1974

Trial Diplomacy by Alan E. Morrill

Daniel G. Moriarty

Albany Law School

Follow this and additional works at: https://uknowledge.uky.edu/klj

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol63/iss1/11

This Book Review is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
BOOK REVIEWS


One cannot read this book without viewing it as a symptom of the fact that legal education is fumbling at the crossroads. For this is a comprehensive textbook on trial technique, which was issued originally in a soft cover for law students — even though the subject is not a traditional subject of law school study. Now, this hard cover edition has been issued for practicing lawyers.

Thus, legal education has come almost full circle since the apprentice system for qualifying lawyers started in colonial times. Under that system, a young man "reading law" and working in the office of a practicing attorney learned trial technique and procedure as he absorbed substantive law. Then came the law professors, with the case system, who proceeded to tell the legal world that teaching such mundane subjects as trial technique to a law student was a mistake. Indeed, at the American Bar Association meeting in 1921 it was successfully insisted that, thereafter, only law school study could qualify an applicant for admission to the Bar. Today, it is at least arguable that that was an error, and that the apprentice system should again be permitted as an alternative to law school study in order to qualify for bar examination.

Specifically, in opposing the recommendations of the Special Committee of the Section of Legal Education of the American Bar Association in 1921 that "every candidate for admission to the bar should give evidence of graduation from a law school," Charles F. Carusi, of Washington, D.C., said in rugged opposition:

I would say now that I protest in the name of 110,000,000 people against so reactionary, so narrow, so unfair a position as says: "It matters not what your competency in every particular, if you did not acquire it in one of about half a dozen great endowed universities, then, not *prima facie*, but conclu-
sively, you are unfit to represent your fellow citizens or to advise them upon their legal rights."  

Finally, a reaction did develop. In 1947 Judge Jerome Frank took a hard whack at the system of law school study in his article, "A Plea for Lawyer-Schools." The article's theme was that practice or apprenticeship should be combined with the study of law. Here is what he said in part:

American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell. I call him a neurotic advisedly. He was a cloistered, bookish man, and bookish, too, in a narrow sense. In his student days at Harvard Law School, he haunted the library, poring over the Year Books; he is said to have expressed regrets that he had not lived in the time of the Plantagenets. In his sixteen years of practice he led a secluded life, seeing little of clients, for the most part in the law library writing briefs and drafting pleadings for other lawyers. One of his biographers says of that period, "In the most inaccessible retirement of his office, in the library of the Law Institute, he did the greater part of his work. He went little into company." Returned to Harvard as a law teacher, there soon to become Dean, he is said to have referred to "a comparatively recent case decided by Lord Hardwicke." [Reviewer's note: Lord Hardwicke lived from 1690 to 1764].

His pedagogical theory reflected the man. The experience of the lawyer in his office, with clients, and in the court-room with judges and juries, were, to Langdell, improper materials for the teacher and his student. They must, he insisted, shut their eyes to such data. They must devote themselves exclusively to what was discoverable in the library. The essence of his teaching philosophy he expressed thus: "First that law is a science; second, that all the available materials of that science are contained in printed books." This second proposition, it is said, was "intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice."

Judge Frank also described how different American legal

---

1 46 REPORTS OF THE A.B.A. 663 (1921).
2 56 YALE L.J. 1303 (1947).
3 Id. at 1303-04.
education had been under the apprentice system when he said:

The history of American legal education commenced with the apprentice system: The prospective lawyer "read law" in the office of a practicing lawyer. Daily he saw for himself what courts and lawyers were doing. Before his eyes, legal theories received constant tests in legal practice. Even if he did not always articulate the discrepancies between theory and practice, he felt them. The first American law school, founded by Judge Reeves in the 1780's, was merely the apprentice system on a group basis. The students were still in intimate daily contact with the courts and law offices.

To shorten a long story, legal apprenticeship, a la Reeves or otherwise, all but disappeared in the universities under the impact of Langdellism, as school after school quarantined its students in the library.⁴

In more recent years, the old case system of Dean Langdell, based entirely on books, has come under increasing attack. Clinical education on trial technique now has its head in the tent of law school study in many of the nation's leading law schools—including Harvard.⁵ And the American Bar Association has only recently affirmed standards for legal education which not merely permit but affirmatively require the learning of advocacy skills in law school.⁶

What are the reasons for this? It is hard for a practicing lawyer to say with certainty. But several things appear to be clear. First is the fact that now many law students appear to be bored with ordinary law school study,⁷ particularly after the first year. And when students are bored—watch out! Undoubtedly, one reason they are bored is because, after four years of college, most of them are eager to come to grips with the practical world. Three years of law school study in the Langdell system do not appear to enable them to do so. Such study appears to be so theoretically repetitive that students become restless with it.

