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# Law and Psychology in Conflict by James Marshall

Deborah Jo Milner

Samuel Milner

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# Book Reviews

LAW AND PSYCHOLOGY IN CONFLICT. By James Marshall. Indianapolis: The Bobbs-Merrill Company, Inc., 1966. Pp. 119. \$5.95.

*Law and Psychology in Conflict* is a compelling argument for a major alteration in the rules of evidence and, in some aspects, of trial procedure. The author's advocacy of change is predicated upon experimental evidence of how our senses mislead us and upon established psychological findings related to perception and memory. The author categorizes these in the following manner:

(A) *Perception*, including (1) the limitations on the range and acuteness of human sense perception and (2) the way events are interpreted and significances assigned to them (*i.e.*, the determination of sense perception) by a person's idiosyncratic needs, moods, and emotions; (B) *Recollection*, the time lapse between the accident and its recounting, during which other influence on the observer permit the image of the incident to be altered; and (C) *Articulation*, the basic problem of communication, whereby the same words are used with different meanings by different persons.<sup>1</sup>

Dr. Marshall offers few definite alternatives to the present system; his recommendations are general in nature:

[T]hese phenomena . . . present a challenge to lawyers and judges to simulate and participate in research to test new judicial practices that might produce greater objective reality in testimony, that might produce greater correspondence between what is perceived and recalled by those who testify (their subjective reality) and what is called objectively real<sup>2</sup> . . . . What is required is a social invention in the law based on findings of the social sciences<sup>3</sup> . . . . [E]ffort should be to reconcile the rules of evidence and conduct of trials with what we know about the nature of perception.<sup>4</sup>

One of the author's basic assumptions appears to be that reliable evidence is impossible when witnesses retell their observations after a period of time. This fallibility of perception and memory applies not only to witnesses, but to jurors as well.

After the thesis is developed, the remainder of the book is a well-organized description of the ways memory and perception deceive, and the application of this situation to the law.

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<sup>1</sup> MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 8 (1966) [Hereinafter cited as MARSHALL].

<sup>2</sup> MARSHALL 81.

<sup>3</sup> MARSHALL 101.

<sup>4</sup> MARSHALL 107.

Dr. Marshall believes the adversary system of trials, far from being conducive to an objective search for truth in the evidence, is actually detrimental to it.

That is the essence of a trial; it is not a scientific or philosophical quest for some absolute truth, but a bitter proceeding in which evidence is cut into small pieces, distorted, analyzed, challenged by the opposition, and reconstructed imperfectly in summation.<sup>5</sup>

In this regard he states the adversary duel is "a sublimation of more direct forms of hostile aggression . . . such as blood feuds."<sup>6</sup> He also identifies the basis of the human tendency to characterize everything in terms of black or white, good or bad, as the necessity to be on one side or the other in relation to the family. It is, however, in the opinion of the writers of this review, more likely an attitude directly taught by the parents. Dr. Marshall, on the other hand, cannot be so easily disputed when he sticks directly to the principles of psychology.

The *res gestae* rule is criticized in the light of psychological data demonstrating the overestimate of time and distance when the observer is either in danger or under stress. The rule of *res gestae* is predicated on the assumption, according to Wigmore, that the "stresses of nervous excitement" will make for a "spontaneous and sincere response."<sup>7</sup> The rule permitting the refreshment of recollection is likewise questioned because it leaves open the basic question of whether the observation by witnesses was accurate in the first instance. The rule allowing evidence of character for truth and veracity is attacked on the basis of psychological findings to the effect that an individual will not behave in the same way in all situations and that a given individual will be truthful in one situation and will offer perjured testimony in another. The rule prohibiting a witness from stating conclusions should be altered, according to the author, because permitting a witness to state the reasons why he came to certain conclusions would enable the tribunal to more accurately evaluate his testimony. He lauds those courts which permit evidence of conflicting statements made by the witness to be received substantively in evidence rather than merely for the purpose of impeachment.

About one-third of the book describes a well-constructed experiment conducted by the author which aptly illustrates some of the factors affecting recall. Police trainees, law students, individuals of

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<sup>5</sup> MARSHALL 94.

<sup>6</sup> MARSHALL 6.

