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Book Reviews

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BOOK REVIEWS

THE CRIME OF PUNISHMENT. Karl Menninger, M.D. New York: The Viking Press, 1968. Pp. xii, 305. \$8.95.

Dr. Menninger has written what a former colleague of mine would call "a writ of arousal." *The Crime of Punishment* is an indictment of America's system of criminal punishment. To Menninger the system is brutal, archaic and socially disastrous. He says: "The public will grow increasingly ashamed of its cry for retaliation, its persistent demand to punish. This is its crime, *our* crime against criminals—and incidentally our crime against ourselves."¹ Menninger distinguishes between punishment and penalty by equating punishment with penalty *plus* vengeance. He comments: "The crime of punishment is that punishment aggravates crime. Quick and appropriate penalties are required."²

The Crime of Punishment will make a lot of lawyers and judges mad. Two distinguished legal scholars have taken diametrically opposed views. Fred Rodell, of the Yale Law School, noted in a very favorable book review in the *New York Times*:

[O]ne of Menninger's chief arguments for uprooting in its entirety our "incredibly backward . . . judicial-penal system," with its "vicious cycle of evil for evil and vengeance for vengeance perpetuating the revolving-door principle of penal justice," is that it just plain doesn't work.³

Rodell concludes:

"For all its mournful message about the miserable present state of our penal system, there is a strangely refreshing aura of excitement and hope about this book. The renowned doctor, long recognized as one of his profession's most gifted members, writes not only with the insight and inventive imagination one would expect in him but with a vigor and a sturdy simplicity of style that fairly shout his battle cry toward better days to come."⁴

Herbert Weschler, Director of the prestigious American Law Institute and of the faculty of Columbia University Law School, attacked Rodell's review as failing "to bring any critical intelligence to bear on Dr. Menninger's simplistic treatment of the social effort to control harmful behavior by the methods of the penal law."⁵

"Simplistic" is hardly the word I would employ—although Dr. Menninger does hack his way through the unfamiliar jungle of the law with a machete rather than a scalpel. The adversary trial is "monstrous strange"⁶ and "a little absurd."⁷ The jury is an archaic institution; cross-examination is a barbaric relic related to trial by ordeal. While I find these trenchant observations to be fascinating revelations of the gap between medicine and the law, I am not persuaded by them to abandon my favorable view of all three of these institutions.

1 K. MENNINGER, *THE CRIME OF PUNISHMENT* 280 (1968).

2 *Id.* at inside front overleaf.

3 N.Y. Times, Jan. 5, 1969 § 7 (Book Review), at 4, col. 3.

4 *Id.* at 5, col. 1.

5 *Id.*, Feb. 9, 1969 § 7 (Book Review), at 20, col. 4.

6 K. MENNINGER, *THE CRIME OF PUNISHMENT* 54 (1968).

7 *Id.*

Historically, they have contributed greatly to the protection of human freedom. But as I understand Dr. Menninger's point, it is that no doctor would think of using such means as these in diagnosis of an illness or in prescribing treatment for it. And Menninger clearly thinks that medicine, through psychiatry, has much to offer in the future diagnosis and treatment of the socially ill whom we now term criminals.

In sum total, however, Menninger's comments on criminal trials occupy a relatively few pages of this book and bear mention here primarily because they may well be a provocative intimation of another book to come. The main task of *The Crime of Punishment* is to turn a spotlight on that half of the criminal law which has been hidden in the shadows of jail and prison walls. And Menninger goes about this job with a passion and an eloquence which have placed *The Crime of Punishment* on the list of the forty-four most important books of 1968.

Menninger's fundamental theses include these:

(1) Penitentiaries of today are brutal institutions—sometimes (maybe frequently), regardless of the motivations of the prison administrators. The standard prison experience includes deprivation of any normal social contact and any normal sex life. In addition, for *most* prisoners there is the horror of enforced idleness unrelieved by either education or work. For younger prisoners there is the probability of homosexual rape and the certainty of years of close association with the selected worst citizens of the state. And in many prisons (and jails) beating, flogging and the "hole" are the fundamental disciplinary tools.

(2) The vengeance aspect of criminal sentences is still present and society (at least for its own protection) must eliminate it. Vengeance breeds vengeance. The young offender who is brutalized by ten years of the penitentiary life described above does not come out a penitent. More often, he returns to society as a killer.

