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Book Reviews

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BOOK REVIEWS

Crime and Insanity. Edited by Richard W. Nice. New York: Philosophical Library. 1958. Pp. vii, 280. $6.00.

The symposium approach is like a mountain sunrise: The peaks are accentuated while the valleys remain in shadow. This symposium of eleven authors surveying different aspects of criminal responsibility is aimed at the "popular" level. To remain readable it rarely penetrates deeper than the more elementary aspects of the subject. The editor has sought to give the book a measure of unity and cohesion by supplying an introductory and a concluding chapter, an all-state table on insanity as a defense, a list of the criteria of responsibility and the states using each, and an index. To this reviewer, the psychiatric essay by Dr. Davidson and the three legal essays by Judge Sobeloff and Professors Weihofen and Wechsler were the most rewarding. Not to be overlooked is the fact that two of the best and most comprehensive texts in this field—*Forensic Psychiatry* and *Mental Disorder as a Criminal Defense*—were written by Dr. Davidson and Professor Weihofen respectively.

Some hint of the scope of the studies, the weight to be accorded them, and the "professional angle of view" of the authors may be gained from a brief listing of the contributors with their subjects and professions: Dr. Henry Davidson (Psychiatry), the irresistible impulse; Dr. Donald Cressey (Sociology), compulsive crime; Dr. Herbert Bloch (Sociology), the legal, psychiatric and sociological "views" of a crime; Dr. William Haines and John Zeidler (Psychiatry), disposition of a "criminal" found insane; W. F. Burke (Psychiatry), the law-medicine conflict; Hon. Simon Sobeloff (Judiciary) and Professor Henry Weihofen (Law Teaching) each discusses discerningly the weakness of the "right and wrong" test and persuasively urges the general adoption of the test of the recent *Durham* case; Dr. Merrill Eaton, Jr. (Psychiatry), the court-prison work of the psychiatrist; Dr. Michael Finn (Psychologist), the psychologist as expert witness; and Professor Herbert Wechsler (Law Teaching), an explanation of the American Law Institute's recent formulation of the law of responsibility in criminal cases. Dr. Ralph Winn (Psychology), introduced the entire series with a general discussion of the principle of punishment.

Since these commentators draw heavily on social science for their concepts and arguments, the chief value of the book to lawyers is that it brings to bear upon our tradition-bound legal thinking refreshing

insights from scientists working in neighboring fields. Law needs cross-fertilization from the social sciences; even if it be granted that this book is not the best possible proof of the value to law of such cross-fertilization, at least it is an effort in the right direction. Dr. Davidson's effort to fit the various psychiatric categories of mental disorder into the "right and wrong" legal test of responsibility is an excellent example of the worthwhile contributions the scientific disciplines can make to law. His analysis indicates that the explosive psychotics are the group which law considers the true "insane" (irresponsible) while the compulsive neurotics, like the pyromaniacs and kleptomaniacs and the normal individual who permits himself to fly into a blind rage, are legally "sane" (responsible). If the application of the rule of *McNaghten's* case follows this distinction, the "right and wrong" test would undoubtedly be on psychiatrically sounder ground than it is when applied in the traditional manner.

Another practical contribution of psychiatry to legal thinking is seen in the discussions of Sobeloff, Weihofen and Wechsler, the first two advocating the *Durham* test (whether the act was the product of mental disease) and the latter the A.L.I. proposal (whether he has capacity to appreciate the criminality of the act and to conform his conduct to legal requirements). The psychiatric weakness of the "right and wrong" test is that it is based on a discredited psychology which considered cognition and volition as separate faculties, the latter being controlled by the former, and made a test of knowledge determinative without considering whether the "whole" personality could control conduct or not. Accordingly, if a man knows "right from wrong" but is incapable of controlling the urge to do wrong, he is punished for an act which he was powerless to prevent. The A.L.I. proposal seeks to remedy this directly by expanding the "right and wrong rule" to include volition; the *Durham* case solved it by asking whether the conduct is a product of mental disease rather than of sane mind. The *Durham* rule emphasizes the role of the psychiatrist and, accordingly, receives much praise from the psychiatrists and lawyers with psychiatric leanings. The A.L.I. rule is a more conservative reform resulting from extended deliberations of lawyers; as such it may well influence the application of the "right and wrong" rule in future cases. The law, being a conservative discipline, is more likely to modify an old rule than to substitute a completely new and largely untried test. Judge Sobeloff effectively presents the shortcomings of the "right and wrong" rule and the merits of the *Durham* rule in remedying them; Professor Wechsler considering the *Durham* rule vague strongly advocates the A.L.I. Penal Code rule as clearer and more practical while at the same time reflecting the best psychiatric thought of our time; Professor Weihofen carefully compares

the pros and cons of the *Durham* rule and the A.L.I proposal, rejecting the latter for the *Durham* rule. To a lawyer-reader, these three excellent essays are likely to outweigh all of the remainder of the book.

