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Book Reviews

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BOOK REVIEWS

THE INSANITY DEFENSE

Abraham S. Goldstein New Haven and London,
Yale University Press, 1967 Pp. 289

The Insanity Defense surveys the problems involved when there is a possibility that an accused offender may have been suffering from some mental affliction at the time an offense was committed. The author describes these difficulties from the time the offense was committed through the stages of the trial to detention and release. The book emphasized that the defense can be expected to reach only a handful of mentally ill offenders even though many could qualify under its application.

The plea of insanity is a criminal law defense asserted by a mentally ill offender seeking relief from criminal responsibility. The insanity defense is used almost exclusively in cases which involve serious crimes punishable by the death sentence or long imprisonment. The use of the defense will often result in a full presentation of an offender's mental life while keeping him in custody, if necessary. If the defense is unsuccessful or abandoned, the offender will be presumed sane and a jury will determine his criminal responsibility. However, if the defense is successful, the accused will be acquitted by reason of insanity, but will be detained in an institution for mental treatment.

Although the insanity defense is one of the most spectacular and controversial issues of modern-day criminal law, there has been a trend toward its abandonment for a number of reasons. Counsel may be deterred from pleading the defense because of the difficulty in proving to the jury that the calm and composed, normal-looking defendant they see during the trial was suffering from some mental defect when the offense was committed. Since the defense is used predominately in cases of murder and rape, the offender will have to be very ill before the jury will acquit him. The jury may also be reluctant to acquit the offender by reasons of insanity because they are rarely told that such a verdict means detention in a mental hospital and not absolute freedom.

A lawyer who contemplates the use of the insanity defense will encounter a variety of problems. Invariably, there will be a lack of financial resources and time needed for psychiatric investigations of the defendant's life. Psychiatrists, whose availability as expert witnesses is extremely limited, hesitate to testify in regard to an offender's insanity because they fear being substituted for a jury in deciding the fate of an offender. Certain tests of rules of law used in instructions to a jury for their determination of the offender's insanity may present serious problems concerning the admissibility of evidence. Finally, because of its effect on the offender's final outcome at the trial, the problem of choosing the proper time to plead the defense is especially important.

Unquestionably the most important issue associated with the insanity defense is the indeterminate detention of the mentally ill offender. When a minor offense is committed, an offender may serve only a slight sentence in a penal institution. However, a successful insanity defense could result in indeterminate detention in a mental hospital if the offender is suffering from an incurable mental disease. If the offender becomes substantially cured, the mental institution could be quite hesitant to accept the responsibility of releasing him. Improved facilities in the penal system may make it possible for a mentally ill criminal to get better treatment than that offered in a mental hospital. The correctional system is also more able to accept the responsibility for releasing substantially cured offenders. Therefore, an offender who has a definite need for mental treatment may be deterred from asserting the insanity defense because of the length and ineffectiveness of commitment in a mental institution.

The Insanity Defense reads like a textbook. The author details many concepts and theories whereas a general survey would be more beneficial to the reader. However, the author very adequately presents the many issues a lawyer should consider if he suspects that his client was suffering from mental disease or defect at the time an offense was committed.

JOHN L. HILTS

OMBUDSMEN FOR AMERICAN GOVERNMENT?

Edited by Stanley V. Anderson
Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1968. Pp. 180. $1.95.

As the physician and surgeon have pressed for the cure of the common cold, so the lawyer and the statesman have searched for an answer to the lack of rapport between our government and its constituents. There are those who believe that the answer is found in the introduction of the Ombudsmen system into our political structure.

This book, *Ombudsmen For American Government?*, gives in 173 pages a macroscopic discussion of the past and present aspects of the Ombudsmen. Each of the five contributing authors covers a different aspect, thus offering the reader a broad, yet basic, introduction to this new concept. The idea of having a trained grievance handler first originated in Sweden in 1809 and did not begin its spread elsewhere until after World War II. Since then the plan, with modifications, has been adopted by Finland, Norway, Denmark, New Zealand, Mauritius, The United Kingdom, Guyana, Alberta, New Brunswick and Hawaii.

The Ombudsman is a unique grievance handler. He is considered an officer of the legislature and he is politically independent of all branch-

es of government. His main power is the right to investigate and, although he has no direct control over the courts or the administration, his decisions are given serious consideration. This is true because at his disposal is the scalpel of unlimited publicity which can readily amputate the public official who is the festering source of grievances.

