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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. New York-Kansas City: Bobbs-Merrill Co., Inc., 1966. Pp. 119. $5.95.

The author of *Law and Psychology in Conflict*, Mr. James Marshall, is a successful and respected member of the New York Bar. Constitutional law experts may remember him for his successful representation of the NAACP in the second of the "Texas primary election cases" (Grovey v. Townsend, 295 U.S. 45). His skills are not merely those of advocacy. He has been an Adjunct Professor of Law at New York University, has been the president of the New York City Board of Education, and has written several books and articles on political philosophy. Mr. Marshall is a successful blend of brilliance, scholarship, and specialized skill as a lawyer-craftsman. In his maturity he has developed a broad sense of social concern and forward-looking civic mindedness. Consequently, he appears to have transcended the myopic tunnel-vision which so often limits the man of narrow specialization. Mr. Marshall's viewpoint has not become fixed in the professional concrete of stereotyped practice. He appears to have achieved an expanded consciousness of interdisciplinary resources available to men of the law. He describes with real understanding some of the many dimensions in which an interface between psychology and the law is possible. Through his engaging little book (it is a mere 119 pages) he shares with us some of the vista of possibilities his multidimensional viewpoint has encompassed.

Despite the limited content of his book, it is a significant statement of an interesting and pertinent thesis. It deserves a thoughtful reading by any forward looking lawyer or jurist interested in this field. Its footnote references are generous and thorough, and Mr. Marshall's style generally makes for easy reading.

Despite the title of his book, Mr. Marshall actually seems to make less of a case for the existence of a conflict between law and psychology than he does for the existence of a lack of involved awareness about the usefulness of psychological data on the part of many lawyers, judges, or law professors. The first part of his monograph is dedicated to an expositive summary of the facts known about the perceptive process as it effects testimonial evidence. He implies this

area of psychological knowledge is unfortunately ignored by lawyers and jurists. If this "ignoring" of psychiatry-psychology were the result of inadequately developed knowledge, or if the viewpoints of the psychiatrists-psychologists were too theoretically divergent from the lawyer's to permit notice, it would be one thing. But if the ignoring is in the more general sense of the word ignorance, it is another proposition entirely.

Mr. Marshall's little book may be a harbinger of eventual changes to come. New collaborative efforts are being made by lawyers, psychoanalytical psychiatrists, and psychologists to achieve understanding by studying and challenging the experiences, assumptions, and knowledge of their different disciplines. New learned treatises appear and old favorites are revised. For example, the Free Press of Glencoe has recently released a new book interpreting psychiatry and psychoanalysis to lawyers. This book, entitled *Psychoanalysis, Psychiatry, and the Law*, was written by Katz, Goldstein and Dershowitz. Henry Davidson's book, *Forensic Psychiatry*, has now been revised and expanded in its second edition in an attempt to interpret law more effectively to psychiatrists. It seems clear that, as a group, psychiatrists are generally as ignorant of the law as the lawyer is of psychology and psychiatry.

Mr. Marshall correctly contends that there is a body of knowledge now available to the law which it should use, and that the time is overdone for American lawyers and social scientists to inaugurate a series of joint discussions and research projects with the ultimate goal of correcting the game of "make believe" which Mr. Marshall charges is inherent in the adversary system of trial law. He advances a good deal of evidence in support of his first proposition that repeated, adequately proven psychological research has shown that human beings have very limited ability to observe, recall, or describe events as they really happen. His second proposition is that this limited ability results in a faulty process which in turn is exaggerated by the adversary trial system. He concludes that evidence as accepted under our rules of admission is often unrelated to reality, and makes a farce of one ideal of justice, namely, to arrive at truth.[1]

[1] It is possible of course to argue that the purpose of a trial is never really a search for truth since truth is an abstraction and is only meaningful as relative to the information at hand. Truth is constrained by the limitations of the media through which it is communicated. A trial is a process for arriving at a fair and orderly determination of the issues in accordance with what data is available. This may be a very limited construction indeed. Truth as an ideal of justice is one thing, while the ordering of facts to permit a socially acceptable decision is another.

We are often witness to the fact that in the adversary trial game the craftsman-advocate emerges triumphant in the contest, not because truth is on his side, but by virtue of his having successfully manipulated the psychologically unsophisticated minds of the triers of fact so that they identify with him and hence his client on an emotional rather than a factual or legal basis. We are all familiar with this type of trial technique, and must surely concede that many of the great personalities of trial work have utilized it. The charismatic mystique which surrounds the successful practitioner with this skill increases the momentum of success. The news media may accelerate the "build-up" of mystique simply because the figure is newsworthy. However, Mr. Marshall complains not so much about the trial attorney himself, who, after all, is simply a product of the system, but the system itself.

