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Book Review: Crime, Law and the Scholars: A History of Scholarship in American Criminal Law, by Gerhard O. W. Mueller

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Crime, Law and the Scholars: A History of Scholarship in American Criminal Law. By GERHARD O. W. MUELLER. Seattle: University of Washington Press. 1969. Pp. xv, 302. (\$12.50 U.S.)

In 1966, I attended a summer seminar at New York University

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Law School on Comparative Criminal Law. It was conducted by the author of *Crime, Law and the Scholars*, Professor Gerhard Mueller. I felt that I contributed very little to the sessions and I came away feeling that the Continental system of penal law had little to offer and that I would be happier reconciling cases under our common law system. I now see that the influence of Professor Mueller's personality (which happily shines through this book) and thought have had a greater effect than I had consciously realized.

The after-effects of that New York seminar, some subsequent experiences of my own,¹ and now this book convinced me that the argument made by Professor Mueller is irresistible. He points out in this book that the three most accomplished criminal law scholars in the United States in the twentieth century, Hall, Perkins and Wechsler all followed the path from Realism through Analysis to Synthesis (or at least through part of that process of scholarly evolution). I am sure that most young scholars of criminal law today are following the same route although some of them have spent a rather long time on the Realism stage and some may have been permanently waylaid by criminal procedure.

My only nagging doubt about Mueller's argument (or historical exposition as he would no doubt prefer to call it) was that, at first, I was not sure what he was driving at. He talks of synthesis, of developing a system of penal law, of going beyond the present state of criminal law bases on common law so that we can have a rational code of law relating to and regulating the phenomenon of crime. In the early parts of the book, I had no conception of the type of scholarship which he would like to encourage. He keeps teasing the reader and eventually he summarizes his aspirations, exemplified by the careers of Professors Wechsler, Hall and Perkins, as an evolution from case law to scholar's law to code law. This is further explained as:²

... a tentative verification of the predictions and demands by American scholars of the nineteenth and twentieth centuries, in terms of step-by-step forward through the various stages of research and scholarship, again beginning with case-law analysis, leading through the various fact-type researches—historical, sociological, psychological, etc.—to analytical jurisprudence and ultimately, to a synthetic jurisprudence of criminal law.

Professor Mueller's historical sketch of criminal law scholarship in the United States shows that his call for new and more rigorous approaches is justified. One must add that English and Canadian professors with an interest in criminal law have no

¹ If the power of the subconscious is doubted, see Parker, *The Inhibitions of the Criminal Law Teacher* (1969), 4 U.B.C. L. Rev. 29 and compare with the contents of this book.

² P. 215.

need for smugness. Mueller only deals with the scholarship of the United States and yet one can make the same judgments of England and Canada. The only bright prospect, in Mueller's estimation (other than the doctrinal work of Professor Glanville Williams) is the use to which the governments of England and Canada have put Royal Commissions and similar investigatory bodies.

Crime, Law and the Scholars is short and, necessarily, the scope is wide and the detail is sparse but nevertheless I think he has done a remarkable job. This book shows clearly the obstinate conservatism of the lawyers in the light of developments in other fields such as sociology and psychiatry. Allied to this is the almost complete reliance of the common lawyers on a "common sense" approach to criminal law as if criminal law theory were capable of nothing better than this. The faith in judges and precedent seems to approach a theological quality. Too frequently, the academics and commentators seem content with clever little exercises in case reconciliation and with little thought for the more challenging task of systematization. The author has some very scathing, and I admit, well-merited criticisms of those common lawyers who seem to have made little progress since the classifications of Coke, Hale and Blackstone and beyond a listing of specific offences in alphabetic order or by some other equally vacuous method. These writers, with the exception of Dr. Williams, give very little thought to the General Part. He points out that the common law had insulated itself from the other sciences which were relevant. Unlike the European experience, where criminal law drew early inspiration from the social sciences, the common law has been very insular. On this, he quotes Immanuel Kant who had said:³

All this may remain entirely hidden even from the practical jurist until he abandons his empirical principles for a time, and search in the Pure Reason for the sources of such judgments, in order to lay a real foundation for actual positive Legislation. In this search his empirical Laws may, indeed, furnish him with excellent guidance; but a merely empirical system that is void of rational principles is, like the wooden head in the fable of Phaedrus, fine enough in appearance, but unfortunately it wants a brain.

