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Law and Psychology in Conflict, by James Marshall

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BOOK REVIEW

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

It is surely estimable to try to bring anything in this world closer to reality; the book under review is written in an effort to bring the law closer to reality. The author, James Marshall, believes that the law is much farther from reality than it need be, given the current knowledge of reality, or of certain of its highly relevant aspects, available to the law in other fields. In this volume the field of psychology is credited with such knowledge, and the bulk of the content is the description and exposition, from investigations in psychology, of facts that bear especially upon what happens in the courtroom during a trial. The facts pertain very largely, although by no means exclusively, to the credibility of the testimony of witnesses regarding the accuracy of their recall.

The author critically explores the relationship of such facts to the rules governing the admissibility of evidence through testimony. He also considers psychological facts that bear upon the way in which judge and jury may evaluate, remember, and be influenced by the witness, his evidence, and the way in which that evidence is presented. The author has made himself familiar with an impressive array of facts from psychology, and he presents a detailed account of his own research which offers some new insights into the factors related to recall. Both sets of facts are relevant to legal procedure, especially to procedure in trials, and the author draws upon both individual and social psychology.

It is a useful and challenging undertaking to survey and report upon recent and older work in psychology in areas which can be shown to shed light on what happens in the courtroom. Work in recall, group dynamics, and the making of decisions of all kinds might well suggest a bringing up to date of Hugo Munsterberg, whose classic work[1] the author refers to with admiration.[2]

Whose memory is to be trusted, and under what conditions? Whose judgment is to be trusted, and under what conditions? What factors determine that one remembers or forgets this or that? What conditions affect the way one person appraises another? What determines that one decides this rather than that? What determines

[1] MUNSTERBERG, ON THE WITNESS STAND (1908).

[2] MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 2-3 (1966).

that one adopts an opinion, or changes an opinion previously held? There is indeed much recent work in psychology on such questions, and all of these things are presently going on in the courtroom. The author has chosen the studies that seem to him most relevant to these questions as they pertain to the processes of justice and, consequently, to the harmony between those processes and reality.

There is a foreword by Lee Loevinger[3] in which is considered briefly the general problem, in human life as a whole, of attaining harmony with reality, as well as the underlying problem of knowing reality. Here the reader comes upon the needed recognition that profound epistemological issues in the broadest sense underlie the more specific problems dealt with in the text. The attack of the text proper is at three levels, each being the relationship of one aspect of the law to reality: the first, jurisprudence as a whole; the second, courtroom procedure in general; and the third, the rules of evidence. The bulk of the book deals with the third level.

Ideally, one would suppose, a review of such a book would explore and reveal how its general thesis or detailed assertions might strike the legal reader, for it is the foundations of his profession which are brought into question, and it is he who would know best what those foundations are, whether they are fairly represented in this volume as objects of attack, and whether the facts adduced from psychology affect those foundations to the extent the author contends they do. This reviewer knows far less about the law than the author knows about psychology; the author knows many facts about memory, recall, inference, and judgment that are, he believes, relevant to the credibility of witnesses and therefore to the rules about such credibility and about the admissibility of evidence. The reviewer, in contrast, knows no facts about the rules; he does not even know what the rules are. The author reveals them only tangentially, by way of introducing his attacks upon them.

Where is the locus of the conflict between psychology and the law, as the author sees it? Is it in the very principles of justice themselves, or is it at the point where the law should acknowledge and use certain psychological facts that bear upon the successful or unsuccessful working of the particular processes held necessary to implement these principles? To locate the conflict in the principles of justice would raise the gravest questions about the hierarchy of divisions of human knowledge and practice and the relations among them — questions of the sort recently raised anew and masterfully

[3] Loevinger, *Foreword* to *id.*, at vii-ix.

dealt with by Michael Polanyi in the most general way as well as with specific reference to jurisprudence and the principles of justice, in his critical survey of the whole sweep of human cognition.[4] To locate the conflict in the principles of justice would bring us to the issue of reductionism. Whatever the author may say about the principles of justice — and he does suggest at times that the conflict is there also, as shown by his complaints about the theological connotations of "right" and "wrong"[5] — he devotes himself in his developed exposition almost wholly to the particular processes, that is, to "technique."

His conclusion, for example, runs this way: "Above all, what is indicated is establishment of a closer relationship between law and psychology, and participation by lawyers and psychologists in empirical research into the processes of the law. This is practically non-existent, and it is curious in view of the common deductive approach of both science and the law."[6]

Marshall believes that the law is much farther away from reality than the natural sciences are. They are his ideal, to such a degree that there is throughout the volume a disturbing suggestion of naive faith that one could immediately transfer the special method of these sciences to the law and apply their findings directly. Edward S. Robinson decided thirty years ago that such a view proves to be a constant source of disappointment. The findings of psychologists about memory, for example, had not seemed capable of direct assimilation into the evaluation of legal testimony. Too many factors are always involved in the particular case; what the findings can do, at best, is to provide guides to better judgment.[7] Speaking

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[4] POLANYI, PERSONAL KNOWLEDGE 54, 223-24, 278, 308-09, 348, 377, 380 (1958); POLANYI, THE STUDY OF MAN 71, 92 (1959).

