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Book Reviews

BOOK REVIEWS

ESSAYS IN CRIMINAL SCIENCE, by Gerhard O. W. Mueller (Editor), Rothman & Company, 1961, 460 pages. Price: $10.00.

From four continents and twice as many countries, eighteen leading authorities and scholars in the field of criminal law have contributed to a worldwide search for new ideas. This quest—which has been crystallized in Professor Mueller's new book, "Essays in Criminal Science"—has been an eminently successful one. Indeed, this collection might well have been entitled, "Ideas in Criminal Science," for its pages furnish stimulating and challenging thoughts in this portion of the seamless web which constitutes the law.

A brief venture into this collection of ideas presents significant questions which arise from the contents of these essays. In Part One, which is expressly concerned with Contemporary Ideas, Professor Manuel Lopez-Rey deals with the standardization of criminal processes and the use of modern prediction tests. Is criminology becoming "more and more engulfed in the technical-scientific current constituted by mass-education, mass-communication, mass-welfare, mass-persuasion, mass-leisure, mass-benefits, and mass-conformism"? If so, what factors may be contributing to such a threat? Is the individual becoming a forgotten entry in an era of mass statistics and treatment designed for time and money saving purposes? How scientifically sound is it to use sampling groups for predicting the future behavior of individuals? Are these tests based too heavily upon underlying theories of determination, and should a more sociological approach to criminology be taken? What can be done to prevent the possible misuse of prediction scores for quick decision making, or the use of such scores for other purposes than those originally intended? What if they are used against non-conformists in all senses, and what effect may they ultimately have on the dignity of man?

One may differ with some of the concepts advanced by the essay writer, such as his criticism of the importance placed upon psychological factors in the prediction of crime, and may feel that there are other remedies for the problems he has pointed out which are more consistent with current criminological thought. Nevertheless, the questions raised by Lopez-Rey are of considerable importance. Indeed, it must be acknowledged that he has provided some caution lights and guideposts for the future in this area.

From the modern age of prediction tests, one is moved to the distant yesterday of pre-classical penology by Professor Paul Tappan's essay. However, he raises challenging questions for today. Does modern penal law bear

the impressions of primitive custom and Germanic and ecclesiastical law? If so, in what ways and to what extent? Does some contemporary thought and theory bear the mark of ideas hundreds of years old?

Professor Hans von Hentig of the University of Bonn Law Faculty explores the commonly mentioned theory that the criminal often returns to the scene of the crime. Professor Franco Ferracuti of Italy deals with the contribution of psychological testing to both criminal theory and diagnosis, and the "dangerous dualism between psychology and sociology."

Professor Helen Silving of the University of Puerto Rico School of Law, in her essay on " 'Rule of Law' in Criminal Justice," raises thought-provoking questions of considerable importance. Has not a "virtual evolution" of criminal substantive law occurred in modern times with the shift of penal philosophy and sentencing techniques from the "law of the act," which is concerned with the specific crime, to the "law of the actor," which is more concerned with the personality of the individual? If so, is this adjustment being achieved "in a manner violative of the spirit of the constitution, if not its letter"? What safeguards exist in the area of sentencing to protect the individual from arbitrary decisions and deprivations of freedom? Does the indeterminate sentence pose a threat to liberty? Is a return to theory emphasizing the "retribution" aspect of punishment needed? What constitutional principles need re-examination in light of current social development and what improvements can be made in criminal law machinery, especially at the post-conviction stage, to effectuate and give these principles their full meaning in terms of human rights? In this essay, as in all of the others, the reader may differ with the author in some matters. Thus, one may feel that a return to the retribution theory is unnecessary, and that concepts of liberty and individual dignity may stand alone in meeting the danger presented by shifting penological insight. Nevertheless, here, as in the other essays, one must acknowledge the validity of many of the questions raised.

Following these essays on contemporary thought are ones dealing primarily with general principles of criminal law. Here again is found the basic theme which permeates the entire book and makes it a valuable contribution to criminal science—a search for new ideas and thoughts. Professor Jerome Hall begins this portion of the book by posing questions concerning the logic, policy and factual aspects of criminal law. In the first of these areas, he asks, what fundamental ideas or principles run throughout the criminal law and give it organization and unity? Cannot one who knows the principles ask the correct questions about each crime, even though he may be unfamiliar with its specific content? Is not the foundation of criminal law to be found in seven basic principles: "(1) legality, (2) harm, (3) act (effort), (4) mens rea, (5) the concurrence of the mens rea with the act to form the

conduct, (6) causation, that is, a causal relationship between the conduct and the harm, and (7) the punitive nature of the sanction"?