(3) Menninger notes exceptions to his blanket condemnations of penal institutions—particularly in the work of James V. Bennett and Myrl Alexander in the federal system, and of Richard McGee and Austin MacCormick and others in a few state systems such as California. He includes a postscript to report a conversation in which Nathan Leopold described to him a great change for the better in Joliet in the years since Leopold's parole. But Menninger still concludes that fundamentally nothing has changed and that those basically responsible (the public budgetmakers in the legislatures and state houses) do not really want change.

(4) Menninger's most important message is that, given existing knowledge, better treatment is possible as to most offenders. But such treatment must be based on acceptance and love rather than rejection and hate. As to this last point, I will let Menninger speak for himself:

[W]e have at hand great quantities of research findings which clearly indicate what we should be doing. Much indeed we don't know, but we are not doing one-tenth of what we should about what we already do know.^{18]}
* * *

I once put this principle in a paragraph of directions for the workers in our psychiatric hospital:

"If we can love: this is the touchstone. This is the key to all the therapeutic programs of the modern psychiatric hospital; it dominates the behavior of its staff from director down to gardener. To our patient who cannot love, we must say by our actions that we do love him.

"You can be angry here if you must be; we know you have had cause. We know you have been wronged. We know you are afraid of your own anger, your own self-punishment—afraid, too, that your anger will arouse our anger and that you will be wronged again and disappointed again and rejected again and driven mad once more. But we are not angry—and you won't be either, after a while. We are your friends; those about you are all friends; you can relax your defenses and your tensions. As you—and we—come to understand your life better, the warmth of love will begin to replace your present anguish—and you will find yourself getting well."^[9]

* * *

Hope is just as important as love in the therapeutic attitude.^[10]

* * *

When the community begins to look upon the expression of aggressive violence as the symptom of an illness or as indicative of illness, it will be because it believes doctors can do something to correct such a condition. At present, some better-informed individuals do believe and expect this. However angry at or sorry for the offender, they want him "treated" in an effective way so that he will cease to be a danger to them. And they know that the traditional punishment, "treatment-punishment," will not effect this.

What *will*? What effective treatment is there for such violence? It will surely have to begin with motivating or stimulating or arousing in a concerned individual the wish and hope and intention to change his methods of dealing with the realities of life. Can this be done by education, medication, counseling, training? I would answer *yes*. It can be done successfully in a majority of cases, if undertaken in time.

The present penal system and the existing legal philosophy do not stimulate or even expect such a change to take place in the criminal. Yet change is what medical science always aims for. The prisoner, like the doctor's other patients, should emerge from his treatment experience a different person, differently equipped, differently functioning, and headed in a different direction from when he began the treatment.

It is natural for the public to doubt that this can be accomplished with criminals. But remember that the public *used* to doubt that change could be effected in the mentally ill. Like criminals, the mentally ill were only a few decades ago regarded as definitely unchangeable—"incurable." No one a hundred years ago believed mental illness to be curable. Today *all* people know (or should know) that *mental illness is curable* in the great majority of instances and that the prospects and rapidity of cure are directly related to the availability and intensity of proper treatment.

In the city in which I live there had been for many years a gloomy,

9 *Id.* at 260-61.

10 *Id.* at 261.

overcrowded, understaffed place of horror called "the insane asylum." In its dark wards and bar-windowed halls, as late as 1948, one psychiatrist and one nurse were on duty for nearly two thousand sick people. There was no treatment for them worthy of the name. There was no hope. There were few recoveries.

Today this old asylum is a beautiful medical complex of forty one- and two-story buildings, with clinics and laboratories and workshops and lecture halls surrounded by parks and trees and recreational areas. Some patients are under intensive treatment; others are convalescent; many are engaged in various activities in the buildings or about the grounds. Some leave their quiet rooms each morning to go to work in the city for the entire day, returning for the evening and their night's rest at the hospital. The average length of time required for restoring a mentally ill patient to health in this hospital has been reduced from years, to months, to weeks. Four-fifths of the patients living there today will be back in their homes by the end of the year. There are many empty beds, and the daily census is continually dropping.¹¹

No one familiar with the present state of the criminal law will look on *The Crime of Punishment* as a blueprint for the correctional system of the immediate future. Indeed, it poses many more questions than it answers. But it is also an exposé of a problem and a challenge to work toward a solution which present-day society can ill afford to ignore.

George C. Edwards, Jr.*

INTERNATIONAL LAW AND THE USES OF OUTER SPACE. By J. E. S. Fawcett. Dobbs Ferry: Oceana Publications. 1968. Pp. vii, 92. \$3.50.

