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## BOOK REVIEWS

**On Aggression.** By Konrad Lorenz. New York: Harcourt, Brace & World. 1966. Pp. xiv, 306. \$5.75.

The nature of human aggression is an ancient riddle, an enigma, an affront to our presumed rationality. But what is known about aggressive behavior in man and other animals?

Konrad Lorenz, Director of the Max Plank Institute for Behavioral Physiology in Bavaria, and the author of this landmark study, is one of the most important students of aggressive behavior in animals. Indeed in a general sense, the fascinating work that has been done on the social behavior of animals, such as Lorenz's studies of aggression, has immense implications for the legal scholar, as I shall try to suggest.

From the point of view of a lawyer or social scientist, there are a number of provocative questions that Lorenz would move us to ask. Why is recorded human history so filled with acts of destructiveness, *e.g.*, the last fifty to sixty years of Western bloodletting? What is known about aggressive motives, especially the intra-species destructiveness of man? Why does aggression malfunction in man? In an applied sense, how does law serve the purpose of channeling and controlling destructive human aggression? How can the law profession benefit from knowing more about the nature of human aggression, in both social and psychological terms?

With such interests in the reader's mind, Lorenz indicates that his book serves the following purpose: "The subject of this book is *aggression*, that is to say the fighting instinct in beast and man which is directed *against* members of the same species."<sup>1</sup> Why does the author emphasize aggression against members of one's own species? Lorenz challenges us when he points out that in most other animals we know about, aggression *within* species is rarely ever carried to the point of destructiveness. Destructive aggression within species is in fact inhibited in animals after conflicts of dominance and territoriality are established. Why is it that man and rats are plagued by the ancient aggressive instincts which are destructive within species—that is to say, why do we not, like other animals,

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<sup>1</sup> LORENZ, ON AGGRESSION at ix (1966).

possess inhibitory mechanisms which control destructive aggression? Our cultural inhibitions have not caught up with our aggressive instincts. We are, thus in Julian Huxley's metaphor, an animal commanded by many captains, and a prominent one is the process of aggression which, as indicated, can be both species preserving and species destructive.

In Lorenz's readable and enchanting style, we are treated to a variety of natural science exercises presented for the purpose of helping us to understand aggressive behavior. Lorenz treats us to vivid descriptions, for example, of aggressive behavior in a variety of animals—fish, rats, geese, etc. He examines the nature of aggression and, like a good Darwinian, asks what aggression is good for, *e.g.*, spacing, leadership, etc. A selective illustration of his subject matter is secured by his chapter titles: "What is Aggression Good For"; "Habit, Ritual and Magic"; "The Great Parliament of Instincts"; "Behavioral Analogies to Morality"; "Anonymity of the Flock"; "Social Organization Without Love"; "The Bond"; and "On the Virtue of Humility." Lorenz introduces us to the complexity and fascination of the function and malfunction of aggression in various species and in different types of species organization.

From the point of view of law and its function in society, Lorenz's book stimulates a number of urgent questions. What is the relationship between effective legal sanctions and the control of aggression in man, between groups, and between societies? Are some legal systems better structured to achieve conflict resolution than others? What have been the successes and failures of legal codes and the regulation of aggressive behavior in man? To what extent is it necessary for the lawyer to make use of current social science knowledge as to the nature of human nature?

Indeed, in reading this book, one may very easily have his view of human behavior altered. You may leave the book wondering how did man develop these self-destructive patterns. In fact, what are our hopes for controlling an impulse which we have no assurance will not destroy all of us? "Man is, as Arnold Gehlen has so truly said, by nature a jeopardized creature."<sup>2</sup>

I commend this book to your attention, the subject matter to

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<sup>2</sup> *Id.* at 238.

your assessment, and the implications for a dialogue between law and social science to your imagination.

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**The Good Samaritan and the Law.** Edited by James M. Ratcliffe.  
Garden City, N.Y.: Anchor Books, Doubleday & Company, Inc.,  
1966. Pp. xv, 300. \$1.45 (paperback).