In the policy area, he poses the question whether criminal liability should be extended to non-voluntary acts, and considers problems in the area of regulatory crimes and objective liability founded upon the "reasonable man" test. In the factual, or "law-in-action" aspect, Professor Hall poses the challenging question whether there is a significant discrepancy between the law "as expressed in books" and "the actual operation of the law" as it affects the thinking and conduct of human beings.

Another essay in this area sets forth equally thought-provoking issues. Professor Gerhard Mueller, in dealing with causation, raises serious question as to the adequacy of the state of the law. What has been the purpose of Anglo-American law concerning causation, and is it fulfilling its purpose? What are the various limitations which should be placed on any theory of causation? Where there is more than one element contributing to a given result, what criteria should be used to determine criminal liability? Is the law, as currently applied by the courts, so vague that arbitrary and unjust results often occur? Professor Mueller's excursion into comparative law brings forth a number of ideas relating to the objective, objective-subjective, and finalistic theories for one's consideration. In the final portion of his essay, he raises questions as to which approach is best, poses his own solution and tests it against concrete situations such as the "pre-Redline" Pennsylvania felony murder cases. One may disagree with Professor Mueller on certain minor points, and indeed may question the validity of theories resting upon a deterrent basis—that of "seeking to dissuade persons tempted to do so from engaging in conduct which will bring about a certain legally recognized harm." It may well be argued that such considerations do not influence the thought processes of most criminals. Underlying psychological factors may be of more importance, and it may be that, in addition to a separate mens rea requirement, any theory of causation should be based primarily on these factors. Nevertheless, characteristic of the entire book, Professor Mueller raises important questions and sets forth numerous ideas as food for thought in his essay.

The next essay, that of Professor Johs. Andenaes, deals with the effects of ignorance of the law. In such cases, what doctrines should be applied—absolute liability, judicial discretion, fault or mens rea? Furthermore, what effect should this ignorance have upon the verdict and punishment—full acquittal, less than the usual minimum, a lesser form of criminal liability, other mitigation or none?

Professor James Starrs, in his essay on the "Regulatory Offenses in Historical Perspective," raises serious questions as to whether the regulatory

statute has become a mischievous instrument which both threatens the liberties of innocent persons and carries with it grave practical consequences for members of society as a whole. Have present trends in this area tended to "distort and disparage the true nature of the regulatory offense and consequently efface the benign society conscience which inspired them"?

The last two portions of the book, dealing with "Problems of Forensic Medicine" and "Law Reform Abroad," also present new ideas. The former begins with an essay by Professor Norval Morris concerning defenses of insanity. He asks whether new definitions, similar to those found in some of the Australian code states, could not be used to replace the M'Naughten Rule. Are these definitions more in accord with psychological and sociological realities? Professor J. Ll. J. Edwards then views possibilities for replacing the old rules in this area, and explores the concept of "Diminished Responsibility." Professor Glanville Williams' essay probes into "automatism" and its treatment. Professor Morris Ploscowe concludes this portion with a most interesting discussion of the treatment of drug addiction and raises questions concerning the adequacy of the treatment of addicts in this country.

In the latter portion dealing with "Law Reform Abroad," the French, German, Soviet and Japanese experiences are considered. Here, also, new ideas are set forth and significant questions posed. Justice Marc Ancel of the Cour de Cassation discusses the need for reform of French Codes founded upon earlier criminological theory inconsistent with modern thought and reality, as well as some of the problems and issues encountered in law reform. Professor Hans-Heinrich Jescheck, in dealing with German law reform, raises the serious question of "whether this age . . . can mobilize adequate scholarly and political strength to carry this law reform to fruition." George Ginsburgs and George Mason discuss the Soviet law reform and the dilemma faced by Soviet leaders relating to the ensurance of "maximum local effectiveness which would take into consideration the economic, customary, cultural, geographical and historical vagaries inevitably proliferating over the length and breadth of one-sixth of the earth's surface," while at the same time "reconciling it with the need for sufficient centralized direction to counteract local deviations . . . and other numerous manifestations of potentially dangerous centrifugal forces."

Professor Shigemitsu Dando's essay on the new Japanese Criminal Procedure Code brings to light an experiment in comparative law. As the last essay in this world-wide quest for ideas, it appropriately leaves in the mind of the reader this question: cannot criminal law reform in various countries benefit from the experience of both the common and civil law?