⁴ Id. at 1312.
⁵ Moulton, Clinical Education: As Much Theory as Practice, 24 Harv. L.S. Bull. 16 (1972).
⁶ 1973 Standards for the Approval of Law Schools of the American Bar Association § 302.
Second, law school courses well could be presented in a more interesting fashion. A law school professor should not be allowed, by virtue of scholarship, to become indifferent to the technique of presentation. This reviewer lectures at various universities on legal subjects and under a system whereby each student has a chance to grade him. Some of the students' comments can be brutally to the point, and many lecturers under this system have learned a good deal about improving their technique of presentation.

Third, perhaps, is the fact that while no law student attempts to cover the entire area of law, he may study more subjects under the case system than appear to be worth the use of that method. Is three years of law school study necessary?

In any event, a recent wave of harsh criticism has been directed at legal education for its failure to teach practical skills. To use Chief Justice Burger's phrase, voiced at the London portion of the 1971 Annual Meeting of the American Bar Association, legal education today fails to teach "basic training and skills in advocacy." Many other writers have said the same thing. Stanley Balbach raised this and many other questions in a comprehensive article entitled "Legal Education—The Lawyers' Responsibility." In another article, "Clinical Legal Education: A Growing Reform," Marvin J. Anderson and Guy O. Kornblum insisted that law schools were getting better because programs with clinical education are now being undertaken, and because in many states students can work in a law office for considerable periods during the year of study. This is particularly true of the School of Law of Northeastern University, as Thomas J. O'Toole, Dean of The Law School of Northeastern University in Boston, articulates in "Realistic Legal Education".

Unquestionably, these signs, and the appearance of the book under review, indicate that clinical education on such things as trial technique is back in the law school to stay. Accordingly, we may fairly ask the next question—why not permit a return to the apprentice system as an alternative to

---

law school study? Why should the apprentice system still be prohibited? For now the law schools are in retreat from the old case system; they are now trying to teach some of the things which the apprentice system taught more effectively. And in order to try to teach clinical education, they are eliminating traditional subjects of law school study which were undoubtedly dear to the heart of Dean Langdell.

Let us not forget that the apprentice system turned out many tremendously able lawyers. Moreover, it should be noted that most criticism of that system, such as that asserted in 1921 at the American Bar meeting, was stated in very general terms only; specific criticisms invariably have been lacking. There appears to be every reason to give the apprentice system another chance.

In any event, this reviewer has a suggestion: Part of the problem of many a law student is that he is not oriented to the legal world when he lands in a law school's cloistered halls. If he comes from a family of lawyers, or has worked as a clerk or otherwise in a law firm during a summer, he has a very great advantage over a student who comes from a family of engineers or artists, knowing nothing at all about the legal world. What better orientation could a potential law student have than a one or two-year apprenticeship in law office study? By being able to focus on problems and the challenges of the practical legal world, he would also necessarily acquire a vivid interest in legal theory. And a period of apprenticeship in a law office would endow the neophyte entering law school for a final year or two with a good deal of legal maturity, and perhaps find him ready to tear into the curriculum. Moreover, students with a background of practice might make the class more interesting and diminish the feeling of boredom.

This sort of approach would not enable law school study to cover every field of law in a one-year or two-year course. But then, neither do present curricula. Nearly every law graduate takes some kind of a cram course before he takes a bar examination, and in the process he finds himself studying a variety of subjects that he never took in law school. Then, after getting admitted to the bar, he may find himself plunged into subjects like international law that were never covered in either law

---

school or bar exam preparation. Indeed, a lawyer's main education and development certainly take place, not before law school graduation, but afterward.

Now, what about the contents of *Trial Diplomacy*? The author, Mr. Morrill, is executive director of the Court Practice Institute, a nonprofit corporation. The book has impressive credentials. It is used in the National Institute for Trial Advocacy, an organization sponsored by the American Bar Association, the American Bar Endowment, the American College of Trial Lawyers, and the American Trial Lawyers Association. It is said to be the most popular work in this area since Goldstein's *Trial Technique*.

