



Spring 3-1-1969

Law In A Changing America, Jeffrey C. Hazard, Ed.

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Recommended Citation

Harrison J. Pemberton, Jr., *Law In A Changing America, Jeffrey C. Hazard, Ed.*, 26 Wash. & Lee L. Rev. 179 (1969).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol26/iss1/20>

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BOOK REVIEWS

AN AMERICAN JUDGE: Marmaduke Dent of West Virginia. By John Phillip Reid. New York, New York: New York University Press. 1968. Pp. xii, 230. \$8.50.

Legal history in West Virginia has been badly neglected by both bar and historians but this book helps to fill in some of the many gaps in West Virginia's knowledge of her legal past. In addition to the interest in local history, the author, Professor John Phillip Reid of New York University School of Law, has employed a technique resulting in a significant contribution to the literature of historical jurisprudence.

Professor Reid's method of allowing Marmaduke Dent and his chief antagonist, Judge Henry Brannon, to speak for themselves is perhaps the most important aspect of this book. This is the stuff of which historical jurisprudence is made. By using the disagreements of these two "molders of West Virginia law" Professor Reid has graphically brought forth the conflicts and problems that faced appellate judges all over the country at the turn of the century. Judges Dent and Brannon brought into focus some of the conflicting issues that had disturbed our courts from the days of the first railroad in New England. Many of these problems of an industrial society were not settled until after both Dent and Brannon left the bench but many of their conflicting judicial attitudes, prejudices, and jurisprudential ideals concerned the problems that faced our industrial culture at the turn of the century. Professor Reid's method of bringing these conflicts to light is a distinct contribution to the field of American legal history and jurisprudence.

It is regrettable that there was not more anecdotal material available to Professor Reid, but little is known about Dent's family or personal life, for the mountaineers of western Virginia kept little in the way of records. Dent's great grandfather was the first of the family to settle in what is now West Virginia in 1776. His grandfather was an unsuccessful doctor; his father an undistinguished lawyer. Marmaduke Dent was but 13 years old when West Virginia became a state. He attended West Virginia University and has the distinction of receiving both the first bachelor's degree and the first master's degree ever awarded by that institution. After teaching school for three years he was able to study law under a preceptor, supple-

menting his income by being deputy clerk of the circuit and county courts as well as master of chancery, commissioner of accounts, and notary public. Upon his admission to the bar Dent set up his practice in Grafton. At the age of 44 he was elected to the Supreme Court of Appeals of West Virginia, in 1892.

Professor Reid's description of the West Virginia bar at the turn of the century, if somewhat unflattering in the light of today's standards, is nevertheless accurate. Undoubtedly the supreme court reached its lowest point of esteem during the tenure of Dent: it was the lowest paid court in the nation and perhaps the most overworked; there were only four members on the bench. (This even number of judges helped to contribute to its lack of prestige, in that an even split left the decision of the lower court standing, but did not become a precedent.) These factors, plus its involvement in the political fights of the day, made the court the scapegoat of West Virginia politics.

Marmaduke Dent comes alive on the bench as he debates the problems that faced him and his chief opponent, Henry Brannon. While Dent is the main subject of this book, we could not have so vivid a view of him without the counter arguments of Judge Brannon. They compliment each other in their disagreements. It is unfortunate that the picture of Dent the man does not come through as clearly as that of Dent the judge. This, however, is not Professor Reid's fault, but rather the earlier negligence of the West Virginia bar in failing to keep adequate biographies of the members of bar and bench.

Some of the legal issues that Marmaduke Dent fought for became obsolete with time. For example, he was a champion of female equality under law, opposing inequities which have long since disappeared. Other of his theories would be considered extremely old fashioned today. Dent was a moralist in a bible belt state at a time when this philosophy was at its height. This carried over into his belief that the Ten Commandments were precedents for the common law. He was a legal fundamentalist who tried to incorporate the tenets of a fire and brimstone theology into jurisprudence. Even in his day his exercises in judicial textualism were considered extreme. In this respect Dent was a throwback to the jurisprudence of the New England Puritans and this moralistic philosophy carried over into his ideas of criminal justice. His Mosaic interpretation of criminal law made him the spokesman for criminal-law classicism of his day. Dent believed in an eye-for-an-eye and a tooth-for-a-tooth type of criminal justice that was based upon his Calvinistic faith and his belief in a God of righteousness and vengeance.