Mueller also cites a similar criticism from a recent treatise commenting on the stagnation of the criminal law which is "spawned in self-complacent artificial isolation, the snug certainty embalmed in criminal law needs ventilation with fresh ideas and scientific techniques".⁴

One of the most disturbing findings from the book is the complete poverty of criminal law scholarship until the twentieth cent-

³ Cited, at p. 149.

⁴ Cited from Clark and Marshall, *A Treatise on the Law of Crimes* (6th ed., by Wingersky, 1958), p. 150.

ury. Mueller does not trace the reasons for this which would provide some fascinating insights into penal history and social history in terms of the public attitude toward the criminal and his punishment. He points out, for instance, that few criminal law commentators (one could hardly call them scholars) were teachers in the law schools. We also discover that in the United States that there was no criminal law text book of analytical dimensions for almost fifty years after the publication of Bishop⁵ and Wharton.⁶

Even when this drought had ended, there were unfortunate consequences. I am sure that many will consider Mueller's argument heretical but I think that it is correct. He suggests that when the laws of the United States started to proliferate, two courses were open to the lawyers, commentators and scholars (if there were any). The mass of rules could have been reduced to a set of manageable principles; this is not as far-fetched as it seems because the law of the Pilgrim Fathers was not pure English case law and the Americans were attracted to many intellectual ideas from France and other countries in Europe. (The only point which is not sufficiently emphasized by Mueller is that the judges and practitioners who dominated the law and subsequent commentaries had been nurtured on English texts and digests and used them almost exclusively in the courts.) The other alternative open was to devise "a new method of transmitting the proliferated mass".⁷ This course was followed and we find that in the expanding university law schools the case method was introduced⁸ and flourished for a hundred years. I think that Mueller is correct in thinking that this has had a very unfortunate effect on the law (although it may have saved some students from boredom and some library volumes from overuse and destruction). He says:⁹

The theoretician of the criminal law had found a new outlet for his energy. Frustrated about the unmanageable mass of the criminal law, he abandoned efforts at theoretical refinement and structuralization, and made the decision to confine instruction and theorization to "selections of leading cases". In my opinion, this decision now appears as a most unfortunate capitulation in the face of adversity.

In the light of Mueller's story so far, it is instructive to compare the Canadian experience until 1950 (which is being rather

⁵ Bishop, *Commentaries on the Criminal Law*, two volumes published in 1856 and 1858, and in many subsequent editions.

⁶ Wharton, *A Treatise on Criminal Law of the United States* (1847), and a more elaborate treatise, *Criminal Law* (e.g. 8th ed., 1880), appeared after the publication of Bishop.

⁷ P. 54.

⁸ According to Mueller, at p. 55, Christopher Columbus Langdell may have propagated the case method but he could hardly be called its inventor. The first criminal law casebook, Bennet and Heard, *A Selection of Leading Cases in Criminal Law* appeared in 1856, fourteen years before Langdell's contracts casebook.

⁹ P. 56.

generous because I am tempted to say until 1960). The commentators on the criminal law were usually practitioners and judges. There were no criminal law texts (and this is still true today if we ignore the annual volumes of annotated codes which read like a series of file cards from Canada Law Book or some other law publisher). Canada did not even have the dubious luxury of criminal law case books (but of course the country had very few criminal law professors either). The law was dominated by the judges and practitioners, and with the exception of Mr. G. Arthur Martin, no-one seemed to be taking much interest in the criminal law except as a device to convict or acquit criminals. The Canadian courts slavishly resorted to the English common law despite the fact that Canada had a perfectly good code which was not interpreted on its own terms but in accordance with English precedents even if they were not germane. I am not sure if Professor Mueller would think it fortunate or otherwise that Canadian legal scholarship seems to be jumping from the pre-text book stage to Realist research into criminal procedure with very little interest in doctrinal criminal law or principles of penal law. Revisions of the Canadian Criminal Code have simply been crude housekeeping assignments or sporadic changes in the content of the offences included within its sections. The remarks of Professor Ames, quoted by Mueller, seem to be very true of the attitudes of Canadian law reformers and judges when looking at the criminal law:¹⁰

Too often the just expectations of men are thwarted by the actions of the courts, the result largely due to taking a partial view of the subject, or a failure to grasp the original development and true significance of the rule which is made the basis of the decision.