Within its scope, it is a good and comprehensive book. However, virtually all of the situations covered come from personal injury cases and a few criminal trials. Nevertheless, these trial situations are covered with a clarity and such a high degree of articulation that they are readily understandable. In addition, the author has a keen sense of psychology and the dramatic, and a broad imagination which is certainly one key to the practical problems of trial work. Further, as with Spellman's much older *How to Prove a Prima Facie Case*, there are many good question-and-answer examples for methods of proof in specific situations.

Moreover, the book has an overall sense of trial organization, in that the author views a trial as a single, overall project which must be handled in terms of organization and management from the very moment the client walks into the office until the last appeal has been exhausted. As a result, there are constant practical suggestions for tying the pieces together as the trial process goes along, writing letters of instruction to clients, keeping a trial notebook and a trial manual, and integrating the threads of evidence into a closing argument.

One noteworthy feature of the book is that it contains so much material in concentrated form that any study in depth by a law student without courtroom experience would necessarily take a fair amount of time. Indeed, many lawyers constantly engaged in trial work usually spend a fair number of years exclusively in that activity before they learn this subject as thoroughly as the author articulates it.

However, as stated above, the book does not go much beyond personal injury work. The author is the head of a law firm
in Chicago, apparently engaged mainly in that type of practice. There is no effort to cover trials in contract or commercial litigation. As a result, the law student using this book will undoubtedly emerge from the course thinking that all there is to trial work in this country is personal injury work, with a dash of criminal law thrown in.

As with any book, *Trial Diplomacy* is not reliable in every respect. The author's description of the difference between materiality and relevance—always a sticky subject—must have Professor Wigmore twisting uneasily in his grave. And in the bibliography under "Trial Practice" we have Carlos Israel's book *Corporate Practice* thrown in along with *How to Try a Drunk Driving Case*. How *Corporate Practice* ever got into this list of books on trial technique remains a puzzle. Such failings aside, Morrill's book remains a thorough treatment of trial techniques that should help to shift the emphasis of legal education back to the practice of law.

*F. Trowbridge vom Baur*

---

*Admitted to the New York bar, 1934; D. C. Bar, 1948 and Illinois Bar, 1952; associated with the firm of Milbank, Tweed and Hope, New York City, 1933-1942; Regional Counsel, Office of the Coordinator, Inter-American Affairs, Central America and Panama, 1942-1946; General Counsel of the Department of the Navy, 1953-1960; Member of vom Baur, Coburn, Simmons & Turtle, and predecessor firms, 1960 to present; Member of the American Bar Association (Member of the House of Delegates, 1957; Council Member, Administrative Law Section, 1955-57; Chairman, Standing Committee on the Unauthorized Practice of Law, 1958-1962; Chairman, Section of Public Contract Law, American Bar Association, 1970-1971); Member of the Federal Bar Association (President, D. C. Chapter, 1954-1955; Chairman, Administrative Law Committee, 1953-1958); Member, American Law Institute.
The task of speaking to Professor Milton Handler's collection of essays and speeches, *Twenty-Five Years of Antitrust*, is one to be approached with a good deal of trepidation. Professor Handler long ago established himself as an authoritative commentator on the antitrust laws, and there can be no question but that his speeches and essays have constituted a very important contribution to the literature of the field. One need only sample the book to move very quickly and confidently to the conclusion that the book is important and of undoubted merit.

What then remains to the reviewer? A number of justifications can be raised for commentary, notwithstanding a commendatory conclusion being reached in the first paragraph. A potential reader might wish the advice of a past reader with respect to the question of what one can expect from the book and how one can use the book most efficiently, or one might wish to have the assistance of a co-reader in evaluating the truth of the statements made by the author. This review is intended to achieve a rather modest goal — to comment briefly on the book in terms of format and style, and to note the existence of certain themes which might be overlooked by the reader who reads only one or two of the essays.

The book itself is comprised of two volumes which include 1276 pages of text, a list of published and unpublished works by Professor Handler (totalling an impressive 146), a table of cases filling 89 pages and an index of 57 pages. These volumes contain not only the Antitrust Development Lectures numbers 4 (1951) and 7-25 (1954-1972), but also a number of other speeches and articles spanning Milton Handler's career, ranging from "False and Misleading Advertising" (1929) to "Labor and Antitrust: A Bit of History" (1971). The case and subject indices seem comprehensive and should contribute mightily to the utility of the work. Too often otherwise useful works are hamstrung because indexing has been neglected; this collection seems not to suffer from that deficiency and so the substantive information the book makes available is complemented by the indexing mechanism for access to the information.

