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Modern Scientific Evidence by James R. Richardson

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Book Review

MODERN SCIENTIFIC EVIDENCE by JAMES R. RICHARDSON. Published by W. H. Anderson Company, 1961, 538 pages, \$18.00.

Law books as educational tools for the use of lawyers and judges must contain materials to mold intellectual scholarship with practical experience. Professor Richardson's volume is faithful to this objective. With a style displaying simplicity, knotty problems involving the use of science in law receive provocative discussion and helpful, if controversial, solutions. Books of quality in scientific evidence are not in abundant supply. This work helps to shore up their number. Not only will it answer a legal point involving scientific facts or opinions but it will also cultivate philosophical thought on the better utilization of science in justice.

We do well to recognize that in society law follows the procession of man's life. Science creates for society. Law utilizes what is created to serve society's needs and desires in the area of justice administration. Law must not be too slow to utilize, nor too fast. Law should keep science within sight, not any easy task where science and its creation — the industrial, urban society — are in a fantastic revolutionary propulsion. This publication will help to accelerate law and to narrow the gap between law and science. The how and why of digesting scientific evidence in the decision-making process are this book's contribution.

Science enters law through the gate called evidence. This threshold should not be a strange experience. Evidence has always been concerned, first, with the truthfulness of the matter to be presented and, second, with the weight or conclusiveness to be given that matter in deciding the fact in issue. Rules of evidence to assure the trustworthiness of the matter introduced are ancient products of common-law judicial decisions. To authenticate the trustworthiness of intoxication tests, electronic speed detection devices, blood grouping tests, ballistics, narcoanalysis, fingerprints, questioned documents and photographs, x-rays, or motion pictures, the author has provided a storehouse of helpful directions.

However, it is in the area of the weight to be given to the scientific evidence that really challenging ideas are offered. The first seven chapters weave together the difficult and complex constitutional matters of self-incrimination, due process, and conclusiveness of a scientific fact before a jury of inexpert men and women. Undoubtedly, in these sections Professor Richardson will have the greatest influence.

He isolates the basic differences between science and law:

Science and the law differ not only in methods but in objectives. That is, the objectives differ if law is conceived as part of the social process rather than as natural phenomena . . . Science does not inquire

into the social values and ideal possibilities of things as does law; it is content to show their present actuality and operation. Science narrows its gaze resolutely in regarding the nature and processes of things as they are; the scientist is as impartial as the forces of nature.

But the law, as an institution for controlling human conduct and regulating human relations, must go beyond the scientifically determined fact as such; it must seek to determine its relation to society in the light of experience, and determine its worth and reliability as an operative fact in jurisprudential thought. . . . Science is objective, while the law is subjective, and the law must ever accept scientific truths to be weighed in the scales of justice as determined by the experiences of life.¹

He poses the age-old challenge of balancing the legal verdict with the social verdict:

The inquiry, "under the letter of the law and the facts, is the defendant guilty or not guilty?" is a "strict law" concept. But, if the law is functional, rather than arbitrary in action, then the jury, in the exercise of its discretion, should be permitted to inquire, "under the law and the facts, and in the light of all the circumstances, what disposition of this case will best serve the purpose of the law as it reflects the interests of society?" Is the basic purpose of criminal sanctions to exact arbitrary statutory punishment or to intelligently protect society against criminal action by its members? If the answer is the latter, then, to this end should juries be permitted to critically examine scientific proof in relation to specific cases.²

He identifies the greatest weakness of science in the process of criminal justice — the unavailability of scientific evidence to the defendant. Scientific laboratories in the criminal procedure are identified with the police and prosecutor. He suggests a fundamental change in the procurement of scientific evidence on behalf of the defendant in criminal trials:

[A] method can be devised whereby scientific aids in criminal investigation are financed by the state and made available to both the state and the defendant. Under such a proposal investigative agencies would be divorced from the prosecutor's office and attached to the court. The investigating agency would properly file all findings made in a given case with the clerk of the court where the prosecution and attorneys for the accused would have equal access to the whole of it. . . . Any procedure whereby the facts in a case, developed through investigation and scientific research are made equally available to both parties will go far toward the accomplishment of society's true objectives in the administration of criminal justice. However, hope for reform of any kind directed toward "equal access to the facts" will necessarily be preceded by a revision in concept of trials to the point that they are conducted as judicial investigations instead of battles.³

This proposal goes a long way toward the continental civil law system of justice: the judge is an investigating officer in an inquisitorial system. Our common law judges are umpires in an accusatorial system. Before

1. RICHARDSON, MODERN SCIENTIFIC EVIDENCE 53-54 (1961).

2. *Id.* at 52.

3. *Id.* at 28.

we condemn this suggestion as "foreign" we must remember that justice is not an exclusive possession of our American society. An admonition of the United States Supreme Court must be respected:

[W]e are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice — *sum cuique tribuere*.⁴

Major changes in legal procedures have been achieved in the past: the elimination of the grand jury as a vital cog in criminal justice in several states is but one example.⁵ The needs of contemporary society must be the guideline for justice procedures, not the traditions of past generations. Professor Richardson opens the argument for better justice to be accorded the accused when he urges the creation of the non-adversary scientific laboratory as an adjunct of the independent judiciary rather than the servant of the adversary prosecution.