Dent's most important fight was against corporations in general and railroad corporations in particular. He strongly believed that corporations should be responsible for any harm they might cause. One of his favorite techniques to achieve this end was to balance the interests of the parties and, if necessary to achieve justice, to give facts a greater weight than law. No one could have disagreed more with him than Judge Henry Brannon.

Dent was the rebel, the lone dissenter, while Brannon stood on the side of orthodoxy and usually the majority. Together they represented a conflict of many interests. Brannon protected the interests of corporations with a doctrine of *laissez-faire* that carried with it the Darwinian undertones that were then current in American jurisprudence. Dent, on the other hand, thought corporations existed by the grace of the public and, as a result, the public was entitled to their safe operation. He was more interested in the humane aspects of justice being done. Brannon was rational, legalistic, and narrow in his approach to the law; Dent was an excellent example of what the law could be if administered with compassion. In the terminology of the late Edmond Cahn, Dent had a consumer perspective of law, while Brannon had an institutional perspective.

Brannon regarded the hardships and injustices inflicted upon some individuals by the law as part of the risk of living in an industrial society. Dent, on the other hand, tried to balance the equities between the helpless victim who could not afford the loss and the railroad which could. Professor Reid points out that Dent was not anti-railroad in the demagogical sense: he did not discount the economic benefits that railroads and industrialization had brought to West Virginia; he only insisted that while the law shielded the railroad from unjust claims, it should not ignore the just grievances of those injured by it.

Conversely, Brannon was concerned about the effect of this kind of holding on the development of the business community. He stressed the need for protecting the corporations that were opening up the backwoods regions of West Virginia, while Dent's question was "opened for whose benefit?"—a question still asked today.

As to which of the two could be considered a success, Professor Reid concludes that while Dent lost the battles of his day he won the war in the long run—at least in the light of modern jurisprudence.

Dent's writing style and humor was unique on the American bench. He wrote in what has been called the Grand Style of common law opinion writing. His opinions were often written in the finest

biblical style; a style that served him splendidly as a vehicle for his native wit. His opinion in *Moore v. Mustoe*, 47 W. Va. 549, 35 S.E. 871 (1900) is perhaps a classic work of judicial humor. The opening sentence is in this biblical style:

This is a suit from the peaceful shades of Randolph County, instituted by Clara, inter-married with Eli Moore, of Montrose, against her pa, the Reverend Anthony Mustoe, of Breitz, near the happy land of Canaan, the neighboring county of Tucker . . .

He concludes the opinion speaking of the fleshpots of Egypt and the companionship of poor Lazarus:

If pa is to continue preaching, . . . and it is to be hoped, for from the conduct of this suit and the testimony of the witnesses Eli is not the only one in need thereof, . . . he should cultivate a greater regard for the truth, and try to overcome his lust for the fleshpots of Egypt. It is bad advice that Stout sent to Eli to betake himself to a warmer country, and it is not wise for pa to take it. A rich man, who chose a home there once, sent back word, when he found the climate was sultry, the air impregnated with the fumes of brimstone burning, the society not select, and water scarce and more to be desired than the gold standard, that he longed for the companionship of poor Lazarus, to whom he had denied the crumbs that fell from his sumptuous table. . . . Rather than accept Stout's advice, it had been better had he remained in jail until he mastered the Pilgrim's Progress, and learned how to get rid of the heavy loads which are preventing the full consecration of himself to his chosen calling, than which there is none higher. If he is going to despoil anybody, it should not be those of his own household. With them, at least, he should be just. . . .

Professor Reid has combined the talents of historian and lawyer in this book, a feat few writers can do. The picture Reid paints is historically accurate and as fully documented as possible considering the lack of both primary and secondary source material. He has applied praise when due but without overdoing it. But he does not hesitate to show that there were times when Dent was inconsistent in his jurisprudential thought. He points out Dent's greatest fault: his failure as a legal tactician in arguing issues of facts as if they were questions of law for the judges to decide rather than demanding that they were questions of fact to be left to a jury. More important however, Professor Reid has evaluated Marmaduke Dent in the proper historical perspective, and not by today's standards.