The analytic content of the essays will prove most helpful to students of antitrust law. To say that the law in this area is
a complicated business is to understate the obvious, and all of
us need every bit of help available in attempting to work with
the tangled skein formed by eighty-five years of antitrust opin-
ions. The two volumes contain a wealth of information about
antitrust decisions of the last two decades, including citations
to relevant cases, statements relating to the records in cases
where the appellate opinions would normally provide the only
raw material, references to other scholarly works, and perhaps
most significantly, opinions as to what inferences might justifi-
ably be drawn based on the judicial opinions discussed.

The essays should prove useful to present and future com-
mentators, as well as those who are dipping their feet into the
cold waters of antitrust for the first time. The first essay in
Volume 1, “The Judicial Architects of the Rule of Reason”, is
a masterful account of the maturation of the “Rule of Reason”.
It is an economical presentation of material, the synthesis of
which would otherwise require massive commitments of time
and energy. The essay in many ways exemplifies the enduring
quality of Handler’s essays. He is committed to the importance
of examining trends in the law—both short-range movements
that may be likened to short-lived phenomena (i.e., tropical
storms), and long-range movements that are glacial in scope
and impact. The Developments Lectures in general represent
a sound balance between the presentation of current cases, the
setting of those cases in the context of historical development,
and the extrapolation of the thrust of the cases into the future.
It is that balance which allows essays written twenty or more
years ago to be of interest to today’s reader.

The foregoing is not meant to suggest that Handler has
examined the field with the detachment of a historian search-
ing for patterns in some musty archive, however. The advocate
is ever present. One of the author’s most consistent themes is
his skepticism as to the desirability of abandoning full-blown
inquiry into anticompetitive effect based on all relevant evi-
dence, in favor of decisions based on more limited inquiries. In
discussing the extent to which reciprocal dealing can be consid-
ered to be anticompetitive and in violation of antitrust laws,
Handler reveals his critical viewpoint:

Establishing the existence of a reciprocity agreement is,
in any event, not a sufficient ground upon which to predicate
a section 1 violation, since the contract in question must also be shown to restrain trade unreasonably. The rules of per se illegality that the courts have applied to tying arrangements may not be necessarily and invariably appropriate in the reciprocity area.

Tie-ins can fairly be described as invariably coercive...

Reciprocity, on the other hand, is not invariably coercive. Of course, a company that is a major customer of another may use its monopsony position to force its supplier to buy unwanted goods. But a reciprocal dealing arrangement may also be entered into voluntarily since, unlike a tie-in, it may well be of advantage to both parties. Although even non-coercive reciprocity may sometimes have anticompetitive effects, does it really make sense, in the absence of coercive use of leverage, to subject such arrangements to a per se rule?

More complete exposure of that cast of mind is found in Handler's discussions of the concept of "quantitive substantiality" as it arose in Standard Oil Co. v. United States and was restricted in Tampa Electric Co. v. Nashville Coal Co., in his discussion of per se illegality and United States v. Topco Associates, Inc., and in a number of other references and comments scattered throughout both volumes.

We all must agree that decisions in antitrust are multifactor decisions. Those who favor the increased application of per se standards are convinced that the net benefits accruing from the use of a limited number of factors are greater than the net benefits of attempting to consider all of the relevant evidence. This writer has not yet formed an opinion as to whether or not the enforcers of antitrust have too willingly embraced per se rules of illegality, or objective, simplistic generalizations about anticompetitive effect, or market definition. It is important, though, that readers of the essays should be aware of Handler's bias on this theme. The existence of the bias itself is difficult to document by quotation from the book since it exists primarily as a flavor, an overtone, an aura. And it is

1 M. Handler, Twenty-Five Years of Antitrust 990 (1973) [hereinafter cited as Handler].
2 337 U.S. 293 (1949).
4 405 U.S. 596 (1972). See Handler at 998 et seq.
Handler's error, if it can be called that, lies primarily in a failure to put forward the strongest of the arguments of those with whom he might disagree as to conclusions.