The authors give specific cases illustrating the successes and failures of the Ombudsmen. They also point to factors in our society which may indicate a ripeness for its serious consideration at the present time. These are discussed from the national, state, and local viewpoints.

It may well be that the Ombudsmen is the joint fluid which can keep our society from developing a crippling arthritis between its segments at this critical period in our history.

For the busy lawyer this is a book from which he can gain, in a short time, a background knowledge of a new and interesting approach to the ever growing rate of private and public grievances voiced against our way of life.

RICHARD G. NOLLMEYER, M.D.

LAW IN A CHANGING AMERICA

Edited by Geoffrey C. Hazard, Jr.
Englewood Cliffs, N.J.: Prentice-Hall, 1968. Pp. 207 $5.95

Lawyers seldom embrace rapid comprehensive change either in the law or the profession. But if there is a common denominator in the thirteen essays comprising *Law In A Changing America* it is: Substantial changes must be initiated both in the composition of the bar and in the process of hearing and deciding disputes to meet the increasing complexity of modern life.

The traditional role of a lawyer as an arbitrator of two party disputes is becoming less effective in an industrial society. It has become apparent that there is a third party, the general public, which must bear the consequences of decisions reached by the giant entities of labor and management. William T. Gossett advances the example of the economic inflation which results from excessive union demands in the collective bargaining process. Mr. Gossett would replace the ineffective and externally applied political regulation currently utilized with a system which is internally applied by the entity itself to regulate its private power.

In addition, in a complex society, it may be as difficult to isolate contemporary problems as it is to solve them. As a result, existing substantive law can in some cases be expected to face a severe credibility test. One example, property law, with its strongly feudal touchstones,

could be potentially irrelevant in a society contemplating the horizons of space.

The development of technology has produced an enormous wealth of data which defies reconciliation with established policy making procedures. New procedures must be devised to retain political and social accountability while still maintaining the maximum benefit that technology can offer. Adam Yarmolinsky proposes that more emphasis be placed on the adversary process than on the more common staff proceeding. He also suggests the concurrent development of a program which forces agencies to formulate the long term objectives which control their current activities. Especially relevant to the judiciary is Henry Kalven, Jr.'s plan for incorporating scientific empirical inquiry into established legal policy to utilize the advantages of modern technology.

The substantive problems are difficult but should not prove insurmountable provided the legal profession does not reverse its initial probings of recognized problems. The failure of law schools to prepare a student for actual practice was treated by Abraham S. Goldstein who maintains the day of the lawyer-generalist is past. Specifically, Mr. Goldstein recommends that law schools should organize the second and third years of study between general electives and areas of specialization involving internships and the type of research that characterizes other professional graduate schools.

The problems in *Law In A Changing America* are well presented by the various authors. More importantly, the study of the problems becomes more palatable when examined in the light of the accompanying solutions. The essay treatment of the problems may leave the reader lacking depth in that every theme could easily be the subject of an entire volume. However, the book does not fail in its goal of bringing the problems to the active attention of the lawyer. Only the most adamant traditionalist will fail to realize that the problems enumerated cannot be easily dismissed but rather must be honestly faced and eventually solved.

WM. P. ROSCOE, III

REPRESENTATION

Edited by J. Roland Pennock and John W. Chapman, New York: Yearbook of the American Society for Political and Legal Philosophy, Atherton Press, 1968. Pp. 317. $6.95.

Representation is the tenth yearbook in the Nomos Series. Previous volumes have discussed such topics as: *Authority,* (1958); *Revolution,* (1966); and *Equality,* (1967). This volume is a collection of nineteen interrelated papers which were presented before the Society by political scientists, lawyers, and philosophers. Taken as a unit, these papers

analyze the concepts, theories, and pragmatic applications of representation.

The term representation is a vague concept which defines many political theories without describing their content. As H. B. Mayo stated in 1960:

> Democratic theory has little to gain from talking the language of representation, since everything necessary to the theory may be put in terms of (a) legislators (or decision-makers) who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to public control at free elections. The difficulties of policy makers are practical, and there is no need to confuse democratic politics by a theory that makes the difficulties appear to be metaphysical or logical within the concept of representation. *(Representation*, p. 4)

Representation is both theoretical and normative in its approach; it does not attempt description of the representative process. Its purpose is to conceptualize the character of the representative in his relationship to the represented. If a core thought were gleaned from the several essays it would be that representation is the idea that an intermediary acts to present the represented.

