common theological and ecclesiological foundation. The Kirk was, after 1560, the only lawful church in Scotland, but its members were frequently indifferent to the institution except to baptize their infants. In France, a gathered, entirely voluntary Reformed Church was populated by articulate, committed believers but, at the same time, the Catholic Church was a legal alternative. There was, in short, a religious marketplace—and if the reformed discipline was too strictly applied by zealous consistories, members could take their spiritual business from Geneva to Rome.

My only significant criticism of Graham's excellent study is the brevity of the Huguenot comparison. While he writes about Scotland and not France, the tantalizing inclusion of some French material makes me wish for a more fully developed Franco-Scottish focus.

The historian of law will find Graham's discussion of public and private justice illuminating. In Scotland, weak courts had traditionally been the recourse of last resort in settling private disputes, but the Kirk held that true penitence and forgiveness could only be realized in church courts which were stronger and which led the way "in early modern [Scottish] state building... [for] by making discipline a necessary mark of the true church, the reformers would play a major role in making the rule of law a necessary mark of the well-governed state" (p. 150).

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ANTHONY G. AMSTERDAM and JEROME BRUNER, *Minding the Law*.
Cambridge, Mass.: Harvard University Press, 2000. x, 453 pp. \$35.00.

At least since John Dewey reminded lawyers that formal logic captured the result, but not the process, of legal reasoning, scholars have sought better to understand how judges decide cases. Part of the motivation is parochial; lawyers need to know how best to advance a client's cause. Part of the motivation is normative; judges can employ methods better adapted to reaching the right result (however defined) if they appreciate how alternatives work in practice. Dewey, for example, suggested that the deductive logic of the syllogism be replaced by what he called experimental logic.¹ Judges should not consider rules, precedents, or principles to require outcomes in particular cases. Instead, they should consider them hypotheses whose application to the case they should always test against anticipated consequences and the social good that law seeks. Exemplifying the movement toward sociological and realist jurisprudence, Dewey's experimental logic invited lawyers and judges to use the insights of other disciplines better to predict and evaluate the consequences of judicial decisions.

In *Minding the Law*, Anthony Amsterdam, a leading teacher of lawyering, and Jerome Bruner, a distinguished academic psychologist, similarly seek to illuminate

1. JOHN DEWEY, LOGICAL METHOD AND LAW, 10 CORNELL L.Q. 17(1924).

judicial opinions from a perspective of disciplines not readily accessible to the “wholly law-trained, law-habituated eye” (p. 282). But much of the similarity ends there. First, the perspective they bring, described in the subtitle as “How courts rely on storytelling, and how their stories change the ways we understand the law—and ourselves,” eschews normative judgment. So the truths about judicial decision-making revealed by appreciating how courts rely on storytelling will not advance the inquiry into whether the results of decisions are better or worse. Next, although relying on insights from such diverse disciplines as “psychology, linguistics, anthropology, literary theory, neurology, and the computational sciences,” Amsterdam and Bruner focus on the text of judicial opinions (p. 3). So their insights illuminate how judges’ justifications reveal undefended presuppositions influencing their decisions. Loathe to join the debate about whether judicial choices are ultimately justified, Amsterdam and Bruner still “do not hesitate to say that the choices lack any justification *in the text*” (p. 7, emphasis in original).

Simultaneously, the authors pursue a Dewey-like agenda by seeking better to understand how judges do decide, considering that syllogistic logic at most shows where judges arrive rather than how they got there. Three processes are critical: categorization, narrative and rhetoric. The authors examine each in a chapter that sums up recent scholarship about these activities. Then they employ the insights of that scholarship to analyze Supreme Court opinions. The result only partly fulfills their desire to broaden the exploration of judicial decision-making by “making the familiar strange” (p. 4). The importance of categorization—choosing and defining relevant legal categories and placing events within them—will be very familiar to lawyers, as will critiques of judicial opinions for failing adequately to defend categorical choices that they make. Dewey similarly criticized syllogistic reasoning in judicial opinions because it often disguised contingent choices as required outcomes. Especially where categorization has normative implications, how should major premises be chosen, minor premises defended and conclusions drawn without considering the consequences for the case and the world at large?