All in all, Professor Mueller and the Comparative Criminal Law Project

of the New York University School of Law are to be congratulated on a job well done. While there are a few things that the reviewer might have preferred, such as a foreword to each main section which would place the respective essays in an overall substantive setting and the use of a few more explanatory footnotes in one or two of the essays, these are matters of personal preference and not legitimate criticism of the book. Indeed, the foreword in the front of the book gives a general guide to the nature of essays to follow and the number of explanatory footnotes is generally sufficient. Nor is the other feeling of the reviewer—that more ideas and subjects in this field need exploration—really criticism of the book. Rather, it points to the need for more books and writings of the nature and quality found here. In an era when penal codes and statutes are being drafted, and various criminal theories and procedures are being proposed for future use, thorough studies must be undertaken. Also, during these times, when freedom and human rights offer one of the brightest shafts of sunlight in a world darkened by oppression and despair, it is vitally important—indeed necessary—that more study be directed toward the formulation of criminal law concepts and procedures which are in furtherance of the dignity of man.

Because it is a scholarly collection of essays, Professor Mueller's book has a much greater value than the "light reading" type of book which may be put back on the shelf to gather dust after a weekend or two of study. Each essay is so "packed" with ideas that it requires serious thought and "re-thought." Because of its quality, every law school and college library should, in the opinion of the reviewer, have at least one copy of this book on its shelves, and those persons who are genuinely and seriously interested in criminal law should give it top priority on their personal reading lists.

DONALD B. KING*

LEGAL REGULATION OF SEXUAL CONDUCT, by Gerhard O. W. Mueller, Oceana Publications, Inc., New York, 1961, 160 pages. Price: $3.50.

For obvious reasons, it is exceedingly difficult for a law-trained writer to communicate legal thoughts with precision to the layman. Nevertheless, Professor Mueller, a law teacher at New York University, in his book "Legal Regulation of Sexual Conduct," undertook such a task. The book—part of the publisher's Legal Almanac Series—was written, as the author states, "to acquaint the intelligent non-lawyer with the law's expectations in the

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sphere of sexual conduct."[1] To the mind of this reviewer, the author has succeeded in making the non-lawyer's acquaintance.

The booklet under review, prepared by Professor Mueller, with the assistance of Neville Ross, Esq., consists of 63 pages of text and 94 pages of statutory tables—a detailed and painstaking breakdown of the statutes of every American jurisdiction for each of the sexual offenses surveyed. While the main target of the book is the layman, its utility is broader. Noting that there was "not a single reliable guide to the American statutory law of sexual offenses," the author sought to supply his "colleagues in law" with such a "guide through the labyrinth."[2] Further, it was observed, the book may be useful to "the various state reform committees" and to "the multitude of students of law, sociology and related sciences."[3]

Noting that many sexual offenses were to be discussed, and that "the mode of perpetration" is the safest criterion by which such offenses can be distinguished, the author seized upon the following classification.[4] Under the head "Sexual Offenses Requiring Heterosexual Connexion,"[5] he discussed: rape, statutory rape, incest, adultery, fornication, lewd cohabitation, seduction and abduction. In the chapter entitled "Sexual Offenses Requiring Other Than Heterosexual Connexion,"[6] he explored sodomy (occasionally called buggery) which in its broadest sense encompasses "all perverse or unnatural sexual copulations."[7] Under the topic "Sexual Offenses Without Connexion,"[8] he examined: indecent liberties, voyeurism and exhibitionism. In order to reckon effectively with sexual offenses of a "predominantly commercial nature,"[9] the author added two separate chapters dealing with prostitution[10] and obscenity.[11] Under the head of prostitution, he discussed the prostitute, the house of prostitution, procurement and pimping. Obscenity, for convenience of treatment, was broken down into commercial obscenity, its mass publication, and non-commercial obscenity.