Approximately in the second month of law school, freshmen learn the rules concerning legal duty in their torts class. The professor usually serves up a hypothetical about a man standing near a lake. In one hand the man fingers his Olympic swimming medal and in the other he carries a life preserver. Ten feet away a boat with a child in it capsizes. The child shouts "I can't swim" before hitting the water, bubbles up three times, and then disappears into the water while the man calmly watches. It would not be uncommon if a student mildly disbelieved his professor when he said that the man in the hypothetical incurred no tort or criminal liability.<sup>1</sup>

A healthy student reaction might be to rush into the library saying "This can't be," look up a case like *Osterlind v. Hill*,<sup>2</sup> and then approve an inner revolt. Maybe that feeling should grow when our student learns that if the man had tried to help and had done a poor job of it he might find himself a defendant in a tort action. And further, if he did act courageously but was injured or ruined his clothing in saving the child, he would probably not receive any compensation for his losses unless the child's parents happened to feel generous at the moment.

So far we have only mentioned the student's surface reactions. With a bit more probing and thought our student begins to see the innumerable problems involved in changing the distasteful rules of law. At a given moment of time these problems are nearly insoluble.

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<sup>1</sup> It is altogether remarkable, as Professor Gregory comments, that we can state with confidence what the law *would* be in such a hypothetical case. *THE GOOD SAMARITAN AND THE LAW* 24 (Ratcliffe ed. 1966) [hereinafter cited as Ratcliffe].

<sup>2</sup> 263 Mass. 73, 160 N.E. 30 (1928).

It has only been over a period of six centuries that the common law has been brought into closer harmony with moral principles. This is the point that is brilliantly made in Professor Ames' classic essay *Law and Morals*<sup>3</sup> which is appropriately the first chapter of *The Good Samaritan and the Law*. The rest of the book is comprised of fourteen essays, most of which were papers presented by a distinguished panel of writers and scholars<sup>4</sup> at a University of Chicago conference on "The Good Samaritan and the Bad—The Law and Morality of Volunteering in Situations of Peril or of Failing to Do So."

Because the subject is somewhat like Pollock and Maitland's "seamless web" it must be acknowledged that Editor Ratcliffe has arranged the essays in as logical an order as might be asked. None-the-less, a straight through reading of the book from essay to essay will no doubt leave the reader at sea. There is probably no help for this when the problems faced are so involved with mixed arguments of policy and law, and particularly when the subject of the Good Samaritan is viewed in the light of common law history.

Among all of the writers there is a general agreement that the state of affairs in American law on the Good Samaritan question is not good. A man should help another who is in danger when he can do so without risk and the law should somehow foster such action. This duty might even be extended to include protection of property from damage. Further, a man should report crimes (the Chicago conference was in part a response to the Kitty Genovese affair in New York where thirty-eight people listened to a killing outside their apartments without lifting a finger). Whether one

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<sup>3</sup> This essay originally appeared in 22 HARV. L. REV. 92 (1908).

<sup>4</sup> Besides Professor Ames, the authors are: Charles O. Gregory, Professor of Law, University of Virginia; André Tunc, Professor of Law, University of Paris; John P. Dawson, Professor of Law, Harvard University; Alkesander W. Rudzinski, Associate in Public Law, Columbia University; Norval Morris, Professor of Law and Criminology, University of Chicago; Louis Waller, Professor of Law, Monash University, Australia; Alan Barth, Editorial Writer, Washington Post; Lawrence Z. Freeman, M.D., Professor of Psychiatry, University of Chicago; Joseph Gusfield, Professor of Sociology, University of Illinois; Herman Goldstein, Asst. Professor of Criminal Justice Administration, University of Wisconsin; Hans Zeisel, Professor of Law and Sociology, University of Chicago; Herbert Fingarette, Professor of Philosophy, University of California, Anthony M. Honoré, Fellow, New College, Oxford University; Wallace M. Rudolph, Professor of Law, University of Nebraska. In addition there is a draft law entitled "The Good Samaritan Act of 1966: A Proposal" by two third year University of Chicago law students.

should be required to intervene physically raises serious questions. If it involves placing oneself in physical danger, no one would require intervention. If it merely required minimal physical action without risk and this will prevent grievous injury to another, such action might be required. No one thinks it is too onerous to require that notification be given to the police or other authorities in appropriate circumstances.

