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Book Reviews

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BOOK REVIEWS

TRIAL BY JURY. By *Samuel W. McCart.*† Pp. vii 204. Chilton Company, Philadelphia, Pennsylvania, 1964. $4.95

This book is a welcome addition to the growing library on the merits and demerits of the jury system in the administration of justice under law. In a somewhat conversational style the author tends to speak to three specific groups: the layman who is vitally interested in the jury system as a part of the legal process; the practicing attorney who works with jurors and juries in a very real way; and the law student who needs a better understanding and some general knowledge of the jury as an institution; information which he cannot obtain during his busy law school career.

The author is very frank in stating that his purpose is neither to defend the jury trial system nor to condemn it, but rather to explain the system in a manner easily understood by anyone. He has accomplished his purpose to a large extent, primarily because of the conversational style of his manuscript and also because of the many interesting facts he weaves into the manuscript, which facts ordinarily are not readily available. Throughout the book there are a number of excellent brief historical backgrounds relative to the jury system which even the experienced lawyer may not know and which give life and meaning to the system.

It is apparent that much of the manuscript is the result of years of experience in trying cases before a jury. Illustrative of the point is the chapter, "The Selection of a Jury", in which the author discusses the *voir dire* and indicates many of the evaluations that pass through the lawyer's mind as he must forthwith decide whether to accept or reject a particular juror.

The eighteen chapters in the book are nicely arranged. The first two chapters outline the genesis of the jury system and how it became a part of our judicial process. The search for jurors and the selection of a jury, both criminal and civil, are discussed in the three subsequent chapters. The chapter, "Actors in the Drama", indicates the proper spheres of counsel for both parties, the court, and the other necessary court officials, and is well conceived. The author describes

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the opening of the trial, considers what constitutes evidence, speaks of the defendant's case, and discusses the important and mysterious power of directed verdicts. The chapter on the essential purpose of the jury trial, namely, the ascertaining of truth, and the chapters on the closing arguments of adverse counsel and the role of the judicial office in charging the jury are presented with some revealing insights. The author then discusses some of the things that go on inside the jury room, the verdict that is rendered by the jury, the power of the jury and, finally, the granting of a new trial and the functions of the appellate courts.

This manuscript has a very special appeal to the general reader who himself may sometimes be either a litigant, a witness, or a juror. The chapter on the closing arguments by counsel should be quite revealing to the layman and is recommended reading for every juror before beginning his jury duty, as it will give him a much better understanding of the function of a juror, particularly the use to be made of the closing arguments of counsel. Other aspects of the book will give the layman a better understanding of the jury system and how it operates in our system of jurisprudence, and may give him a greater respect for the value of this system in our society.

Even the trial lawyer who has had much experience in the court room will benefit from the book. In the chapter on the defendant's case, the author points out nine courtroom tactics which should be condemned but which "tricky" lawyers still use, not without some immediate success, but with a jaundiced eye from the court and opposing counsel. And in the chapter, "The Whole Truth", the author reveals to even the practicing lawyer some practical ways in testing the witness for telling the truth. Because this is most important to the success of the jury system, a trial lawyer must know the tests and how to use them discreetly. The author refers to some of the observable factors which may be detected when a witness purposely departs from the truth. A law student may well take note of these observable factors for, whether or not he ever tries a case in a courtroom, he will be plagued throughout his professional career in ascertaining the true facts even from his own clients. Clients are not always known for their precise, objective presentation of a problem, a fact which the lawyer learns from experience.

For the law student, not only is the historical prospective of the jury system well outlined, but there are many practical suggestions contained in the volume, illustrative of which is the change taking place in our jurisprudence in the matter of the plea of insanity.

The chapter on "Directed Verdicts" is particularly revealing, not only to the layman, but also to the practicing lawyer and the law

student as well, because of the mystery which seems to be present when the trial judge takes the case from a jury and directs a verdict. This is a part of our law which causes difficulty for experienced lawyers and which is a mystery to laymen. Law students and practicing lawyers sometimes regard it as a weapon to be feared. The author presents an excellent analysis and evaluation of this judicial prerogative.

There are three appendices to the book, one of which is *Natures of Laws in General*[1] with several exclusions. Every lawyer should be familiar with this treatise by Blackstone and have it readily available in his office.