In setting the stage for his examination of the specific offenses, the author indulged in some "general considerations." Among other things, he discussed the impact and relevance of mental abnormality;[12] the nature of criminal and non-criminal sanctions;[13] the applicability of criminal law

1. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT, vii (1961).
2. *Ibid.*
3. *Id.* at viii.
4. *Id.* at 12.
5. *Id.* at 40.
6. *Id.* at 53.
7. *Ibid.*
8. *Supra* note 1, at 56.
9. *Id.* at 13.
10. *Id.* at 49.
11. *Id.* at 60.
12. *Id.* at 24-28.
13. *Id.* at 29-31.

doctrines such as "attempt" and "accessoryship"[14] and some evidentiary problems.[15]

It is worthy of note, as Professor Mueller sees it, that the law of sexual offenses is fighting a losing battle; indeed, it is a battle that it cannot win. In the main, two reasons are assigned for this position: (1) the "threat of punishment" is not effective "because most sexual misconduct is carried on by consenting parties in private"—the usual circumstances are such that "our detection efficiency" is "extremely low."[16] Accordingly, the author concludes, we are left with "an unenforced—and unenforceable—body of law on sexual offenses."[17] (2) The law of sexual offenses lacks "popular support" in that "a wide gap exists between what our medieval law expects the public to do in the sexual sphere, and the actual practices of the public."[18] While some psychiatrists, according to the author, feel that "the current rigid standards of our sex laws create unnecessary guilt feelings," others feel that a repeal of such laws "would remove the psychological block and open the floodgates to widespread profligacy."[19]

The keynote of the book under review appears to be this: the criminal law, "with the traditional means at its command," cannot "enforce the sexual standard which it endorses" and "we must face the fact."[20] Professor Mueller put it this way:

> The law simply cannot direct itself against all immorality, and the judgment as to what is moral must be entrusted to the responsible human being, who must engage in his own soul searching with the help of those spiritual agencies whose principal function is the support of the moral standard.[21]

This book, dealing with a difficult subject matter, has met the sexual offense problem squarely. Ought the criminal law attempt to set the moral standard? While this reviewer grants that the criminal law may not have the equipment to do so effectively, it is not so ineffective that the effort should not be made. It is of course open to the reader to reach his own conclusion. This book provides an honest and informative base upon which an intelligent judgment can be made.

CHARLES E. TORCIA*

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14. *Id.* at 31-37.
15. *Id.* at 38-39.
16. *Id.* at 15.
17. *Ibid.*
18. *Supra* note 1, at 17.
19. *Id.* at 18.
20. *Id.* at 17.
21. *Id.* at 22-23.

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THE PROUD AMERICAN BOY, by Russell Braddon, St. Martin's Press, 1961, 280 pages. Price: $4.95.

The eyes of the world are focused in these times on the United States and the way in which it handles its racial problems. Russell Braddon has created a mythical, though typical, southern town through which he dramatizes and comments upon the clash between negro and white as the negro attempts to attain equality with his white neighbor.

The setting of the story is the small town of Golden Eagle, population 12,203—a town with a reputation for being more liberal than most southern towns. Luke Robert "Boy" Jackson is a negro child of four. The nickname "Boy" attached because Luke Robert's father considered him his "all-American boy." His parents are educated people, his father being a financially secure dentist and his mother, a former schoolteacher. "Boy's" formal name, Luke, came from his Uncle Luke, but he has been known only as "Boy" ever since his uncle burned to death in a fire set by the Ku Klux Klan a few years earlier.

This is "Boy" Jackson, his family and his town. The author meticulously lays the foundation of the story as he scans the next four years of "Boy's" daily life. He introduces the reader to "Boy's" favorite playmate, Virginia Sundstram. Virginia is the same age as "Boy," and in their playful and innocent manner they agree that someday they will marry. This close friendship is greatly disquieting to Virginia's parents. Virginia is white.

At the age of eight "Boy" is charged with raping Ginny. From this point, events unfold rapidly. "Boy" is taken to jail. His mother is notified of the charge against him and is told that she will not be permitted to see her son until the case is to be heard—three days hence. No lawyer can be found who will help the Jackson family. The case is heard in a closed juvenile court with only "Boy," his mother, his grandfather, and the town's chief of police present. The judge is a farcical, Klan-controlled figure, and the hearing is a mockery. The charge is read and sentence is passed. "Boy" is to be committed to a negro school "until he should be released as provided by law." Without such imprisonment the judge declares that "Boy" would probably "grow up to be an ardent sexual criminal." Thus, without a petition, a summons or a proper hearing, "Boy" Jackson, eight years old, is committed to reform school for rape.

Enter Robert Hale, a brilliant negro lawyer from the north, a man who has devoted all of his energies to defending his people from the oppression of the whites. Mr. Hale is contacted, and he flies to Golden Eagle to appeal "Boy's" conviction. At this point the reader is given an insight into Hale's

approach to the problem. The attorney gives the story to the Associated Press and it is carried to newspapers around the world.