However, due to the infinite number of Good Samaritan situations which might arise the formulation of legal rules is quite difficult. Even before clearing those hurdles there is the initial problem of how to effectuate the desired results. Some people might advocate criminal laws condemning failure to act. Tort liability for inaction is another possibility. Also the Good Samaritan could be rewarded for his good deeds. All of these proposals evoke a torrent of questions. One of them is the extent we can require a man to be brave and what the law can do to create a climate in which he will act bravely.

I am reminded of a mess hall conversation from my early army days. A Pentagon psychologist was telling me about his job which consisted of interviewing war heroes to determine why they had acted courageously under fire. At that time his results were so diverse that he was despairing of finding a unifying thread. Whatever the difficulties may be of determining why soldiers behave as they do in combat, I think it is fairly obvious from a purely legal point of view why people generally shun the Good Samaritan role in civilian life. It is simply this: our law says that people who come to the aid of strangers are "intermeddlers" or "volunteers" and they accordingly have everything to lose and nothing to gain. Unfortunately, the problem cannot be analyzed from a "purely legal point of view" as I just stated it. Psychological and sociological elements interplay with and even govern legal considerations in this problem.<sup>5</sup>

Nonetheless, we must find a seam to our web and I think if any is to be found it is in Professor Morris's essay, which is also the shortest in the book. Namely, it is a question of compensating one who incurs injury or loss in assisting a policeman or aiding a victim in peril. As Professor Morris says: "Morally and legally this issue is of central importance."<sup>6</sup>

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<sup>5</sup> Ratcliffe 171, 183.

<sup>6</sup> Ratcliffe 136.

Any talk of changing common law rules of duty must start with this question and perhaps end with it. Admittedly compensation itself is far from a complete solution, and even deciding how and when to compensate brings on numerous problems in itself.<sup>7</sup> Compensating a rescuer monetarily does not and can not restore him to his previous position. He has lost time and perhaps health, two uncompensable items. However, there is little else to offer him except the approbation of his fellow men.

Worthy of note at this juncture is Professor Gusfield's approach. Instead of asking "Why don't people help?" (or report crimes?) we should turn the question around and ask "Why do they help?"<sup>8</sup> Sociology Professor Gusfield explains that when people are in closed social positions playing roles with sanctions and rewards close at hand, they are more likely to act. As one moves into the open, away from the closed circle into a public situation, it is the danger which is close at hand and it, therefore, is more likely to control one's actions.

Professor Goldstein, who teaches criminal justice administration, views the problem as an outgrowth of citizen apathy towards the investigation and apprehension of criminals.

it is but a symptom of a much broader . . . problem—the lack of citizen support in various aspects of the process by which crime is investigated and criminals apprehended. A patrolman or detective in an urban area daily experiences a variety of frustrations stemming from the failure of citizens to cooperate by not reporting crimes; by not identifying assailants; by not informing on the whereabouts of wanted persons; and by not cooperating in the prosecution of criminal cases. For the officer, it is a natural step to see this apathy extend to those situations in which a citizen is attacked in the presence of others.<sup>9</sup>

Professor Goldstein then provides an impressive catalogue of reasons why an individual, as such, might be better off not to cooperate. Anyone who does cooperate stands to lose a great deal: time, health, possible violent reprisals from criminals against himself or his family, browbeating by police for reporting the crime, browbeating by defense counsel at trial, and possible tort actions against himself.

Professor Goldstein doubts that we can search for immediate

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<sup>7</sup> A good start for such a law is found in the draft act. *Id.* at 279.

<sup>8</sup> *Id.* at 188.

<sup>9</sup> *Id.* at 201.

solutions with any dependence "upon long-range efforts to improve the over-all moral tone of society"<sup>10</sup> when the problem is a fundamental one involving our system of law enforcement.