> Testimony is constantly dissected and contradicted and reshaped toward partisan ends. That is the essence of a trial; it is not a scientific or philosophical quest for some absolute truth, but a bitter proceeding in which evidence is cut into small pieces, distorted and reconstructed imperfectly in summation (p. 94).

I do not think that Mr. Marshall means to suggest that the factual reality cannot be subjected to rigorous investigation and analysis. Rather, he is saying that the trial process, as we know it now, not only obfuscates the relationships between cause and effect, but generally blurs an understanding of the context in which the given action takes place. Moreover, the whole process of "noticing" is treated by most people, many psychiatrists included, as if it were a simple absolute when in fact it is a variable and complex process. In fact, the individual perceptive-apperceptive-response process is as unique as the fingerprints of the person who does the "noticing." Any perception suffers the consequence of being filtered through an imperfect associational process and "osterized" into the matrix of the observer's previous experience. While this may seem an overstatement, scientific research data does support this conclusion.

This point, once granted, raises the question as to whether it ever really serves the ends of justice to fragment complicated animate transactions and to try to reduce them to fundamentals for the purpose of classification. For instance, we might inquire whether a mechanistic approach to analyzing the mental state of an accused person (the usual approach generally trying to describe this state in progressively reductive terms) can ever really result in a full under-

standing of that person in a dynamic relationship to his circumstances. It may be that such attempts are only rituals that provide absurdly reductive criteria that often mislead despite their cloak of "scientific" accuracy. They become steps by which one rationalizes as "just" or "scientific" a classification which is in fact purely arbitrary. At least this approach does dispose of the offender on a right-wrong basis in accordance with a bias previously established by the psychological set of the trier of fact and the judge. On the other hand, it is possible for the criminal act to be properly described in terms of the psychological transaction of the "offender" with his society. Of course, this transaction can only be understood from the history of the accused and when the act is viewed according to the context of circumstances in which it took place. The label applied to the person is irrelevant to his understanding and is often prejudicial to a reasonable dispositive process.

The factors which shape the offender's judgment in giving vent to an antisocial impulse or in taking an action at a given point in time is in fact germane to taking a proper corrective action. This should be no mere "cause-effect" simple stimulus-response equation, but rather an attempt to understand the event as a transactional sequence within the global context of its occurrence. Many persons adopt the point of view that it is sufficient to simply reach a judgment that such and such form of behavior is approved of, and therefore good, and such and such form of behavior is disapproved of, and therefore bad. But that act of so classifying the behavior does not generally solve the social problem. Ultimately, it must fall to someone to reach a fair and mature judgment as to the most socially constructive disposition of the offender. While the easiest form of disposition of the detrimental or the unwanted is to destroy it, when the unwanted or detrimental is human life there must be second thoughts as to what the psychological and emotional impact of such action has on the rest of society. Is it the proper function of a trial, for instance, to try to bring before the court all of the material which may be relevant to the best possible sentence, over and beyond the question of guilt and innocence, once that categorization has been made? If that is so, then in understanding the experimential matrix of criminals we have a legitimate area of inquiry for the courts' attention. As John Dewey has said: "Until we know the conditions which have helped form the characters we approve and disapprove our efforts to create the one and do away with the other will be blind and halting."[2]

[2] DEWEY, HUMAN NATURE AND CONDUCT (Modern Library ed. 1930).

While it is true that understanding in many areas of psychiatry and psychology are cloudy, speculative or moot, there is a valuable body of knowledge already available for profitable study by lawyers and jurists. I should like to submit that it may be just as pertinent for the student of law to learn something about the complex nature of the human's perception-cognitive psychobiological systems, and about the individual and group psychosocial dynamics as it is for the medical student to learn something of the microscopic nature, function, and pathology of the tissues and organs and systems, the disorder of which ultimately expresses itself as physical disease.

Mr. Marshall's book focuses on one such area. His comments on perception form the most significant portion of the first chapter. In fact, his exposition of data about the perceptive process variables is as good a brief summary of pertinent comments as I have ever encountered. Furthermore, this summary is developed in a way which makes it readily understood by students of law who may have never had significant education in the areas of psychology. The reading of this chapter, or something similar to it, in my opinion, should be required reading by every enlightened teacher of a course in evidence.

One may question whether the present state of our knowledge about perception is sufficiently advanced to permit practical application in legal contexts. The answer can only be an emphatic "yes"! Psychology is an intricately partitioned field. While some areas of it have been relatively neglected or only roughly surveyed, some sections have been tilled and cultivated to a point where practical applications to other transactional social science such as jurisprudence can now be harvested to enrich our understanding and propel social movement forward. Perhaps no portion of the field of psychology has been as vigorously tilled and cultivated as has this area of perception—the complex act of "noticing."