At this point, the almost inescapable question must arise for most readers (or at least for those who are not West Virginians). Why Marmaduke Dent? Why did Professor Reid choose a relatively ob-

scure judge in what was then the jurisprudential backwaters of the country to do a major biography? Certainly Marmaduke Dent was not a Lemuel Shaw of Massachusetts in his influence on American law. Nor was he a reformer of law as Charles Doe of New Hampshire or Arthur T. Vanderbilt of New Jersey. Professor Reid answers his readers' question, as if in anticipation, in the last chapter of the book. Dent is important because he was typical of the American bench of his day, and while typical he was also something special and unique. Dent was an activist, "a doer"; and while he failed to achieve the miracle reforms that skeptics often demand, and while many of his crusades were quixotic, he was indeed the fighter of good fights. Except for his stand on railroads and their responsibility to the public, the battles he fought were not the great battles, but rather the little battles that the American bench fought in his time. Nevertheless, large social problems are usually caused by an accumulation of many small problems—many of them soluble by small scale activism. The fact is that a democracy needs "doers" at every level, including the judicial. And while the battles he fought were not always the great ones, a democracy needs to have the small battles fought also. This is the greatness of Marmaduke Dent. He was a dreamer of American law and in Professor Reid's terms the "poet of American law." Perhaps we need more judges like him.

EARL M. CURRY, JR.*

LAW IN A CHANGING AMERICA, THE AMERICAN ASSEMBLY. Edited by Geoffrey C. Hazard, Jr. Englewood Cliffs, New Jersey: Prentice-Hall. 1968. Pp. xiii, 207. \$5.95.

One of the keenest, most skillful, and successful lawyers, and one of whom we have a most illuminating record, was Oedipus the King. No man could sense a difficulty in the state more quickly or outline the general problem in legal terms more clearly, and no one ever pressed a case more brilliantly. In strict lawyer-like manner he followed up every piece of evidence and drew the logical conclusion: He was the very one on trial and was guilty. Unfortunately in recent times Oedipus is more famous for his secret fault than for his obvious virtues, for he is at least as significant at the conscious level as at the unconscious level. He shows the pattern that an excellence when followed all the way through turns back on itself and brings itself

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into question. Oedipus was never more impressive than when his own brilliance recognized itself as blind in the face of the dark forces that shape our destinies. In the dignity of humility he was no longer king and separated from us but showed any man himself.

In *Law in a Changing America, The American Assembly*, we can see the contemporary legal mind exercising its particular excellence to complete the circuit of inquiry and call itself into question and, indeed, to put itself on trial. In this inquiry we see specialists in a movement any man can appreciate. The problem is any man's problem and so may perhaps be appropriately considered by a non-lawyer.

Not unlike Oedipus the editor of this collection of essays moves first to consult outside authority. Whereas Oedipus inquired of the oracle at Delphi and gained some obscure indication of the problem he faced, the editor here gives us the words of the contemporary seer, a sociologist. In some thirteen pages he manages to say that it is difficult to predict the future but adds that most likely the future will be complex and troubled; or rather, "The attempt to descry the future would be easier were we better equipped with reliable knowledge of the causes and course of social change" but surely the future problems will "critically challenge the capacity of our conflict-resolving mechanisms." Thereafter in the next five essays some of the most pressing and most difficult problems facing the country and the legal profession are outlined. Not a single shrill note is sounded (though in his article "To Secure the Individual Rights of the Many" Louis Pollak barely stays on pitch at good middle C) but together these articles clearly cry Crisis! We shall return in a moment to the particular excellence of these articles. They are followed by six more which concern themselves primarily with the kind of training our lawyers now get, the ones who must deal with these problems. Crisis again: our law schools presently do not offer the training future lawyers will need. We shall deal with a particular lack of excellence of some of these articles right now.

When a scientist faces a problem and he has as a purpose an intelligible arrangement of presently disordered material, he has typically found a mechanical model useful in arranging the material. This has worked well in the natural sciences and has been appropriately admired. That his own purpose in this creative effort is not intelligible in terms of the model he uses need not trouble a natural scientist. The social scientist has made some headway toward his purpose of understanding social phenomena by carrying over as far as he can the method and model of the natural scientist, and

this has been uneasily admired. For his own activity, and indeed the social activity of social scientists, does fall within the province of this science, and yet this purposive behavior is not made intelligible in terms of the mechanical model chosen to order the phenomena. The social scientist, however, may postpone attention to that kind of problem until his own researches force him to face it (perhaps someday in a book analogous to this one). But now the problems lawyers face directly involve human purpose, indeed, they arise from the too forceful manifestation of purposes and their resultant conflict; moreover, the lawyers' own activity is clearly recognized as purposive. Finally, one problem the lawyer must face is the training of lawyers. We can sympathize and encourage anyone who undertakes such a difficult problem, but when he says the solution lies in lawyers' being trained more like social scientists we may rightly exclaim there has been serious distraction of thought. At this level of inquiry the familiar, but apparently not clearly maintained, distinction between the descriptive and prescriptive, the factual and normative, does not keep the subject matter neatly arranged, for the inquirer himself is problematically, but definitely on one side and not the other. In this way the activity of the authors of the articles in question is more informative than what they say and speaks against it.