The case for a full and complete hearing of all relevant facts prior to decision is made many times, and made persuasively. But the countervailing considerations are not marshalled with equivalent vigor. A brief catalog of these considerations might include the following. First, the benefit to businessmen of relatively clear and objective standards against which their behavior will be evaluated is unquestioned — for increases in certainty in this area pay real dividends in terms of facilitating planning and evaluating possible courses of action. Next, clarity and simplicity also facilitate consistency of administration. It has long been a defect in the system of administering our laws that with changes in personnel in administrative agencies, the public, and especially that part of the public directly regulated, must speculate not only about where the enforcement emphasis may fall, but also must attempt to guess about what the new enforcer thinks the law means. The business communities that are subject to regulation are entitled to continuity of enforcement behavior and consistency of interpretation; use of objective standards makes continuity and consistency more likely. Finally, the more clear and simple the standard, the greater the possibility of avoiding complex and costly litigation with respect to the intricate fact situations which seem inevitably to be present in antitrust disputes. The omission of thorough discussion of these countervailing interests seemed, to me, one of the book's few weaknesses.

Other themes appear in reading the essays. Handler's frustration with the Robinson-Patman Act is apparent. His opinion seems to be that the Commission has not only made hash of the statute in some cases, but that it seems bent on increasing the breadth of the statute rather than vigorously enforcing the statute against "hard core" violators who were the real objects of the statute's prohibitions. This is not a problem unique to the FTC. Many administrative agencies on the federal level

\[5 \text{ See Handler at 431.}\]
seem enamored of a policy of expanding their doctrinal jurisdiction and power at the expense, perhaps, of vigorous enforcement of accepted principles, which latter course might be more in the public interest.

It would be nice if one could, by quotation, demonstrate lucidity of style; the difficulty is that writing which is clear and concise is often disarmingly plain, and seemingly unexceptional—which is, of course, its virtue. No talent is more needed in antitrust than to make the complicated comprehensible while avoiding the sacrifice of accuracy by resort to generalization and approximation. The quotation which follows is representative of the directness of Handler's style and illustrative of his unhappiness with the opinions of the Supreme Court as they relate to the issue of market definition. Once again we are reminded of Handler's respect for comprehensive fact assessment.

Markets are not theoretical abstractions—they are economic realities. There is nothing esoteric about ascertaining the proper boundaries of a market for, after all, a market for antitrust purposes is the area of effective competition. No one today disputes the fact that there can be submarkets within broader market categories. From a product point of view, the area of effective competition may include other separate and disparate products which vie for the public's patronage. The test here is whether there is a high degree of cross-elasticity of demand. The fact that a product properly belongs within a broader market does not necessarily mean that its own characteristics and uses may not properly define the metes and bounds of a submarket. By the same token, the differences in physical characteristics and uses need not compel the conclusion that there is a submarket. There can be no pat rules. The facts must reign supreme, and there is no escape from a case-by-case determination.6

No review of Twenty-Five Years of Antitrust would be complete without also alerting readers to the lighter side of the book. The most sustained bit of humor in the collection is an imaginary opinion in the case of the United States v. Joe's Delicatessen.7 The result reached by Justice Christopher Co-

---

6 Handler at 1050.
7 Handler at 546.
lumbus Brown is to order divestiture by Joe’s Delicatessen, “[T]he second largest food establishment at the intersection of K and 21st Streets, N.W. Washington, D.C.,” of the assets of Victor’s Meat Market Co., “the third largest food store at this intersection.” The opinion contains all of the necessary incantation of findings as to such matters as relevant market and exhibits a wealth of case citation. The result is a very funny bit of work which, like all good satire, is not without its sting; we are reminded implicitly the verbal formulas are no substitute for judgment, and that legal analysis may disguise the suspension of common sense. Interestingly enough, Handler himself, in commenting on our merger jurisprudence nearly a decade later, comments that:

My fictitious opinion in Joe’s Delicatessen was intended as a fun piece, but the joke was really on me, since Joe’s Delicatessen turned out to be the precursor of Von’s Grocery and Pabst.8

Those more knowledgeable about antitrust jurisprudence than this reviewer might perhaps have more to contribute in terms of substantive criticism of Professor Handler’s positions; even those who disagree with him at times, however, must acknowledge the magnitude of his contribution, and surely would agree that the publication of these essays is a boon to all those interested in antitrust.