At this point, two observations should be made. The subtitle of the book, "A Complete Guide to the Jury System", is highly presumptious for the volume is clearly not a complete guide to the jury system. Secondly, the chapter, "Inside the Jury Room", is theoretical and the author missed the opportunity here to give the prospective juror some practical guidelines as to his conduct and method of operation in the jury room.

Although this volume could not be classified as a "must" for law students and lawyers, it is worthy of a place in every lawyer's library; it is the type of volume which merits reading after a difficult and busy day in either the law school, the research library or the courtroom.

**Thomas F. Lansberry*

CLINICAL INVESTIGATION IN MEDICINE: Legal, Ethical and Moral Aspects. Edited by *Irving Ladimer*† and *Roger W. Newman*‡. Pp. xxi, 517. Boston University Law-Medicine Research Institute, Boston, Mass., 1964. $5.95.

In recent years there has been a considerable increase in medical research activities involving human subjects. As one might expect this has been accompanied by a similar growth in the number of articles dealing with the ethical, legal and moral environment for such ac-

1. BLACKSTONE (Harper Brothers. 21st London Edition, 1854.)

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tivities. This anthology presents seventy-three selections from a large body of literature on many aspects of clinical investigation and, in addition, contains a bibliography of almost 500 other items that have been written on the subject.

Interestingly enough, there has not been one reported judicial decision specifically dealing with the standards to be applied in the true experimental research situation. Perhaps the preceding statement is subject to challenge because of the prosecutions of certain Nazi doctors whose conduct of experiments on human subjects led to their conviction at the War Crimes trials. Nevertheless, the Nazi experiments were so different from the medical research being conducted in the United States and other western countries at the present time, that it was relatively simple to develop a standard against which to measure the Nazi doctors. It is far more difficult to develop a standard, or forecast the standard the courts would apply in litigation arising out of the conduct of clinical research carried out in our research institutions.

Basically, there are two matters to focus on in assessing the manner in which medical research with human subjects is conducted: the consent of the subjects, and the research design and actual conduct of the experiment. Practically all the articles in this anthology deal with both of these, although some stress one considerably more than the other.

The attorneys, along with the physicians and theologians, whose contributions are part of this anthology, have had to wrestle with the fact that there are no legal precedents in our common law experience which go to the really difficult problems in human experimentation. The attorney reading this volume may conclude that the authors of a number of the selections are disappointed that there have not been some decisions dealing with clinical research so that there would be definitive legal guidelines. Several of the authors who are not attorneys suggest that members of the legal profession should set the standards that should be applied if litigation occurs. While this striving for certainty is understandable, the difficulty in enunciating such a standard, and further, being assured that it would be applied by a particular court, is very great.

The legal precedents cited by the authors to help evolve guidelines are of two types: decisions dealing with malpractice where the court has characterized some outrageous procedure by a physician or an unlicensed quack as experimentation; and decisions dealing with consent to procedures which are clearly therapeutic or ostensibly theraputic and not part of a research design. These decisions are not very

useful because they fail to deal with the true research environment, which has its own complicating factors. It is somewhat misleading for a court to characterize a procedure of dubious value on the part of an unqualified practitioner as experimentation. The rule for considering this practitioner's conduct, deviation from the standard of practice of physicians in the community, may not be useful in assessing a new technique, carefully set out in a research proposal approved by authorities in the field and the administration of the institutions where it is to be carried out. This is especially true where the existing conventional therapy for the condition has been rather unsuccessful, and a dramatic breakthrough is hoped for, both in the interest of the subjects as well as in the interests of the community at large.

A number of the selections in this anthology describe attempts to codify rules dealing with human experimentation, the most notable of which is the Nuremberg Code. However, the formulations of these rules leave much to be desired. The real stumbling block to almost all analyses of human experimentation and its legal environment has been the requirement of consent of the subjects to the particular experiment. In some experiments the subjects are persons who are suffering from a particular condition and who receive a new and different therapy, rather than the conventional one which is the standard practice of physicians in dealing with the condition. In such situations there is hope for therapeutic benefit to the subjects.