In his article "The Unfulfilled Promise of Legal Education" Abraham Goldstein speaks of "a conception of legal education that transcends the professional and places law firmly among those social sciences which search for a body of theory and for a methodology adequate to test the theories." In further imitation of the sciences Professor Goldstein urges specialization. He says:

It seems apparent to me that the present structure of the law schools is unsound and that the unsoundness contributes to the delusion that the lawyer-generalist is competent to deal with the increasingly complex areas drawn within legal regulation and control. It is time for us to give up the generalist myth and to develop instead patterns of lawyer specialization adequate to the need.

Adequate to the need? Who is to decide that? Or better, how can people be trained to be able to discern what the need is and be able to meet the need? Is not that rather what training of lawyers should be oriented towards? Notice that Professor Goldstein himself faces a problem in his article and then urges as a solution behavior patterned after the behavioral sciences. But urging such a behavior is not itself such behavior. Professor Goldstein is trying to solve a problem, an extremely general but not a mythical one, and one of evalua-

tion and not of description of behavior. He just has not dealt with the problem very well. In short, his effort, as that of David Caver in his "Legal Education in Forward-Looking Perspective," shows directly, but by default, where the problem of legal education lies.

In contrast to this we should notice an article in the first part of the book. Harry Kalven in his "The Quest for the Middle Range: Empirical Inquiry and Legal Policy" addresses the problem of the *use* of science in the law-making process. He keeps quite clear the distinction between policy and matters of fact and recognizes "the law does, and should, embody value judgments that are beyond the reach of factual impeachment." He adds, "When these profound premises are involved, there will necessarily be an embarrassing distance between the premise and any facts modern social science can offer in its support." Professor Kalven traces out the uses and misuses of the empirical sciences to law in a manner most admirably careful and attentive to the evidence but equally careful and attentive to a lawyer's purpose. In this article and also in the two following, "Legal Regulation and Economic Analysis" by William Jones and "Responsible Law-Making in a Technically Specialized Society" by Adam Yarmolinsky, we can see the authors demonstrating in their own efforts precisely what they are talking about, the appropriate relationship between science and legal policy, a relationship which is a judicious evaluation.

In two other articles in the first part of the book the authors turn to several of the large and urgent social problems themselves. William Gosset in his article "Balances and Controls in Private Policy and Decision-Making" examines the extensive concentration of power in large corporations and labor unions as it relates to public interest, and Louis Pollak in his article "To Secure the Individual Rights of the Many" examines the "shabby despotisms" at the fringe of government that increasingly threaten the individual. Even though the issues are finally of an extremely general nature and invite, if they do not require, high abstraction, the inquirers never lose sight of the individual human referent that defines the issues as human problems. The articles show the lawyers' particular excellence not only in the clear-headed way the problem is analyzed (any disciplined inquiry should show this much) but in the precision with which the problem is related to human rights and aspirations (which scientific inquiries methodically neglect). If a science can be defined as intelligible clarity *appropriate* to the subject matter, then there is reason to suggest a reversal of Professor Goldstein's claim that lawyers should be trained as social scientists.

The kind of clarity of purpose of these articles is maintained in some of the articles in the second part of the book, notably in "Regulating Professional Qualification" by Richard Nahstoll, "The Future of Continuing Legal Education" by Irving Reichert, and "General Education in Law for Non-Lawyers" by Alex Elson. These efforts give us good reason to expect that the problems of the legal organization can be met by the exercise of the lawyer's particular excellence though it is regrettable that the organization is presently—well, very like other academic and professional organizations, in part self-stultifying. When lawyers put themselves on trial the culprit is very like any man, and yet it is clear they have an excellence that puts them heroically above average.

And so we should return, not merely in the interest of symmetry, to Oedipus. But reluctantly. For we would have to speak of a parental wisdom bringing forth a vigorous and clever understanding that impetuously kills its father and then as master takes his mother as subservient wife. But then when all is made clear the mother must hang herself and the son blind himself. What could these dark movements possibly mean? Who is father, who mother? Who can play Teiresias and see? No, rather let us see that the vigorous offspring has much yet to do, and let us be proud the drama is far from complete.

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