On appeal, Hale first attacks the jurisdiction of the juvenile court by alleging that the elements of due process of petition, summons, and notice requisite to a criminal proceeding were not observed in the supposed hearing which "Boy" had had. However, the jurisdiction of the court is upheld because the proceeding was not a normal criminal hearing, but rather one for alleged delinquent behavior by a juvenile.

Hale's next step is ethically questionable. He is interested more in attracting world attention to the social question involved than in gaining "Boy's" release. Forsaking the legal means available to him, Attorney Hale attempts to force the white supremacists to buckle under the pressures of public opinion. In this way Hale feels that a great and widely publicized victory may be won for the negro race. The release of a single eight-year-old negro boy is secondary. It is the negro race on trial, and Hale intends to win if it means sacrificing that one child to the cause. If the white men refuse to be swayed by the public outcry, "Boy's" freedom will be lost.

Russell Braddon speaks out against this sensationalist representation of the negro race through the youngster's grandfather, a keen-minded, retired preacher. Hale's questionable methods are laid bare by the old man as he recognizes the scheme for what it is, an attempt to exonerate "Boy" in the "Court of Public Opinion." The clash between Hale and the old preacher dramatizes the underlying differences between those who seek the end of discrimination by revolutionary means and those who believe that only through legal processes can true justice and harmony be attained.

Public opinion, not only in the North, but throughout the world, runs high. "Boy" is a catching name—making good copy for newspapers. Add to this the sensational crime of rape, committed, allegedly, by an eight-year-old boy, and the newspapers are handed a highly saleable story. Large and small papers the world over send reporters to Golden Eagle to report the drama as it unfolds.

Realizing that the eyes of the world are upon its cause, the Ku Klux Klan refuses to release "Boy." The thought of "nigras" applying pressure upon them angers the Klan; and nothing will force them to release this symbol of negro equality. The governor of the state depends upon the Klan's support for his security in office and cannot risk its loss by releasing "Boy" even in the face of pleas by the President of the United States.

The author combines all of these forces into a powerful, driving story that races to a startling conclusion.

The book takes Mr. Braddon's understanding of the South's racial problem and projects it upon the international scene. One receives the

impression that a few of the passages are somewhat incredible and that the author's pen has given way to his imagination and is not sufficiently guided by realism and fact. But who is to say that a town such as Golden Eagle cannot exist, that a southern town of 12,203 persons cannot produce a U.S. Senator, a Governor and a future Vice-Presidential candidate.

THOMAS DEMARINO

MY LIFE IN COURT, by Louis Nizer, Doubleday and Company, 1961, 524 pages. Price: $5.95.

Louis Nizer, one of America's most famous trial lawyers, has handled hundreds of varying cases in many different states, yet in the words of Mr. Nizer, "the excitement has never been diminished. Indeed it has grown. The challenge is ever new. The contest is ever intense."

From these words one might well be able to sense the drama of the courtroom which Louis Nizer so vividly displays in his most recent work. The author of *What To Do With Germany, Thinking On Your Feet,* and *Between You and Me,* has, in this reviewer's opinion, made two major accomplishments with his latest book. He first has quite successfully attained his apparent goal of relating in a most brilliant and exciting fashion the world of suspense and intrigue one encounters when he devotes his life to that aspect of the legal profession known as trial work.

As a means of accomplishing this objective, Mr. Nizer has written concerning six diversified areas of human conduct in which he has tried cases. Each area is represented by one or more actual cases, some celebrated—as the libel action of *Quentin Reynolds v. Westbrook Pegler* and the divorce case of Billy Rose—while others are less famous but equally interesting and exciting. It is through a step-by-step analysis of these cases that the author has managed to captivate the authenticity of his life's work and relate it to his readers.

Possibly even more important than the above accomplishment, Mr. Nizer has, whether intentionally or not, permitted the reader to gain a wonderful insight into the author as an individual, as a trial lawyer, and as an American. The evident ability of this man, coupled with his unbounded energy and devotion to his client and the profession leaves little doubt as to the reason for his amazing success as a trial lawyer.

My Life in Court is not only delightfully interesting, but also quite practical in that it contains innumerable suggestions and rules concerning legal problems which most certainly are of great value to one in the legal profession. Indeed, it is the first time this reviewer, while reading for pleasure, has felt compelled to underscore many segments of the material for future reference.

JOHN C. PETTIT