It would appear that such investigation involves few problems. But, the use of the double blind test, where neither the subject nor his physician knows whether the experimental agent or the traditional agent is being used because the research design prevents such knowledge, inhibits obtaining a truly informed consent from the subject. The double blind test, by denying the subject the knowledge of what agent is to be received, raises doubt whether a truly informed consent from the subject can be elicited. Yet, to a certain extent, by informing the subject that he is a participant in the experiment and giving him an indication of the risks and possible therapeutic value, the consent requirement may be met, although there is not universal agreement on this point.

In the case of the normal subject, one who is not suffering from any particular malady or condition, but whose reactions to particular agents is being measured, it is often difficult to give sufficient information so that a truly informed consent can be obtained. Where the experiment involves measuring reactions to therapeutic agents, stress, or any factor that may cause physiological or psychological reactions, the results may be biased if the subjects are informed to the extent that they can surmise what the reactions will be. Thus,

the desire to have a scientifically reliable experiment may stand in the way of obtaining informed consent.

When this point is reached in the discussion in a number of the selections, the authors make a quick transition from the subject of the experiment to its design, and justify the absence of informed consent on the basis that the risks are minimal, or that the experiment could not be conducted successfully if the subject was fully informed. These authors then lapse into cliches about the good faith of the researcher and the fact that benefits derived from the experiment, if of sufficient social value, justify withholding from the subject the information necessary for his informed consent.

In commenting in this fashion, the reviewer does not mean to be overly critical. Rather, the comments are intended to indicate the complexity of the research context, and the formidable problems in enunciating a code to cover all human experimentation. The field of human experimentation is so broad and there are so many different circumstances, that an all-inclusive code appears almost impossible to formulate.

What conclusions can be drawn from the fact that there is no body of useful precedents? Can much litigation concerning human experimentation be anticipated in the near future? Perhaps the meaning of the lack of litigation has not been sufficiently explored. One might argue that safeguards are being imposed as needed through administrative control upon physicians, scientists and institutions conducting research, and that the need to seek redress in the courts for real or apparent harm has not materialized. As the devil's advocate, one might propose another reason; that subjects who have been harmed have no knowledge that they are being used in experiments, and therefore do not possess sufficient information to be aware that legal rights have been infringed upon in current experiments.

The most dramatic situation to come out of the field of human experimentation in the last few years has involved implanting live cancer cells in terminal patients in two New York nonprofit hospitals. The public outcry was considerable, judging by the newspapers. The most objectionable aspect of the procedure was that these patients had no knowledge that they were being so used, and it may be assumed that at least some of these patients believed that they were receiving material which had potential therapeutic value. This was clearly not the case. In defense of the investigators, on the basis of previous research, there was no reason to believe that these patients would suffer any harm. However, it was admitted that the patients and their families were not informed, and that the members of the

board of trustees of at least one of the institutions involved had no knowledge that such experiments were being carried out on the patients at the institution.

For the attorney, the question of whether hospital liability policies and malpractice policies carried by the physicians protect against actions arising out of the implantation of live cancer cells into uninformed patients must be considered. In the absence of consent such an act constitutes a battery, which is both a crime and a civil wrong. Since the procedure is not directed toward any therapeutic purpose, conceivably the physician's malpractice and the hospital's liability policies would not provide coverage.

Obviously, an attorney interested in the fascinating issues of medical research with human subjects is not going to find definitive answers to such questions in this volume. Nevertheless, the subject of this anthology raises a very interesting question for members of the legal profession. The growing concern about the legal aspects of clinical investigation and use of human subjects in experiments is obvious. Physicians and institutions are seeking legal advice concerning these activities. What does the attorney tell his client? Is the attorney to take the extreme conservative position, and say to his client that others should do the research, that other institutions and physicians should advance the cause of medical knowledge, and that his client should play it safe? Or, is the attorney going to devise a code for his client to minimize risks of liability? Obviously, if investigators and research institutions consult their attorneys, and the attorneys give extremely conservative advice, the researchers may be in the position of choosing between curtailing their research activities greatly or acting contrary to their attorney's advice.

The lawyer called upon to give counsel on such matters should realize that the client is seeking some kind of affirmative answer; an answer that will permit him to proceed, subject to reasonable rules. Since the client is coming to the attorney before, rather than after, the conduct, the attorney must make a wholehearted effort to find a basis on which to permit his client to proceed. If the research design is considered sound by the researcher's peers and the attorney believes that the maximum effort, under the circumstances of the experiment, is being made to obtain informed consent from the research subjects, it would seem he has little basis upon which to withhold his approval in the absence of precedent.