"There is more ado to interpret interpretations than to interpret the things We do nothing but comment upon one another." Michael De Montaigne (1533-1592). Notwithstanding, it is a pleasure to examine the latest work by Mr. J. E. S. Fawcett, Fellow of All Souls College, Oxford.

Mr. Fawcett's book, *International Law and the Uses of Outer Space*, should be of wide interest to the legal scholar seeking a general insight into this increasingly important area of the law. Fawcett gives a concise discussion of United Nations General Assembly Resolutions leading up to the Outer Space Treaty concluded in December, 1966. He considers such basic topics as the effects in international law of the Resolutions and the Treaty;¹ the character and elements of State jurisdiction and control over spacecraft;² the military uses of outer space and the celestial bodies;³ and the management of space operations and control of their side effects, including responsibility for damage.⁴

¹¹ *Id.* at 257-59.

* Judge, United States Court of Appeals, Sixth Circuit; Former Commissioner of Police, City of Detroit.

¹ J.E.S. FAWCETT, *INTERNATIONAL LAW AND THE USES OF OUTER SPACE* 1-16 (1968).

² *Id.* at 17-28.

³ *Id.* at 29-42.

⁴ *Id.* at 43-67.

His treatment of space communications outlines technical aspects of design requirements and touches upon important international problems, including those related to frequency allocation and the establishment of a space telecommunications system along commercial lines. Legal technicians should find this section of particular interest in view of the current activity of the Communications Satellite Corporation and International Telecommunications Satellite Consortium.

Of interest to the lawyer seeking information concerning inter-governmental and non-governmental organizations involved in space activity is Mr. Fawcett's concise chapter on Organization and Control of the Uses of Outer Space.⁵ Nor has Mr. Fawcett forgotten discussion of elements of disorder in the uses of outer space.⁶ His treatment of the closely linked concepts of "damage," "interference," "waste" and "nuisance" is worthwhile reading. Additionally, his discussion of jurisdiction in outer space is generally excellent, while his special treatment of the position of a space station on the Moon or Mars, in light of provisions of the Outer Space Treaty, is skillful.

In summary, the excellent background of the author in the sphere of astronomy, combined with outstanding research effort and analysis, makes *International Law and the Uses of Outer Space* interesting and valuable for lawyers and scholars.

*Harold Berger**

5 *Id.* at 43-56.

6 *Id.* at 57-67.

* Member of the Pennsylvania Bar; LL.B., University of Pennsylvania, 1951; Chairman, Inter-American Bar Association, Committee on Space Law; National Chairman, Federal Bar Association, Space Law Committee.

BOOKS RECEIVED

COMPULSORY ARBITRATION AND THE NLRB. By Paul A. Abodeely. A study of congressional and administrative policy on compulsory arbitration. Philadelphia: University of Pennsylvania Press. 1968. Pp. xii, 96. \$2.50 (paperbound).

CONCENTRATION AND PRODUCTIVITY. By Betty Bock and Jack Farkas. The authors compare the productivity of selected companies in the same industry and relate their findings to the degree of industry concentration. New York: National Industrial Conference Board. 1969. Pp. vi, 170. \$12.50 (non-Associate price).

THE CONSTITUTION AND THE SUPREME COURT. Edited by Louis H. Pollak, Dean, Yale School of Law. A documentary history of federal constitutional law combined with the author's commentary, this study attempts to show how problems in American society have been met and resolved within the framework of constitutional law. Cleveland: The World Publishing Company. 1968. Volume I, pp. xxvii, 440. Volume II pp. xxiii, 483. \$5.95 (paperbound).

COURTS IN THE AMERICAN POLITICAL SYSTEM. By Henry J. Schmandt, Professor of Law, University of Wisconsin. A treatment of the roles of the national, state and local judiciary, including a consideration of their policymaking functions. Belmont: Dickenson Publishing Company, Inc. 1968. Pp. x, 144 (paperbound). (Price unreported.)

DISCRETIONARY JUSTICE. By Kenneth Culp Davis, John P. Wilson, Professor of Law, University of Chicago. The author considers the need for improving the quality of justice in areas where decisions depend more on discretion than upon rules and principles, such as in the areas of administrative, police and prosecutor justice. Baton Rouge: Louisiana State University Press. 1969. Pp. xii, 233. \$8.50.