Notice is prerequisite to testimony, and perception is a preliminary before recall can even be attempted without fabrication. Experience gives rise to expectations that are used to fill in the gaps between any sensory data sequence. "Filling the gaps in perception," according to Mr. Marshall, "is a betting process." (p. 19). He reiterates a truism from psychoanalytic and transactional psychology when he says:

> We select what we believe will be harmonious with those elements we have perceived and repress those that will create conflicts for us. The elements that we choose or repress will depend on what bet, or what selection, we make as the likeliest explanation for what

> we see; and that bet will, of course, be conditioned by past experience in similar situations (p. 19).[3]

In any attempt to collect a group of operative facts prerequisite to a jural act, that perceptive-apperceptive process should be understood and taken into account.

My own recently expanded experience with lawyers, law professors, and law students leads me to observe that a great many of them lack information about the process of perception and apperception, despite the fact that such information cannot help but be needed in their professional work. Their general state of knowledge seems hardly adequate to the task of dealing with their clients or their students. Moreover, if present at all, it is often constrained by the effects of early college courses in psychology. It often appears that most of them never passed the basic tenets of the behavioral school of psychology with its rather rigid, and unfortunately all too durable mechanistic-elementarist frame of reference. Therefore, it seems appropriate for me to disgress and plead for recognition that perceptual theory has evolved very significantly over the past few years. It does not seem wholly out of place for me to briefly summarize its development.

The behaviorist school of psychological theory, despite its initial modern scientific approach, was finally characterized by a rather rigid

[3] While most of us would readily accept the notion that interpretive judgments are conditioned by the observer's experience as a human being, there will be far fewer of us who are aware of what a varying set of constructs emerge from the reservoir of our "remembered" experience. The correspondence between percept and object is in fact never absolute. Even though the physico-chemical-mechanical impingement of sensory data on our nervous systems could be identical between two persons, the associational system on which that data is registered and from which the apperceptive construct must emerge will vary. No two persons in life, even identical twins raised in the same household, ever have the exact same associational system or psychological set. Even if the immediate set is nearly identical, it is superimposed on a reservoir of previous experience which will determine the apperceptive process. This apperceptive limb of the process of noticing differs from person to person. The in-put (or afferent limb of the perceptive process) cannot be separated from the antecedent psychological set. The apperceptive process begins and the sensory impulse imprinted is classified and referred amongst the millions of previously engrammed or imprinted referrants. From the convergence of the present stimulus with this vast multiple of complex antecedent referrants, a number of functional probabilities result. The construct emerging is in fact a selective one. What are some of the factors which influence this process detrimentally? What factors influence perception itself? What factors reinforce recall? Can the process of recollection be subverted completely by factors which influence the mode of articulation of the construct emerging from the percept? Is the percept influenced by factors which should be known to the trier of fact and of law in order that the better ends of justice may be served? Mr. Marshall's book reiterates a whole series of factors which influence perception and recall, and should be an invaluable aid to the student of trial technique and testimonial evidence.

application of a linear concept between stimulus and response. While this was an accurate concept in simple, isolated forms (such as a two-neuron afferent-efferent spinal arc, an example of which would be tapping the knee tendon to elicit a reflex contraction of the muscles supplied by that segment of the spinal cord) this linear stimulus-response concept is revealed to be a serious over-simplification when the number of neurons between the afferent and efferent (receiver-effector) limbs of the arc is increased as it is in any mental process. Each intervening nerve cell interposed connects with other receiver-effector units as well as other intervenors. This increases the complexity and widens the number of variable responses. Ignoring this factor, the early oversimplified reduction led to a predominantly structural and mechanical orientation of perceptual theory. This oversimplified concept had the effect of creating an inference that one stimulus registered to create one direct response which was a straight line response to it and involved nothing more, and could be "objectively" observed. In fact, such a simple S-R seldom, if ever, occurs in nature; and, "objective" observations depend on the circumstances. As time passed, behaviorism, despite its durable effect, gave way to the Gestaltists.

The Gestalt school of psychology took a broader view of the configurational field of forces acting to influence the individual observed. This was an improvement over the simple linear S-R explanation and was accurate except that its phenomenological analysis left out the observer as being part of the process. And as Willian Stein so pithily put it, "there is no Gestalt without a Gestalter." While as attorneys, members of the jury, judges, or examining experts, we would like to think we are objective observers, the operations of a variety of configurations of psychological field forces is being applied to the case before us, which induces rather different albeit automatic or conditioned responses in each of us. The presentation of the case is a stimulus impinging on our own previous perceptual framework. We see the process through the matrix of our own experiential bias. Hence, we in turn cling to the familiar and avoid the unfamiliar, or distort it to fit into our own perceptual framework, filling gaps, making the "bets" as to what transpired in accordance with our own experience.