That statement was made in 1901. Perhaps we can derive some hope from the broad and imaginative interest which the present Justice Minister is taking in law reform and in particular in the drafting of a new criminal code.

The American law professors were very slow to take any interest in criminal law and this did not really occur until the United States Government had carried out surveys of the nation's Crime Problem in the nineteen-twenties and thirties. Then a very crude enthusiasm developed for a scientific approach to problems developed. Prior to this the only men who had campaigned for a broad and well-organized attack on criminal law scholarship were Professors Pound and Wigmore but their aims were often aborted. The zealots for the scientific approach thought that it could work; they wanted to develop a science of law when only a few scholars were working in the field and even the best men, such as Sayre, were primarily concerned with the analysis of precedent and elucidation of doctrines extracted from the case law. The

¹⁰ *Cited, ibid., p. 68.*

lawyers first scorned the social and behavioural scientists and then smothered them with attention and were disappointed when the skills and knowledge of the extra-legal disciplines failed to yield the pay-load in terms of simplifying the law, solving the crime problem and curing criminals. The fine work being done in penal "science" on the Continent by a vast number of scholars was ignored because of an endemic intellectual isolationism. The law professors were too keen to embark on "massive" and badly structured or ill-planned research projects or they were dazzled by some fad such as an unreasonable faith in the use of intelligence tests as a way of isolating the criminal element.¹¹

I am pleased to see that Professor Mueller shares my enthusiasm for that extraordinary book by Professors Michael and Adler, *Crime, Law and Social Science*, which when published in 1933, made such an accurate and scathing attack on the shocking and inadequate state of criminological research. One suspects that much research being carried out today is equally ill-advised or perhaps one could go so far as to say it is useless. Mueller expresses this in the following terms:¹²

. . . there is much duplication of effort, and many of the projects are directed at non-essential topics. Besides, . . . it is wasteful to spend time, money and energy on the proof of hypotheses whose veracity may be taken for granted, while the very fundamentals on which criminal justice rests have not been studied.

Although he tries to keep an open mind about all types of good research which attempts to examine the large problems or tries to illustrate them by tilling a very small part of the field, Mueller seems to be very pessimistic. He does offer some hope for a phenomenological approach to some problems and he is very attracted to the work of Professor Beutel in experimental jurisprudence which he describes at some length.¹³ I suspect however that the author of *Crime, Law and the Scholars* is a synthesist at heart and sees most hope in America trying to distil some wisdom from all the present data much of which has not been used profitably. There has been great wastefulness wrought by those law professors who have sold their academic pseudo-scholarly souls to the mammon of foundation money. Perhaps Mueller's true feelings can be seen in the following:¹⁴

¹¹ This is well stated by Mueller, *ibid.*, p. 108: "It was as if someone had shouted 'gold' and the multitude had rushed into surrounding fields to dig for gold with kitchen implements and sand-box toys. To be sure, a nugget or two had been found in the melee, but the sparkling veins were yonder in the mountains, waiting for war with man-sized tools. The researchers had tried to solve the crime problem before it had occurred to them that 'crime' was as yet, a largely unknown entity, and the researchers as yet lacked the requisite experience in the use of scientific methods."

¹² P. 173. See my review of *Current Projects* (1963), 41 *Can. Bar Rev.* 618 where the types of criminological research are surveyed.

¹³ Pp. 180-182.

¹⁴ P. 177.

The most economical research method, the one likely to yield more fruitful results in relation to expenditure than any other, is the historico-sociological method of criminal-law research. One man, working alone with little more than a good library, paper, a pencil, and 75-Watt bulb, can shed more light on the inner workings, on the actual and supposed structure and content of the criminal law, and on the need for reform, than can a battery of research assistants working under the direction of a high-priced director sitting in a mahogany panelled office—with indirect lighting.

Mueller's hero is Professor Jerome Hall and although he tries to persuade the reader that he has an open mind, I think that he favours the synthesis approach. Who can blame him? That is his own academic interest (although he has taken a deep interest in other topics and in inter-disciplinary work) and he is able to converse and work in the languages of the great Continental systems of penal law. He realizes that the influx of refugee scholars from Europe in the nineteen-thirties gave a great impetus to criminal, legal and criminological studies, particularly the last. He sees that the preoccupation of the younger scholars with constitutional criminal procedure and with sociological "solutions" to problems of law enforcement and crime prevention means that there is little hope for a concerted effort to solve the problems of the substantive criminal law and its underlying theory. I must not allow my own personal bias to intrude here but I do not think that I am making a great distortion of Mueller's message.