DYNAMICS OF AMERICAN LAW. By Marc A. Franklin, Professor of Law, Stanford University. A study of the role courts play in shaping our law, with particular attention to the law as it relates to freedom of expression. Mineola: The Foundation Press, Inc. 1968. Pp. xxi, 803. (Price unreported.)

FAIR TRIAL AND FREE PRESS. By Paul C. Reardon, associate justice of the Supreme Judicial Court of Massachusetts, and Clifton Daniel, Managing Editor of *The New York Times*. Resulting from a debate between the authors, this book presents the issues on the conflict over the accused's right to a speedy and public trial before an impartial jury and freedom of the press. Washington: American Enterprise Institute for Public Policy Research. Pp. 181. \$4.50.

- GAMBLING AND ORGANIZED CRIME.** By Rufus King. A treatment of the interplay of illegal gambling, official acquiescence, and organized crime. Washington: Public Affairs Press. 1969. Pp. viii, 239. \$6.00.
- HOW TO SAVE ESTATE AND GIFT TAXES.** By J. K. Lasser Tax Institute and Ralph Wallace. In this book, the authors describe the estate and gift taxes and then attempt to show how these taxes may be reduced or eliminated. Garden City: Doubleday & Company, Inc. 1969. Pp. xiii, 266. \$5.95.
- LAW AND PSYCHOLOGY IN CONFLICT.** By James Marshall. The author, using psychological data to show that perception and recollection are so imperfect that evidence often bears little relation to reality, charges that the American adversary system is often a game of "make-believe." Garden City: Doubleday & Company, Inc. 1969. Pp. xiv, 138. \$1.45 (paperbound).
- LAW AND SOCIETY: A SOCIOLOGICAL VIEW.** By Edwin M. Schur, Chairman, Department of Sociology, Tufts University. The author examines several major areas of law as they relate to sociology, including the nature and meaning of law, law's relation to social change, the structure of the legal profession, sociological aspects of the courts, and the place of social science evidence in the legal system. New York: Random House. 1968. Pp. x, 239. \$2.95 (paperbound).
- THE LAW OF ARREST, SEARCH AND SEIZURE.** By J. Shane Creamer, Director, Pennsylvania Crime Commission. The author treats of the law of arrest, search and seizure as it should be known by the policeman. Philadelphia: W. B. Saunders Company. 1968. Pp. vi, 273. \$6.95.
- MR. JUSTICE MURPHY.** By J. Woodford Howard, Associate Professor of Political Science, The Johns Hopkins University. The political biography of Frank Murphy, who rose from Mayor of Detroit to Supreme Court Justice. Princeton: Princeton University Press. 1968. Pp. x, 578. \$12.50.
- MODEL RULES FOR JUVENILE COURTS.** By the Council of Judges of the National Council on Crime and Delinquency. The Council of Judges presents its model rules for juvenile and criminal justice systems. New York: National Council on Crime and Delinquency. 1969. Pp. xii, 91. (Price unreported.)
- POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS.** By Otto Kirchheimer, late Professor of Government, Columbia University. The author considers political justice in different periods of history and under a variety of regimes. Princeton: Princeton University Press. 1968. Pp. xiv, 452. \$3.95.
- THE POLITICS OF THE BENCH AND THE BAR.** By Richard A. Watson, Professor of Political Science, University of Missouri-Columbia and Rondal G. Downing, Associate Professor of Political Science, University of Missouri-

Columbia. In considering the Missouri Nonpartisan Court Plan, the authors explore the attractions and deterrents of a judicial career, the interest other lawyers have in the kinds of persons who sit on the bench, and the role sitting judges play in the selection of their future colleagues. New York: John Wiley and Sons, Inc. 1969. Pp. xv, 393. \$10.00.

PUBLIC OFFICIALS: ELECTED AND APPOINTED. By Hugh Y. Bernard. The author considers the law governing public officers and the governmental process. Dobbs Ferry: Oceana Publications, Inc. 1968. Pp. vi, 119. \$3.00.

ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES. By Luther A. Huston, Arthur S. Miller, Samuel Krislov and Robert G. Dixon, Jr. A history of the Attorney General and his office from inception to present. Washington: American Enterprise Institute for Public Policy Research. 1968. Pp. 158. (Price unreported.)

THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA. By Donald R. Cressey, Professor of Sociology, University of California, Santa Barbara. The author considers the nature and growth of organized crime. New York: Harper & Row. 1969. Pp. xii, 367. \$6.95.