While the Gestaltists did give some attention to individual differences and subjective factors as past experience, the effects of these differences were generally played down. While the theory says that

what we see is the product of interaction between external forces set up by stimuli from the object, and autonomous internal forces in the brain itself, the concept tends to minimize the fact that there must be, in addition, some basis for (1) the observer's "choosing" one pattern or set of facts from the infinity of external stimuli impinging on the sensory receptors and (2) for the construct we arrive at from that particular sensory in-put.

This is to say that there are all manner of things simultaneously impinging on some aspect of the neural receptive system—acting to elicit adjustive and alerting mechanisms in order to preserve our physiological and emotional equilibrium. Most of the percepts impinging are outside the focus of conscious awareness, yet are easily brought into focus. The focus of conscious "perceptive attention" shifts with the degree of dominance, for example, the importance the subject of the signal has had for us in our past experience. There will be an "alerting" response to some of these signals while other signals which have been assigned as incidental are ignored until attention is focused upon them.[4]

For the school of social and psychiatric thought called the transactionalists, the act of perception has come to be understood as a selective and dynamic function of the total personality. Perception is viewed as an ongoing process or transaction through which the individual relates himself to his world and which in turn relates itself to him. An accumulation of experiments and observations has confirmed what common sense might seem to testify; perception is not an automatic and discriminant response to stimuli, but is highly conditioned by the matrix of experience which conditions the "set" of the "perceiver." This is equally true whether we are dealing with a psychologist observer, a witness, a juryman or a judge. He will be more receptive to "noticing" material which resonates with material he believes he already knows or which tends to affirm what he believes most likely from his own limited frame of reference.

[4] A simple example of this is easily demonstrated. As you begin to read this you have been "unaware" of the sensations from your *right big toe*, but as you read the words you become aware of some of the sensations that were present and registering on your neuro-receptors all along. The mention of the right big toe affected your immediate psychological set and created a shift in perceptive attention to an area that otherwise would have remained remote or subordinated. You choose to exercise your will to focus—or again, as an incident of your own psychological set involving your attitude toward the subject read, or the author writing, your reaction was quite different, perhaps even negativistic or contentious. In any event your response validates the point which we have attempted to demonstrate at either the Gestalt or transactional level.

Thus we see that perception of a crime, of testimony, or of a witness' demeanor is a highly selective affair. This selective attention, in turn, implies the existence of a corollary—"selective inattention,"[5] that is the capacity of the individual to ignore, reject, transform, and generally reconstruct the material of his experience entirely unconsciously, without ever having to resort to the method of conscious denial and pervarication. This is no rare phenomenon. I venture to say it is the rare counselor who, in working with a client, has not become aware of that person's inattention to some comment or interpretation. Investigation generally reveals that this material was selectively closed out because it was dissonant or contrary to the belief the client needed at that particular time. I suspect that since the process is not unique to the psychotherapeutic interview that it occurs just as regularly in the attorney-client relationship. The individual's motives, needs, attitudes, emotions, the general state of his psychology, and the effects of past experience will all seem to predispose the individual's expectancies. It follows that these factors determine the quality of our reactivity as well as its degree. The expectations will effect his choice and in turn, his choice may set in motion mechanics of discharge which are potentially far reaching. Perhaps in no case does the chain of consequences extend further than when the individual is in a judgmental role, whether as trier of fact, or maker or enforcer of laws.

It is into the richness of these fields that Mr. Marshall's book leads the way. There is a wealth of psychological information gleaned from a scholarly study of the research sources. The material in the first chapter and introduction should be mandatory reading for any student of evidence. The last chapter, which deals with the application of his thesis to the courtroom situation, is rich in psychological concepts which, if practically applied, cannot help but win trials, despite the possible contrary merits of the opponent's case. As Mr. Marshall aptly points out:

> A trial lawyer is probably most successful if he introduces the contradictions, inaccuracies, or falsifications of the opposing witnesses, or the weakness of his opponent's interpretation, *after* he has established a supportive relationship between himself and the jury . . . (p.86).

The jury is persuaded by his arguments *only after* he has succeeded in getting the jurymen to identify with him as a person.

[5] The process was first so described by the late Harry Stack Sullivan, M.D., one of the most progressive thinkers of the neo-analytic school of psychiatry.

The middle of the book, entitled "Some Vagaries of Recall," is weak, but it is weak through no major fault of the author. It is weak because there is only a limited amount of material available to report, which has been derived from specific experiments structured to parallel or duplicate the elements of the testimonial or judicial process. Perhaps any law school classroom could become a laboratory for demonstrating some of these precepts and concepts, and perhaps this will be a teaching-research direction in the future. Certainly Mr. Marshall outlines some interesting problem areas to which research attention might be turned with excellent results. The critical and analytic faculties of the law student could be honed to a greater keenness and an expanded consciousness of operational elements not only within his own "Gestalt" which he may have heretofore ignored, but to the transactional significance of the client's interaction with his environment as well.

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