John A. Kidwell∗

8 Handler at 1053.

∗Assistant Professor of Law, University of Wisconsin Law School. B.A. 1967, University of Iowa; J.D. 1970, Harvard University.
Dr. Halleck is an accomplished psychiatrist who presents in *Psychiatry and the Dilemmas of Crime* a broad and thoughtful critique of the law's treatment of those mentally disturbed persons thought to have committed criminal acts. Acknowledged upon its original publication in hard cover as being "[b]y far the best general and popularly presented synthesis of the psychiatric view of criminal behavior," this book in its present paperback edition has lost little of its value as a layman's introduction to the ethos of forensic psychiatry. Theories of crime as diverse as endocrine abnormality and differential association are presented and evaluated. A theory of crime as adaption by an organism to perceived oppression, both real and imagined, is advanced and defended. The position of the psychiatrist in various legal settings is critically explored with emphasis on ethical resolution of the conflicting roles of patient's doctor and prisoner's gaoler. The broad outlines of certain reforms are presented, and extensive footnotes throughout the work provide further material on the topics covered.

The author of this excellent work is a healer of injured and suffering men. His perception of crime's dilemmas and their resolutions arises directly from that position. He dissents from the view assigning criminal liability to the sane only, finding the mens rea principles involved in the insanity defense rooted in an unacceptable ethic of cruel and vengeful punishment. He deems psychiatry's proper role to be that of physician to those committed to its care rather than oracle on unanswerable questions of free will and moral responsibility. He argues that a humane penal code should be prescinded from questions of personal guilt and responsibility, instead incriminating primarily on the basis of the commission of a prohibited act, with the choice of consequent reformative treatment heavily influenced by psychiatric considerations. Dr. Halleck's sensitive criticisms cause one to pause to consider if indeed the law is

---

2 Innocent intent founded on mistake or supposed justification would remain a defense. See S. Halleck, *Psychiatry and the Dilemmas of Crime* 341 (1971) [hereinafter cited as Halleck].
only a slaughterer, occasionally provoked to mercy, or whether defensible ideals may undergird its prescriptions and justify present-day demands for psychiatric testimony on the issue of responsibility.

Law promotes public aims by establishing formal and recognized rules governing social relationships such that the task of achieving those aims may be accomplished. Of upmost importance is the general observance of certain minimal standards basic to any organized society, e.g., refraining from unjustified attack on individual personality and its accepted extensions such as property. The means for securing such observance are varied and include the enactment of penal law with its formal system for passing judgment on the conformity of the acts of individuals to the required norms. As presently devised, the consequences of an adverse criminal judgment are the imposition of detriments which satisfy society's instinctive urge that "justice be done" and serve the rational goals of incapacitation, deterrence and reinforcement of social mores both in the offender and, more importantly, in society in general.

The cruelty especially apparent in this detriment phase appalls Dr. Halleck and causes his concern with the correctional rather than with the adjudicative process. This, together with his scientific scepticism on the philosophic question of free will, leads him away from questions of personal guilt in the legal process and toward an emphasis of the actus reus of crime rather than the mens rea.

If the penal system were truly free of influence by considerations other than the particular harm caused, there would be little argument with Dr. Halleck's position; homicide, whether by madmen or by hired assassins, is equally threatening to society. Yet there are other influences at work here for society has, at least partially, answered Dr. Halleck's unanswerable question of human responsibility. Man is viewed as a free agent able to act as he chooses. He owes an obligation either to his

---

3 Law is not regarded as the flower of science, to the disparagement of other disciplines. It is recognized that society aspires to something more than this minimal civility and that maintenance of even this rather rude level of behavior is not solely or even primarily due to the existence of penal law.

4 Eclectic scholars uncertain of the will's freedom may still conclude it more desirable to proceed as if free will existed. See Halleck 208, 211; H. Packer, The Limits of the Criminal Sanction, 74-75 (1968).
fellows or to a deity to choose conduct which conforms either to ethical norms of social intercourse or to divine law. This obligation may be, and often is, shirked, but it is the struggle not to do so which lends dignity to the individual and forces society to accord him autonomy to work out his own virtue or salvation as he sees it.

As the legal world presently exists, freedom of will is universally acknowledged by law-giving bodies and is reflected in the penal code’s concern with personal guilt and its insistence on mens rea as a necessary element of criminality. Free will is obviously central to retributive theories of jurisprudence and of considerable aid to utilitarian theories by providing a mechanism by which individual conduct may be influenced.