Although the type of critique may be familiar, its power in the hands of Amsterdam and Bruner will not be familiar to most of us, lacking their analytic prowess and knowledge of the seemingly endless array of possible categorical flaws. They overwhelmingly show that the Court builds the opinions that they analyze (and presumably many others) on the shakiest of foundations. What may appear at first blush to be a well-reasoned decision with which one may nonetheless disagree turns out largely to assume its conclusion by a series of categorical lapses for which most of its critical choices are left unaccounted.

Less familiar will be the chapters on narrative and rhetoric. Lawyers will not be accustomed to considering how the Court denied parental rights to a natural father whose child was conceived while its mother was married to another man by stating the facts consistently with the “Adultery as Combat Myth,” in which only one victor between the natural father and the husband is possible (p. 81). From this telling, it is but a small step to the conclusion that California could choose, consistently with due process, conclusively to presume the husband to be the child’s father, and by that deny the natural father *any* parental rights. Litigators will appreciate the importance of narrative coherence to presenting the facts of a case persuasively. Yet even they are less likely to have considered how narrative constitutes rather than merely recounts reality, and so to see the power of stories we tell ourselves, even while consciously calling them myths. Similarly, lawyers are familiar with rhetorical techniques, even if they often use them unconsciously. Yet they will not be accustomed to thinking of rhetorical techniques as *self*-deceptive, concealing

from users the reality of choices they are making.

Despite the virtuosity with which the authors criticize the Court for category and narrative choices that are not justified in the opinions, and for falling prey to its own rhetoric, *Minding the Law* is, in the end, incomplete. Although it succeeds in employing the analysis of categorization, narrative, and rhetoric expertly to show weaknesses in the Court's opinions, it only implicitly addresses what one should expect from an adequately justified decision. The authors analyze only opinions with which they disagree, and so provide no model of an opinion that avoids similar pitfalls. This is an important omission because, as they note, no opinion proceeds without categorization, narrative and rhetoric, and the reader is left to imagine how courts can better employ these essentials of judicial opinion writing. The authors call upon judges to be more sensitive to how these thought processes can distort or disguise, and by that become more self-conscious about the choices that they make. Nevertheless, the opinions themselves are advocacy documents, usually prepared after judges have voted and decided. Can one expect opinions whose purpose is to justify a decision to highlight its contingency any more than one can expect a storyteller to dwell on the reasons why she thought a particular tale would find a receptive audience?

Moreover, if judges were to leave no categorical, narrative, or rhetorical moves unjustified, in what sense would we have a better decision rather than just a more satisfying text? The authors explicitly avoid this question by confining their inquiry to whether judges' decisions are justified *in the text* rather than in the world. Indeed, by emphasizing how categorization and narrative serve to constitute reality, the authors sometimes seem close to suggesting that opinions remake reality in their own image. Nevertheless, there are limits to their post-modern stance. Amsterdam and Bruner argue that delusive use of categorization, narrative, and rhetoric unduly restricts the possibilities open to courts in deciding cases. Still, one should hardly care unless suppressed possibilities are worth adopting. Only if there is a superior alternative to winner-take-all in the adultery-as-combat myth, for example, should one care about whether the Court chooses to tell this story rather than another. Since Amsterdam and Bruner's case critiques rest ultimately on their revealing *superior* suppressed possibilities, one suspects that, despite their normative disclaimer, they believe their analysis engenders more than edifying texts. The fully justified opinion is still the one that makes better sense of the world and the social good to which law aspires, however contingent or contested that judgment may be.

Minding the Law successfully teaches that the logic of judicial justification is far more complex than the syllogistic reasoning criticized by Dewey and is contingent in ways that Dewey hardly imagined. It therefore significantly broadens our understanding of the factors important to good lawyering and judicial decision-making. Whether relentlessly exposing the myriad ways in which judges portray the contingent as inevitable is best suited to improving the quality of results as well as opinions, however, remains an open question. The answer depends on whether opinions—understood from the expanded perspective the book provides—show the actual process, rather than the result, of legal reasoning, and, to the extent they do, whether appreciation of the book's expanded conception of legal reasoning allows judges to perceive superior alternatives to which they are otherwise blind. As Dewey might say, judges should hardly shrink from the important opportunity that the book has given them to experiment.

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