Little is said in the volume in defense of the "right and wrong" test of *McNaghten's* case, which obtains in North Carolina and in the majority of American jurisdictions. Beyond the legal essays, it has little value as a workbook to a North Carolina lawyer preparing a case for trial in this state. However, it seems to this reviewer (who has probably read his weight in books on the mental element in law) that it has a very real value in contributing to any lawyer's understanding of the complex medico-legal problem of the mentally-disordered criminal, and in indicating the direction of growth of the law of criminal responsibility. Most lawyers have learned (some, to their sorrow) that the law is not static. Often, the ferment around the edges may be more prophetic than the calm at the center; and, as the recent years have shown us, the agitation at the periphery may move with astonishing speed to the axis. Alert and astute lawyers know that not only professional pride, but even professional self-interest, demands that they keep well-informed as to what the "gad-flys" are doing and thinking. To such lawyers this volume will be welcome. There is fresh material in abundance here for anyone wishing to examine an old problem of law and society from a broader and sounder base against a more modern background. In an age which is dashing rather headlong in the direction of strict liability where lies punishment without fault, every lawyer needs convictions—and those intelligently grounded—as to the punishment for acts not consciously known or voluntarily done.

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Income Tax Differentials. By Dan Throop Smith, et al. Princeton: Tax Institute. 1958. Pp. 258. $6.00.

The purpose of the symposium which this volume records was primarily to consider whether our present federal income tax needs reform and, if so, in what respects it should be reformed. Practically all of those who contribute formal papers point out what they consider serious shortcomings in our present tax. But aside from fairly general recognition that our income tax problems would be fewer if tax rates were lower, there is little agreement as to what the so-called "loopholes" and "inequities" in our tax law actually are, how they rank in relative urgency, and what should be done about them.

Income Tax Differentials is a significant publication, if for no other reason than that it reveals the wide diversity of opinion in the United States concerning the next steps in federal income tax reform. Whatever one's pet project for income tax change may be, he is likely to find convincing arguments both for and against it somewhere between the covers of this book.

For those who are not interested in tax reform but merely in keeping their personal income tax liability down to the lowest sum currently permissible, *Income Tax Differentials* has substantial benefits to offer. Many of the tax differentials in our present law turn out to be connected with methods of tax avoidance and tax minimization. In presenting a comprehensive list of the differentials as such, the symposium contributors also produce the most comprehensive list of legal methods of tax minimization this reviewer has ever seen compressed within the limits of one slim volume.

The authors of the sixteen papers are eminently qualified by training and experience to deal with the subjects assigned to them. They certainly do not express the ideas of any single group. Classified by occupation, they include a Senator of the United States, a Deputy to the Secretary of the Treasury, a member of the research staff of the AFL-CIO, a staff official of the National Association of Manufacturers, the Treasurer of a large corporation, a member of a firm of business consultants, five university professors specializing in taxation or finance, three tax attorneys, and two tax accountants. Several of the authors were formerly members of the Internal Revenue Service. One of them was formerly an H. M. Inspector of Taxes in London, England.

Most of the papers are carefully documented, not only with respect to matters of law, tax regulations, and court decisions, but also with respect to pertinent statistics. In view of the complexity of the subjects discussed, it would be unfair to the authors to attempt to summarize each individual paper in a few sentences. Taken together, however, they give us a superb picture of the facts of our present federal income tax situation.

As far as the facts themselves are concerned there is little disagreement among the authors. They diverge widely only in their evaluation of the facts and in the specific income tax changes which they conceive these facts to call for. To the extent that it is possible to generalize about any group of individuals who are accustomed to do their own thinking, it might be said that three general attitudes toward income tax reform are discernible. It must be added, however, that the specific proposals of individual authors occasionally reflect the influence of more than one of these attitudes.

Of the three distinguishable attitudes, one at least is based on an extreme and uncompromising view of what constitutes taxable income. According to this view, every conceivable benefit or potential benefit accruing to an individual within a given year must be counted as part of his taxable income; whether the benefit is received in cash, or in kind; whether it is regularly recurring, or sporadic; whether it is subject to immediate disposition by the individual, or is merely a promise or probability of future benefit; and whether it represents compensation for productive services, or an unrealized increase in the market value of capital assets. Qualitative differences in the various types of income as thus defined are given no recognition. All incomes of the same size, regardless of differences in their component elements, must be taxed at the same effective rate. All income tax differentials, for instance, such as result from variations in non-business deductions, special rate schedules for married taxpayers, dividend credits, percentage depletion, and the application of a special tax rate to long-term capital gains, are ipso facto inequitable tax loopholes which should be abolished forthwith.

A middle-of-the-road attitude is represented by those who accept most of our present income tax differentials as being on balance justified by considerations which relate either to equity, or to social or economic policy, or to administrative feasibility. To those who share this attitude, income tax reform means a reconsideration of all of our existing tax differentials with a view to eliminating any which lack adequate justification on the above grounds. It also means extending the benefits of specific types of differential treatment to additional groups of taxpayers when similar considerations can be shown to apply.

A third attitude toward reform is associated with the belief that income tax differentials are demanded by taxpayer groups and are granted by Congress mainly because of the steep progression of our present income tax rates. Were the present bracket rates reduced, especially in the upper income reaches where they yield relatively little revenue, the pressure for differential treatment of special types of income or special classes of taxpayers, it is claimed, would in large part subside. A less steeply progressive schedule of rates, it is suggested, would make it possible to abolish many of the present income tax differentials. It would also reduce the attractiveness of various present methods of tax postponement and avoidance.

None of the symposium contributors explore the probable revenue consequences of this particular method of income tax reform with any degree of thoroughness. The reason for this may possibly be that they

doubt the political feasibility of reducing upper bracket rates unless corresponding reductions in lower bracket rates are made at the same time.

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