

Book Review: Courts and Trials: A Multidisciplinary Approach, by Martin L. Friedland (ed)

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Book Review

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COURTS AND TRIALS: A MULTIDISCIPLINARY APPROACH, edited
By MARTIN L. FRIEDLAND, TORONTO: University of Toronto Press, 1975.
Pp. 161 (\$4.95 paperback)

The preface to this collection of essays promises to show that non-lawyers can make significant contributions to the study of legal institutions — in this case, courts and trials. The promise is, with varying degrees of success, met by the nine authors representing a wide range of disciplines: philosophy, mathematics, psychology, psychoanalysis, political science, economics, history and sociology.

In the third essay Anthony Doob, a professor of psychology at the University of Toronto, discusses the contribution which psychologists can make to law. Adopting the premise that psychologists are best at predicting behaviour in general rather than in particular cases, Doob turns to the laws of evidence. Reasoning that many, if not most, rules of evidence are in fact based on assumptions of probable behaviour, Doob applied himself to a study of the effect of s. 12 of the Canada Evidence Act¹ on jurors. This is the section which allows an accused person's previous convictions to be presented as evidence going to his credibility but not directly to his guilt or innocence.

¹ R.S.C. 1970, c. E-10.

Doob set up three groups of subjects — the first group was given the facts of a hypothetical case but no information on previous convictions of the accused; the second group had the same facts but was told that the accused had been convicted five times before of the same offence (breaking and entering); the third group was given the same information as the second but was told, in effect, to apply s. 12 of the Canada Evidence Act. The results indicated that the subjects in the groups which had been told of the accused person's conviction were more likely to think him guilty than the subjects who had not been told of his record. The key finding, however, was that the instructions to the third group about the restricted use of the record of the accused (the s. 12 instructions) had no effect. As Doob says (p. 43):

The assumption that people can take evaluative information and differentiate its use efficiently according to external instructions goes directly against the research done on the 'halo effect'. This well-documented phenomenon is simply people's tendency to infer positive characteristics about a person when they hear a few positive things about him and to infer negative characteristics about a person when they hear negative things about him.

These conclusions from Doob's experiment are similar to those reached with similar experiments undertaken by the London School of Economics Jury Project in England. Before going on to discuss police line-ups and their weaknesses, Doob laments that section of the Criminal Code (s. 576.2)² which forbids members of a jury to reveal anything of their deliberations and the effect of that section upon researchers in the field. Charles Hanly, in a subsequent essay, voices the same complaint.

The control of addiction by the criminal courts is the subject of study by James Giffen, a professor of sociology. Giffen makes a strong argument for the de-criminalization of addiction. He argues that the initial commitment to a method of control, in this case the criminal justice system, tends to inhibit the discovery of feasible alternatives. He explores the "revolving door phenomenon" — an endless process whereby addicts are taken off the streets, put in jail, returned to the streets without being rehabilitated and therefore returned to their addiction and jail, *ad infinitum*. Giffen contrasts the treatment of those addicted to alcohol and to drugs, then turns to the British approach to drug addicts, whereby the state provides drugs to registered addicts. He points out that there were very few addicts in Britain when the new system came into effect and most of the addicts were therapeutically addicted middle class people. Subsequent studies of the use of drugs in Britain seem to indicate that the effectiveness of the new system could be ascribed to the social situation in Britain, which social situation is very different from that existing in Canada. The attitudes toward, the method of addiction to, and the number of those dependent upon drugs is very different as between the two countries. Giffen examines four different proposals for dealing with the problem of drug addiction in Canada but declines to embrace any one of them firmly. He concludes his essay with the observation that as the problem of drug use has been so thoroughly associated in the public consciousness with criminality, there is little likelihood of any significant abandonment of criminal sanctions.

² R.S.C. 1970, c. C-34, as amended.

The penultimate essay in this collection is by Donald Dewees, an economist, on the courts and economic regulation. Examining the American antitrust laws and their treble damages provisions, Dewees fairly turns green with envy. At the same time he criticizes the wide range of fines provided for in various Canadian statutes dealing with economic regulation because of the absence of any guidelines by the legislature for the assessment of the magnitude of the fine in any given case. Dewees postulates an ideal system whereby the fines would be high enough to discourage the prohibited conduct by anyone who knew of the fines and where a person could be sure that he would be caught if in breach of the statute. Dewees distinguishes between civil and criminal actions, proposing a system of high fines in civil suits to provide an incentive to those with a cause of action to press their case. Dewees rejects the use of penal sanctions in cases of economic regulation because the courts have generally been reluctant to jail corporate officials for economic crimes.

In addition to discussing a system of penalties which would ensure that price-fixing, polluting, and other such activity would not be economically feasible, Dewees turns his pen to the question of who should decide these cases. As between the courts and regulatory bodies Dewees seems to favour courts, more by default than for any other reason. As he says (p. 121):

Administrative agencies frequently suffer from the need to obtain experts from the regulated industry itself. When there is a substantial flow of personnel between the agency and the industry, it is not surprising to find the agency's regulatory zeal somewhat diminished. In fact, the numerous problems of regulatory agencies in the United States prompted one commissioner to state, 'my experience on the Civil Aeronautics Board has convinced me that an independent regulatory commission is not competent in these days to regulate a vital national industry in the public interest'.

Dewees suggests that the courts could be improved by providing more precise methods for applying the range of fines set out in the statute. He further suggests that the judges could employ clerks skilled in the particular field under investigation where the case is particularly complex.

The other essays in this collection include discussion of the modern trial process in the light of the trial of Socrates, the psychopathological aspects of a trial from a Freudian viewpoint, an analysis of the adversary system from a Marxist perspective, political trials and the Canadian political tradition, and the courts' role in the development of the law, and their role as protectors of civil liberties.

This study of the judicial system, while undertaken by non-lawyers, is certainly of at least as much interest to lawyers as to those outside the profession. Some may find it disconcerting to have strangers to the finer points of the law writing on the judicial system and suggesting changes and new approaches, but these critics will certainly be a minority compared to those who welcome the new and often refreshing light which these essays throw on the general area of courts and trials.

by David J. Mars*

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