The real stimulation generated by this publication, however, is the analysis of how the legal process should be used to evaluate the weight and conclusiveness of a scientific fact or opinion presented as evidence. Science and law are both conceived with probability and inference in mind. The judge in a civil case will charge the jurors that if they find by the weight of the evidence that fact X is more probable than fact Y, the verdict should be for P. In a criminal case the probability required to convict an accused must be beyond a reasonable doubt. And in an unwitnessed criminal act where circumstantial evidence alone is offered by the state, the probability must reach a level beyond a reasonable doubt plus the additional safeguard that the facts established "must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused."⁶

Science too has its spectrum of probability. Blood grouping tests can exclude an alleged father as the natural father of a child. Should law accept this scientific fact and opinion without an independent decision in the legal tribunal? Social implications of the relationship of the alleged father to the mother and who provides for the child will often weigh

4. *Hurtado v. California*, 110 U.S. 516, 531 (1884).

5. In *Palko v. Connecticut*, 302 U.S. 319, 355 (1937), Justice Cardozo considered the elimination of trial by jury itself not to be a violation of due process concepts: "The right of trial by jury and the immunity from prosecution except as a result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as . . . fundamental'. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

6. *State v. Sheppard*, 100 Ohio App. 345, 385, 128 N.E.2d 471, 496, (1955).

more heavily with lay jurors or judges. This volume not only prepares a lawyer to handle a paternity case where blood grouping tests are crucial, it also evaluates the philosophical implications. The trend continues toward the acceptance by the courts of scientific fact and opinion as conclusive. As the author indicates, blood tests are just one aspect of this trend.⁷

Perhaps blood grouping tests will reach the 100 per cent mark on the probability scale just as fingerprint tests have reached this point today. Once a clear statement in evidence by a qualified scientist who has used the accepted scientific tests identifies a fingerprint on the murder weapon or robbed safe, conclusive evidence of guilt may be established.

Lie detection tests have not as yet been favored by judicial tribunals. The uncertainty of proper techniques in testing, the inadequacy of training of the party who performs the test, the overwhelming impact on a jury or judge which reduces their task of deciding independently the ultimate issue of guilt or innocence all plague the position of polygraph tests on the probability spectrum. While the investigating agencies find great use from such tests as a means of eliminating the innocent from suspicion, court utilization is still much restricted. Nearly forty years ago the polygraph was placed in the "twilight zone of admissibility." Time has not improved the probability value of lie detection tests in our formal judicial procedures.

At the lower end of the probability spectrum for scientific fact or opinion rests psychiatric evidence. Intellectual chaos and legal confusion result here, particularly in our criminal prosecutions. Before steps can be taken to raise such evidence on the probability scale, the courts must first define legally what condition of the mind will preclude criminal intent. The several possible legal paths now open are: the McNaghten Rules, the irresistible impulse test, the product test (New Hampshire and *Durham* test), the model penal code and Vermont test, and certain statutory definitions of criminal responsibility by individual states. Professor Richardson sheds light on how a lawyer can proceed under these conditions when psychiatric evidence is vital.

The American Bar Foundation has clarified the conflicting issues in this basic problem facing law and psychiatry.⁸ Perhaps at no other point in our society are science and law so far apart. The speed of psychiatric advances in the past several decades has been awesome; the procrastination of law to cast off outmoded criminal law concepts is discouraging. This volume aids lawyers to live with the unhealthy condition while scholars of jurisprudence grapple with the fundamental changes so necessary be-

7. *Commonwealth v. D'Avella*, 339 Mass. 642, 162 N.E.2d 19 (1959). See Comment 9 DEPAUL L. REV. 281 (1960).

8. LINDMAND & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* ch. 11 (1961).

fore the science of psychiatry can be more accurately placed on the spectrum of probability.

Implicit in this carefully prepared volume is the absolute necessity that lawyers must realize the vital importance of properly collecting data to give to the scientist to determine his scientific facts and to prepare his scientific opinions for evidence. What science can provide for law is often unknown not only to lawyers but also to scientists themselves. To represent a client the lawyer must be aware of the sources of scientific information which are vital to his client's case. A list of medico-legal centers and libraries such as appears in *Stedman's Medical Dictionary* is paramount.⁹ Constant attention to our rapid scientific advances is a necessity for practicing law in a scientific, technological society. It must always be remembered that the proper collection of facts on which scientists can operate is a primary need.

The author of this evidence book has arranged his material to permit easy grasp by the practicing lawyer of the legal implications of the scientific evidence in a case at issue. Thus can scientific evidence become a greater source of factual truth to aid the administration of law in its eternal struggle for justice.

OLIVER SCHROEDER, JR.

9. STEDMAN, MEDICAL DICTIONARY liii-lxviii (1961).

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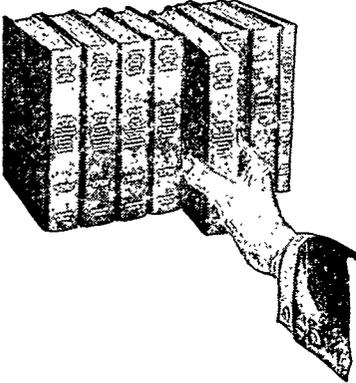
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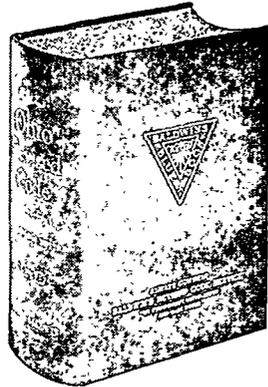
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