Our system for controlling crime and administering criminal justice was, after all, initially designed to meet the needs of a simple, homogeneous, and less urbanized population that we have today. It places very heavy reliance upon the role played by the individual citizen—as victim and as witness. But urbanization has changed things. The prevalent attitude held by the residents of smaller communities, strongly committed to individual action designed to forward the communal good, appears to have been replaced in the large urban areas by an attitude which places a higher value on furthering private ends. Our criminal justice system has not been modified to meet this phenomenon.<sup>11</sup>

In contrast, Alan Barth, a journalist with the Washington Post, offers a reason for optimism, despite his recognition that there is too much indifference by people towards the plight of their fellow men. Mr. Barth posits his hope on the thought that "we have coming up out of our colleges these days a magnificent Good Samaritan generation."<sup>12</sup> The Freedom Movement in Mississippi and the march from Selma, Alabama, Mr. Barth thinks, are motivated by "a sense that they [the demonstrators] are their brothers' keepers."<sup>13</sup>

Mr. Barth will forgive me, I hope, for not feeling optimistic with respect to the Good Samaritan question on the basis of the civil rights activity of the young generation. I am afraid that the same young people who might travel great distances to march in Selma, Alabama are just as apt to ignore the plight of their neighbor as anyone else. Their Good Samaritan behavior is in a sense institutionalized and I do not know if it can be translated from that plane into one involving individual, private action.

It may be that we need to re-read Professor Ames' essay written over half a century ago in a different light. Change must come gradually just as Professor Ames says it has to the common law over a period of centuries. Perhaps the first step should be in the direction of passing laws to compensate Good Samaritans for losses and injuries. This will not dissolve all of the problems but it will

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<sup>10</sup> *Id.* at 207.

<sup>11</sup> *Id.* at 206.

<sup>12</sup> *Id.* at 168.

<sup>13</sup> *Id.* at 169.



be a move in the right direction. The next step might be reward of Good Samaritanship. Later when a point is reached that attitudes toward intervention have changed in response to these measures, the idea of making failure to aid criminal, perhaps drawing on European experience,<sup>14</sup> can be seriously envisioned. Providing a tort action to the victim, which would be the last step, should probably be postponed for many years.

Some evidence that our attitudes towards intervention will need changing on a step by step basis is found in Professor Zeisel's interesting essay based on a statistical study in which he shows that American non-law students, as compared to German and Austrian non-law students, are not disposed to condemn failure to aid as criminal.<sup>15</sup>

Inherent in a step by step approach, starting with compensation for the Good Samaritan, is the fact that time, perhaps a great deal of it, will pass before great changes are wrought. This raises the issue: how vital and necessary is legal reform in this area? Professor Fingarette suggests that it may be a question of newspaper sensationalism more than anything else in which case the law should not be changed in haste.<sup>16</sup> If this is true, as it may well be, compensating the Good Samaritan as an initial step will not imbalance present legal rules but may produce beneficial results.

This is not to say that failure to act in certain circumstances should never be made a crime as a matter of principle. It is a question of timing. Although fifteen other countries (fourteen of which are European)<sup>17</sup> have made failure to act a crime, any such move in the United States should only be taken after a great deal of circumspection. It is here that the *Good Samaritan and the Law* contains much that is helpful.

A definition of the Good Samaritan crime is offered by Dr. Rudzinski: "Basically, the purpose of our provision must be defined as protection of human life in the public interest through punishment of a callous attitude of witnesses and outsiders in emergencies."<sup>18</sup> Following this, Dr. Rudzinski supplies an admirable comparative law discussion of criminal provisions in the fifteen countries

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<sup>14</sup> *Id.* at 91.

<sup>15</sup> *Id.* at 209, 211.

<sup>16</sup> *Id.* at 223.

<sup>17</sup> *Id.* at 92.

<sup>18</sup> *Id.* at 100.

which have them, plus some comments on the desirability of introducing such a criminal law. Finally, he offers a draft statute. The discussion is persuasive, yet, criminal punishment of an "attitude" albeit a callous one does invite an explanation for the moral and legal basis of the crime.

At the outset the point should be made that the difference between feasant and non-feasant, although of historical importance in torts, has been shown of no essential consequence in the criminal law.<sup>19</sup> Even after accepting that, however, one seeks an explanation why he should have to help a stranger in peril or suffer criminal prosecution for failure to do so. Professor Fingarette argues that we all have some communal obligation to protect lives and property of others growing out of a minimal obligation to make sacrifices for the sake of the community. This sacrifice is the very essence of a community for without it no community can exist. Our obligations should be spelled out for us either in custom or law. Our custom, Professor Fingarette says, is not specific on the question of aiding others in peril and therefore the law should give practical guidance about the Samaritan's obligation, that is, "the law should lessen the temptation to avoid bringing aid by providing penalties."<sup>20</sup>