Yet I still have that nagging doubt. The scholar who is sucking his pencil in deep thought under the illumination of his 75-Watt bulb may well emerge with nothing more than a "common sense" solution to problems, (which Mueller would presumably not approve). I wish I could believe that there are likely to be many (or even a few) Jerome Halls in the next generation but I do not have that faith. The younger men have gone back to a new form of Realism but it is still a Realist approach. I still am not sure of Mueller's intent when he talks about gathering together all the threads and coming up with compact concepts of the criminal law which will obviate all that analytical nonsense about insanity and constructive murder found in hundreds of law review articles. I wish I had that faith because I want to believe;¹⁵ we need a thorough re-examination (or perhaps it is a first examination) of the penal theory underlying the criminal laws. Yet what are we talking about? I wish that Professor Mueller had made that clearer. If he is telling me that I should start labouring in the vineyard and cultivating a small patch of ground, I am not very confident that I shall emerge from my labours with much more than the findings of Professor Hall in his treatise¹⁶ of twenty-three

¹⁵ See *op. cit.*, footnote 1.

¹⁶ Hall, *General Principles of Criminal Law* (1947), (2nd ed., 1960).

years ago. Perhaps the problem is that I simply did not pay enough attention during those meetings at New York University in 1966. Perhaps I simply do not understand enough about the workings and philosophy of the civil system. But I am surprised that this has not been made obvious by someone else in the last fifty years or so. I must assure Professor Mueller that I want to believe but I need a little more guidance.

There is one other objection or reservation about his plans; I doubt whether the Americans are culturally ready for a synthetic approach. I think that the country's lawyers have two competing religions which are very strong influences. First, there is the idolatry of the United States Supreme Court and all that the phrase "due process" is supposed to mean. The other is the reverence in which the mystique of the common law and the doctrine of *stare decisis* are held. I do not see the Americans wanting a code system and I do not see the judges being very fond of it either. The analytical nit-picking which goes on at the present time will only be transferred to semantic exercises in construing a code and we will have an even bigger mess. To achieve his aims, Professor Mueller may have to educate (or re-educate) a new generation of law students.

I should like to finish this review on two happier notes. The first may be a partial answer to the groping objections which I have already made. For me the most important single point made in *Crime, Law and the Scholars* concerns the ideology of American criminal law which is inherent in the "due process" comments made in the last paragraph. Mueller makes the point that the United States is professedly, by its constitutional creed, a government of laws and not of men. "Yet", as he says, "probably in no country of the western world are there fewer, and less definitive, laws governing the duties and prerogatives of law enforcement and justice officials than in America".¹⁷ A country which professes to distrust ideology seems to thrive on it. As an example in the area of criminal law study, Professor Mueller suggests that too many law professors spend their entire academic lives cogitating these ideologies when many of them, including the most fundamental, have never been "scientifically investigated" (whatever the word "scientifically" may mean in this context). Too often these manifestos are simply taken for granted by these professors. He gives as an example the manifesto "of the conflict among the objective of efficient conviction of the guilty, successful rehabilitative treatment of deviant behavior and fairness of procedure in

¹⁷ P. 165. The author also cited, *ibid.*, Professor Louis B. Schwartz who had said: "Our genius seems to lie in the creation of great phrases like 'due process' or 'equal protection of laws', which can command general adherence precisely because they are equivocal."

dealing with suspected and convicted offenders".¹⁸ These conflicts are very deep ones and Mueller's call for research in these areas is a very tall order, but he seems, to me, to be getting at the root of the problem because he is talking about penal theory and the very underpinnings, not only of criminal procedure (which has been ideologized to death) but of the theory of punishment and the contents of the substantive law.

Finally this book is a bibliographical storehouse. I have already referred to Professor Beutel's work with which I am pleased to be acquainted. I am also indebted to Professor Mueller for introducing me to Boris Brasol's *The Elements of Crime* which was published in 1927.

GRAHAM PARKER*

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¹⁸ P. 166. The passage is from the judgment of Warren C.J. in *Spano v. New York* (1959), 360 U.S. 315.

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