Theoretically, a representative, in his role as presenter, interreacts with his constituency in four ways: (1) He may be a "delegate," responsive to the imperative mandate of his constituency's desires; (2) He may be a "delegate" in a general sense of representing the desires of a group larger than the district which elected him; (3) He may serve as a "trustee," representing the voters' interest; and (4) He may operate under a "free mandate," serving the best interests of the State.

Pragmatically, the representative presents both the desires and the interests of his constituency, functioning as a delegate as well as a trustee. In practical application, theoretical distinctions blend together and the legislator may function in all four ways simultaneously. The consensus of the papers is that the representative should respect the desires of his district, but that he also has the responsibility to act in their best interest. Rarely, if ever, does the representative act solely as a delegate or solely as a trustee.

However, traditional relationships between the representative and his constitutency were significantly altered when the United States Supreme Court decided Baker v. Carr, 369 U. S. 186 (1962) and the subsequent cases which established the "one man, one vote" doctrine. It is contended by the several papers which treat "one man, one vote" that reapportionment dissolved previously homogeneous interest groups and in doing so created serious inequities. Because of the amalgamation of rural and metropolitan populations to obtain numerical equality, redistricting has produced conflicting interests within the constituency which have tended to weaken the voters' imperative mandate. The authors of these papers express a concern that reapportionment will

increase the influence of metropolitan interests at the expense of rural interests.

Representation provides the reader with an opportunity to acquaint himself with the theories and concepts of representation, with particular emphasis on their application to reapportionment. To a lawyer interested in political theory the discussions concerning apportionment provide insight into the nature of the representative process as it could exist in the future. The editors do not attempt definition of the concept of representation. Instead, they provide a useful theoretical analysis which illuminates the political processes of representation.

REX B. STRATTON, III

LAW WITHOUT SANCTIONS

Michael Barkun

New Haven and London, Yale University Press, 1968. $6.50

The most widely accepted and influential theory of law, the command theory, states that rules of conduct can be called laws only when force or the threat of force stands behind them. Michael Barkun's study attempts to disprove the command theory by showing that international relations and segmentary lineage tribal societies, operating without coercive sanctions, have developed self-regulating patterns of behavior which should be characterized as law because the traditional purpose of law — control and management of conflict — is served.

Barkun's example of international relations will best serve to illustrate his theory of law. Interactions between the nations of the world have a dual role in the author's theory. First, interactions between nations develop in those nations a perception of common interests. Nations who perceive common interests will combine to form systems, e.g. mutual defense pacts or trading blocs. Second, interactions between nations are essential to the development of conflict because conflict is clearly impossible without previous interaction. Hence, conflicts occur only between nations who are members of a common system because the interactions necessary to create conflict also result inevitably in the formation of a system based on common interests. When conflict between nations does occur the self-interest of the conflicting nations normally will be maximized by the preservation rather than by the destruction of the common system. This is true because the system offers values such as trade, security from attack, or a more mutually advantageous distribution of economic goods. A pattern of action which was used in a similar conflict in the past and resulted in system preservation will readily suggest itself and the conflicting nations will pattern their be-

havior on that evolved norm. In most cases, actions patterned on the norm will result in preservation of the system and stability will be achieved. Since stability is the goal of conflict management and, hence, the goal of law, the evolved norm of behavior has performed the function of law. The author contends that such norms of conduct upon which nations repeatedly pattern their actions should, therefore, be called laws.

It cannot be said that *Law Without Sanctions* will broaden the practical lawyer's concept of the law as he knows it, but one whose interests are not limited by statutory and case law will be interested in Barkun's theory of law in which enforcement is effected entirely by the self-interest of the actors rather than by the heavy hand of the state. The style of the book itself may prove unfamiliar to readers with legal backgrounds since the author presents his work primarily from the perspective of the social scientist. Nevertheless, the volume presents an original and ingenious theory of law which is of substantial interest because of its departure from conventional theory.

CARL ROEHL