[5] MARSHALL, *op. cit. supra* note 2, at 103.

[6] *Id.* at 103-04. To be told that it is non-existent indicates that what seemed to some, at the time, a beginning of the relationship he advocates, never lived beyond its embryonic stage. I refer to the collaboration that produced the book, *Law and the Lawyers*, by Edward S. Robinson in 1935. Robinson was professor of psychology at Yale University and a lecturer in the Yale School of Law. His book was an effort to systematically cultivate that area common to jurisprudence and psychology. The primary stimulus to the undertaking was Robinson's several years of participation in a seminar on the social psychology of judicial institutions with Thurman W. Arnold and the graduate students of the Yale School of Law and his collaboration with Arnold in a course of legal ethics given to first-year students. It is curious that Marshall nowhere mentions that volume, a wise, searching, and altogether elegant treatment of the theoretical and conceptual and factual basis for just such a collaboration as he proposes. It was part of what was called by its proponents the realistic movement in American jurisprudence.

[7] ROBINSON, LAW AND THE LAWYERS 9-14 (1935). See note 6 *supra* for further discussion of this work.

of his own findings that accuracy and amount of recall are related to socio-education status,[8] to time elapse,[9] and to the personality factor of punitiveness,[10] Marshall comments that there is little a trial court can do to relate accuracy of recall to these variables.[11] But one is left uncertain whether he takes that to mean that some other legal procedure must be found that would replace the trial court — some procedure in which accuracy of recall could be related to these variables in such a way that a more just decision would be reached. The tenor of his discussion does sound in harmony with that view.

There recurs throughout the author's discussions an inclination to set scientific inquiry apart from free inquiry in general, in a way that imputes kind rather than degree to the difference. He loses sight of the fact that science is a more precise application of the general method of inquiry or, one might say, that we more readily call a field scientific, the more it is able to make precise and quantifiable its own steps in the general method of inquiry. This separation leads him, for example, to describe what he views as a sharp distinction between the rules that a jury must follow and those that scientists follow. When there is a gap in the knowledge necessary to reach a conclusion, scientists try to obtain further data; jurors cannot do this except in a most restricted way.[12] One asks: are scientists never in that position, and when they are, do they never arrive at a conclusion by filling in the gaps with rumor or opinion, as he says jurors are led into doing? Moreover, scientists are not always aware that there is a gap; sometimes it is the genius who must show them that there is one where no one recognized it before.

Marshall complains that a trial is not a scientific or philosophical quest for truth, but that testimony is constantly dissected, contradicted, and reshaped toward partisan ends.[13] It is a bitter proceeding. This sounds to him very different from science. He seems to view science, as many contemporary people do, as an objective, impersonal, machine-like process in which the scientist acts rather like a tender and manipulator of something conceived of as *the* scientific method, which is kept in operation without any peculiar personal passion, commitment, rivalry, or intrigue and with a passion for dis-

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[8] MARSHALL, *op. cit. supra* note 2, at 48-50.

[9] *Id.* at 53-55.

[10] *Id.* at 70-79.

[11] *Id.* at 81.

[12] *Id.* at 14.

[13] *Id.* at 7.

interested service of the truth, unaffected by the unconscious or conscious narrower motives that impair the activities of lesser mortals. I must say that much of his description, along these lines, of the conflict between psychology and the law, sounded to me very like a description of conflict within psychology itself, as well as within other sciences — a conflict rooted in opposing philosophies of science and reality.

The author complains that lawyers tend to dispose of variables and diversities by rationalizations and by attempts to fit the individual man into a logical formula. Presumably, attention to psychology, and perhaps especially to the psychology of personality, would make them quit doing this. Little does he seem to regard, in suggesting this, the continuing struggle within psychology on the part of the individualist, phenomenological, morphological, existentialist, and idiographic psychologists against the formulistic, nomothetic, and group-statistical psychologists.