Professor Waller also opts for the tutorial function of law as a justification for a criminal penalty.<sup>21</sup> In this connection Professor Zeisel's study, mentioned above, adds an interesting perspective. He posed four Good Samaritan hypotheticals to non-law university students. Seventy-five per cent of the American students questioned thought failure to act should be a matter of conscience without legal consequences. Professor Zeisel's essay, which unfortunately was not longer and more expanded, is some evidence that our shared morality on this question may not justify making inaction criminal at the present time. On one hand it provides a political reason why criminal laws in this area may not be seen in great numbers. On the other hand it suggests that further inquiry into the popular basis for such laws is called for. Recognition has been given to the principle that a criminal law should be supported by mores and it has been asked whether an occurrence arouses the kind of resentment directed at perpetrators of traditional crimes like murder and rape.<sup>22</sup>

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<sup>19</sup> HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 190-201 (1960).

<sup>20</sup> Ratcliffe 223.

<sup>21</sup> *Id.* at 141.

<sup>22</sup> HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 331 (1960).

Kitty Genovese affairs do arouse resentment but it may be that that kind of resentment is different than with respect to traditional crimes. Perhaps some people on initially hearing the story felt that those who failed to act (or at least call the police) merited some punishment. My own imaginings and experience lead me to think that most people disapproved of the failure to act and deplored the whole story, but after reflecting on it, this attitude was only part of a general indictment of human nature, not the particular people involved.<sup>23</sup> Many people probably wondered seriously if they would have acted in exactly the same way. Like the student's reaction when he first learns about legal duty in tort law, general surface reactions are only that. "We find that what particular people feel as just or unjust varies according to how much chance they have to think about it, how far they are made aware of the implications of what they say, they feel or think."<sup>24</sup>

Before leaving this point it might be added that a criminal law condemning failure to act in the Good Samaritan situation would surely be attacked on constitutional grounds. Unfortunately, none of the essays joined issue on this question. In the interest of self-enlightenment I polled a number of attorneys of personal acquaintance on this point. Their initial reactions almost to a man were to doubt that a statute could be written which would meet due process requirements to prevent its being void because of indefiniteness. After assuming that obstacle could be overcome, which it probably can, they had an instinctive feeling that such a law would not be constitutional (in most instances stemming from a surface reaction that it would not be good policy to have such a law) but were hard pressed to find a rationale. One recurring answer was that such a statute would be an unwarranted invasion of the right of privacy.<sup>25</sup> A related comment came up in Professor Gusfield's essay: "Perhaps some of our legal tenderness toward non-feasance is the obverse of our very virtuous concern for the privacy of individuals."<sup>26</sup> Al-

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<sup>23</sup> Thus, the reason the stranger who refused food to a hungry child escapes any liability while the latter's father might be guilty of criminal homicide is that, despite avowals, we have not reached the point of really believing that everyone is morally obligated to be his brother's keeper; or, at least, that is not believed sufficiently to be given implementation by the criminal law. *Id.* at 210.

<sup>24</sup> STONE, HUMAN LAW AND HUMAN JUSTICE 317 (1965).

<sup>25</sup> This response must have been cued by *Griswold v. Connecticut*, 381 U.S. 479 (1965) and Justice Douglas' use of right of privacy language.

<sup>26</sup> Ratcliffe 196.

though a constitutional argument could be fashioned along right of privacy lines, I doubt if it could ever carry the day. However, a good Samaritan criminal statute which was not accompanied by a compensation scheme I should think could be attacked as a taking of private property without just compensation.<sup>27</sup> Another possible argument might be ignorance of the law which in a limited way has been recognized by the Supreme Court as a valid defense where the criminal act consisted of an omission to take action.<sup>28</sup> What is left at this point is an invitation for someone to take up the analysis of the Good Samaritan criminal statute and its constitutionality.

If lawyers in reading the *Good Samaritan and the Law* can recapture some of the innocent indignation they must have felt upon first learning about the legal rules of duty to help strangers and particularly our legal attitudes toward compensating those who do, perhaps many of the problems evoked in the book can be solved.

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<sup>27</sup> A self-executing compensation provision might be read into such a statute. *Id.* at 277.

<sup>28</sup> *Lambert v. California*, 355 U.S. 225 (1957).