<sup>7</sup> 6 WIGMORE, EVIDENCE § 1747, at 135 (3d ed. 1940), quoted in MARSHALL

relatively low economic status were shown a film of a possible crime and afterwards questioned about its contents. Strikingly little correct information was remembered. Such factors as education, requesting a person of high status to do his best, pre-test set (subjects were told they would be witnesses for the defense or for the prosecution), and personality traits affect not only the amount, but the type of distortion.

It was found that direct questioning did increase the number of details remembered but decreased the correctness of the responses. This finding has direct relevance to the effect of pre-trial rehearsal upon the testimony of a witness, as does the general discussion of suggestibility.

The writers of this review submit that law and psychology need not be in conflict. Law has much to discover from the methods and experimental evidence of psychology. Those who work with the law should consider the potential for error which science has proved to be inherent in the legal process as it now exists. Much more research is needed to determine the best possible procedures. The behavioral sciences have delved too little into our legal system. The work of the experimental seminars in law and the social sciences sponsored by the Russell Sage Foundation is an important exception. The time has come for co-operation between the disciplines of law and psychology which will make for a more perfect system of justice.

The principal method by which the law of evidence develops, the appellate procedure, is necessarily a very slow, evolutionary process. Rarely does an attorney appeal a case seeking the modification or overturn of a well-established rule of evidence, except perhaps incidental to appeal on other grounds which are more significant to the attorney. Consequently, if the progress advocated by Dr. Marshall is to be made, it will probably have to result from the enactment of statutes, exemplified by the proposed Uniform Rules of Evidence developed by the American Law Institute. However, as most of the law of evidence is traditionally case law, rather than statutory, there may be little hope for progress by the statutory method.

It is believed the experienced trial lawyer, at least to some degree, is inherently or instinctively aware of many of the findings arrived at by means of psychological experimentation, such as that treated by Dr. Marshall. For this reason it is reasonable to assume that, by means of direct and cross examination, errors in perception, recall, and articulation are to some extent brought to light in the course of a trial, although Dr. Marshall would disagree in view of his belief that

the adversary method of trials further distorts testimony rather than clarifies it.

*Deborah Jo Milner\**  
*Samuel Milner\*\**

RECOVERY FOR WRONGFUL DEATH. By Stuart M. Speiser. Rochester: The Lawyers Co-operative Publishing Company, 1966. Pp. 1094. \$28.50.

Stuart M. Speiser has produced a how-to-do-it book on wrongful death actions combining many of the familiar features of his publisher's several multi-volume services.

Starting with a rather general introduction, reciting the history of wrongful death actions since Lord Ellenborough's decision in *Baker v. Bolton*,<sup>1</sup> Mr. Speiser has, in good *A. L. R.* style, thoroughly researched federal and state law for cases illustrative of the statements of law he makes. In areas of pleading—including instructions—the pattern of *Am. Jur. Pleading and Practice Forms* is evident. To complete the assimilation of the publisher's other services the *Am. Jur. Proof of Facts* method of model questions and elaborate tables and charts is employed to enable the practitioner to obtain the "Full Dollar Value"<sup>2</sup> of his client's case. The author has collected in one appendix<sup>3</sup> the full text of all constitutional and statutory provisions pertinent to his topic; in another appendix, these have been condensed for convenience under six general captions.<sup>4</sup>

That Mr. Speiser's treatise has been prepared particularly for plaintiffs' attorneys is emphasized by the use of the word "Recovery" in the title. Although a chapter on defenses is included, it would appear that this has been done for cautionary purposes of the attorney preparing a case for plaintiff. In like manner, the chapter on conflict of laws suggests that if recovery in wrongful death actions is limited in one jurisdiction, the maintenance of the action in a more liberal

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\* A.B. Northwestern University; graduate student in Clinical Psychology at Columbia University.

\*\* LL.B., University of Kentucky; member, Kentucky Bar Association and American Bar Association.

<sup>1</sup> Campb. 493, 170 Eng. Rep. 1033 (1808).

<sup>2</sup> Catchline employed by publisher in mail advertising, conveniently referred to as "FDV."

<sup>3</sup> SPEISER, RECOVERY FOR WRONGFUL DEATH 773 (1966).

<sup>4</sup> *Id.* at 905. The captions are: Basis of Liability, Extent of Liability, Plaintiffs and Beneficiaries, Miscellaneous (principally statutes of limitation), and survival statute. A final appendix, "C", contains "Life Expectancy Tables" derived from federal statistics.