Yet, one may join Dr. Halleck and propose a world in which free will may or may not exist but does not find reflection in penal law. Rather, ethical evaluation is left to other forums and penal proscription is concerned only with the social harm per se; the intellectual processes that caused the harm are determinative only of the means employed to prevent recurrence. Thus homicide through paranoia, intoxication, or greed would be equally incriminating, but the reformative regimen imposed would differ radically. To appraise this theory one must consider why society presently imposes ethically implicative detriments on those willfully violating its proscriptions that are more onerous than those ethically neutral detriments imposed for similar non-willful violations.

Retributive jurisprudence would note that the affrontery present in the willful flouting of social values is absent where the will fails to appreciate and act upon those values. A utilitarian analysis, once positing the existence and significance of free will, would first note that the core of penal law concerns such harms as homicide and theft, the ethical evaluation of which is sufficiently simple\(^5\) that a generally agreed-upon ethical judgment may be expected.\(^6\) Secondly, a given act may not

---

\(^5\) When complications become severe, doctrines such as necessity must be elaborated (see, e.g., Model Penal Code § 3.02) or the effort to penalize abandoned.

\(^6\) The author believes that in the simple concerns of penal law a “correct” ethical judgment may be at least approached by society. The law should not venture where such is not the case for it is effrontery there to claim competence to attain the judgment of one’s fellows. With those finding this last always to be the case, one may only disagree and argue the utility developed from proceeding as if ethically valid judgments may be objectively made by social institutions.
be evaluated as social harm or good without examination of the mental processes producing the act. For example, homicide may or may not have utility depending upon whether it is assassination or execution; and mistake in the circumstances surrounding the act may or may not provide utility through reasonable excuse. Since the same evidence of act and mental state are sufficient for the aforementioned general ethical judgment, the criminal court may receive that judgment for the asking.

The question then becomes whether there is utility in including this answer as a part of the penal system. A danger of great disutility is obviously present if the penal and ethical forums arrive at different conclusions concerning the same event. Ethics being a peculiarly personal matter, when the law takes unto itself a mantle of morality and condemns an act which the people find unblameworthy, the reaction apt to be felt is a lessened respect for law in general, not merely for the particular proscription in question. This counsels a prudent restriction of penal sanction to the truly serious and opprobrious harms which are at its core. If this danger is avoided, the inclusion of ethical evaluation in penal judgment will increase the effectiveness of measures of coercive deterrence and affirmative education used to influence individual conduct. Coercively, insofar as one fears pangs of conscience and the ethical condemnation of his fellows, there is provided a deterrence of a kind not furnished by material and motorial deprivation alone. Educatively, insofar as one may be taught and guided by his fellows, his view of what he ought to be doing will be changed or reinforced. This last is a most powerful tool to reduce the incidence of social harms, i.e., robbery is more certainly avoided if one believes he should not rob, rather than he must not rob. No educative effect is possible from incriminating one who cannot understand and act upon socially espoused ethical norms. The increased deterrence and incapacitation provided by criminal rather than civil treatment of this small group of mentally incompetent people is outweighed by the

---

7 Few insane men commit crimes in the presence of uniformed police. Consider the charge given to the jury in King v. Creighton, 14 Can. Crim. Cas. 349 (High Ct. of Justice, Ont. 1908): "If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help."
weakening in the overwhelming majority of penal law's deterrent and educative effects occasioned by their observation of equal incrimination for the ethically culpable and innocent alike.

These reasons seem ample to justify the special treatment prescribed for willful violation of the law. While this special treatment usually is adverted to with reference to incrimination of those who have wrongfully chosen to engage in proscribed conduct, it is equally administered in the exculpation of those whose mental processes are so abnormal as to extinguish their duty to choose right conduct. It is in the elaboration of this exculpation that much of the boundary of inculpation has been defined. Any refusal of further elaboration would inevitably affect incrimination and the social principles upon which it is founded. In an individual case, society is equally served by either answer to the question of a particular defendant's responsibility, but it has an interest in assuring that the question is asked and an answer given in terms of the reference it has established. Through its special knowledge of the human psyche, psychiatry may contribute to this determination. Society may justly call upon psychiatry to impart to the trial jury that part of its evidence deemed material by society regardless of the discomfort psychiatrists may experience at entering a world of responsibility they find at best irrelevant.

Daniel G. Moriarty*

*Assistant Professor of Law, Albany Law School (Union University). J.D. 1967, Georgetown University Law Center.