In connection with that, and with the question of just how he sees the findings of psychology as being applicable to legal procedures, it seems to me that the author comes perilously close to sounding as though he advocated, on occasion, the fitting of witnesses into formulae — the fitting that he deplores elsewhere. He tells us how prejudice toward a particular segment of the population to which a witness may belong comes into play in a juror's evaluation of that witness' testimony.[14] He goes on to show how this has been fostered by the law: the courts had to rule on whether an Indian, a Jew, or, most often, a Chinaman was per se an incompetent witness — this, he says, continued into the twentieth century. Now comes Marshall showing in his own research that particular groups of the population — groups set apart by certain socio-educational conditions, role occupancies, or characteristics of personality — are relatively more or less reliable in accuracy of recall.[15] It is implied that such facts should play some part in evaluating the testimony of members of such groups. Exactly how? Is a single member of a group to be deemed more or less entitled to credence, and his testimony to admission, according to such findings about his group? Would not this be close to the kind of prejudice elsewhere deplored, namely, attributing to a person, without further evidence, the characteristics of the group to which he belongs? It is an old principle

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[14] *Id.* at 15-94.

[15] *Id.* at 41-81.

among clinical psychologists that what is true for the group need not be true for the individual in it.

I am sure that Marshall would reject any such interpretation of his views as I have offered just now, but my regret is that his exposition does not definitely confirm me. Neither does his exposition make as definite as one might wish what he holds about the rules. His initial complaint was about the rules — that they do not take into account the known facts of psychology about evidence. He says that changing the rules will do no good; a change of spirit is needed.[16] The reader concludes, then, that as the rules are hopeless, the trial in court, which is based upon them, must go. What is required, in Marshall's conclusion, is social invention in the law, based on findings of the social sciences.[17]

The book as a whole had a surprising effect on me. Intending to show how the law overlooks, and its rules disregard, the fallibility of human cognition, *Law and Psychology in Conflict* impressed me with how remarkably sensitive the law seems to have grown to that fallibility over the generations, as shown by the rules as I found them described. The author's complaint is that the rules are wrong; I found myself admiring the awareness shown, by the rules, of the very fallibility he documents in such detail, and of the need to protect the truth against that fallibility. He succeeded in persuading me that by its very rules, to most or all of which he objects, the law acknowledges that man — all too often liar, self-justifier, sycophant, and illuded — must be protected from himself and from others like him.

Perhaps the rules are wrong, and perhaps psychology could show what rules might work better in trials, or how better rules might be made to work elsewhere than in trials. But that is not to say that there is conflict between science and the concern of the law for the purposes and principles that the rules are intended to serve. If the conflict were located there, it would be a much more serious charge against either science or the law.

The author's central aim is, beyond a doubt, to persuade the law to do at least one thing that science professes to do and that, more often than not, it has moved in the direction of doing, namely, to develop ever more penetrating and revealing sources of evidence about facts. Marshall does not forget, and he reminds us, that the law has also done this. For example, it no longer uses the auto-da-

[16] *Id.* at 106-07.

[17] *Ibid.*

fe, the ordeal by fire, hot irons, water, the kangaroo court, and trial by combat.[18] Did these improvements, which surely, as the author acknowledges, have brought the law closer to reality, come about by use of the scientific method? In the broadest and deepest sense of that term, yes; but in the narrower, modern sense, perhaps not. Instead, these improvements were evolved from other modes of apprehending reality — modes, disregarded in this volume, of the sort recently carefully expounded by the psychologist Joseph Royce in his treatise on human cognition, *The Encapsulated Man.*[19]

The burden of most of the book's argument almost amounts to the thesis that no one is to be believed, and that among these, some are to be believed less than others. What can the law do about this? It has to use witnesses who happened to be witnesses. Yet a major part of the author's argument is addressed to the fallibility of witnesses, and to many sources of it about which there seems little could be done during the judicial proceedings themselves. For example, if, as Marshall found, the habitually less punitive person has relatively inferior recall,[20] he could hardly be transformed into a habitually more punitive one during trial, in order to improve his recall. Would not, then, a more promising line of inquiry be one that looked directly into the questions of how *any* witness whatever can be helped to be more realistic? How could testimony from the only available witnesses, however lamentable their initial status for testifying, be brought nearer the truth? What conditions could be met that would foster the discovery of reality in any witness, unreliable as he might be under other conditions?

The author does call attention to the value of such questions in his reference to a judicial reform in New Jersey that was based on this kind of an approach.[21] Also, among his suggested projects for research and discussion by lawyers and social scientists jointly, he introduces an appeal for inquiry both into changes in trial procedures that might produce greater objectivity in testimony and into what legal procedures could be withdrawn from the courtroom and handled differently, with the aim, again, of enhancing the realism of the cognitive processes taking place.[22]

So slender a volume as this might not seem off-hand to warrant

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[18] *Id.* at 104.

[19] ROYCE, THE ENCAPSULATED MAN 11-29 (1964).

[20] MARSHALL, *op. cit. supra* note 2, at 78.

[21] *Id.* at 107 n.170, citing ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

[22] MARSHALL, *op. cit. supra* note 2, at 110.

so extended a review, but issues of far-ranging import are explicit and implicit in its substance. They are issues that deserve the most careful scrutiny wherever they appear.

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