Until such time as an action is brought which will force the court to grapple with the difficult issues raised by modern medical research, the lawyer must counsel his client without the aid of legal precedent.

This anthology, which contains some of the more important thinking on the legal, ethical, moral and philosophical aspects of clinical investigation, should be helpful to the lawyer who must advise his client in that vacuum.

*By Nathan Hershey**

RELIGION AND THE CONSTITUTION. By *Paul G. Kauper.*† Pp. 137. Louisiana State University Press, Baton Rouge, Louisiana, 1964. $3.50.

This book is based on the Edward Douglas White Lectures delivered at Louisiana State University in the spring of 1964 by one of America's foremost authorities in the field of Constitutional Law. In this book, Professor Kauper has expanded upon his earlier works on church-state relations[1] and has documented this series of lectures with the outstanding cases in this area. The book, itself, is divided into four chapters. Chapter One is entitled "Some Introductory Considerations", and the author points to today's features of the interrelationship of the civil and the religious communities. Chapter Two is labelled "Religious Liberty: Some Basic Considerations", and is concerned with developing the theme that religious liberty is the central facet in the constitutional order. Chapter Three is denominated "The First Amendment: Dilemma of Interpretation", and discusses the theories developed by the Supreme Court in interpreting the establishment limitation of the First Amendment and its relationship to the free exercise guarantee. Chapter Four is listed as "Government and Religion: Accomodation in a Pluralistic Society", and is directed to the implications of constitutional doctrine in the light of our contemporary religious pluralism, some specific problems concerning religion in public life, and the use of governmental funds to support church welfare and educational activities. In short, the last chapter, with the author's analytical emphasis on the "permissible accommodation" theory, as fathered by Mr. Justice Douglas,

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1. Kauper, *Church, State and Freedom: A Review,* 52 Mich. L. Rev. 829 (1954). His essay, "The First Ten Amendments", won the Ross Essay Prize given by the American Bar Association in 1951. His *Civil Liberties and the Constitution* was awarded the National Mass Media Certificate of Recognition by the National Conference of Christians and Jews.

represents the most significant contribution which the book makes to the highly controversial church-state relationship problem.

In his introductory chapter, Professor Kauper points out that a very substantial metamorphosis is taking place in the configuration of American religious life; namely, that the Protestant domination of the national religious life has come to an end; that there is an emergence of contemporary religious pluralism with the concomitant problems it raises of recognizing the demands of the major faiths, minority groups, and all other varieties of belief; that there is an expansion of government activity in the fields of welfare and education —activities in which the churches once operated exclusively.

In summarizing the next chapter, the author proposes two theses: (1) that the concept of religious liberty is the central concern of the constitutional order; and (2) that the constitutional provisions and court decisions make it abundantly clear that religious liberty is a broad, independent and a preferred constitutional concept.

According to the author, the most persuasive argument, that religion does not enjoy an independent status and that it should not be accorded a preferred place under the First Amendment, has been advocated by Professor Kurland of the University of Chicago Law School.[2]

The author suggests that, for the purpose of the First Amendment, an attempt to define religion should be made by the courts and it should include various elements deemed to be indispensable (p. 32).

However, the author recognizes there are permissible limitations on religious liberty and he places them into two categories: (1) those in which the religious belief becomes manifest in overt conduct which conflicts with the state policy to reasonably promote the public health, safety, morals and general welfare; and (2) those that directly abridge or restrict the free expression of ideas in the interest of public peace and security.

On the other hand, the author documents the preferred treatment in the enjoyment of certain rights, privileges and immunities that religious institutions receive. Recently, the reviewer wrote an article[3] in this related area and was groping for some examples which the author furnishes and which would have been utilized.

In the next chapter, the author discusses the interpretation of the establishment clause and its significance for governmental recogni-

2. KURLAND, RELIGION AND THE LAW, 16-18 (1962).

3. Rafalko, *The Federal Aid to Private School Controversy: A Look*, 3 Duquesne L. Rev. 211 (1965).

tion and support of religion, with particular emphasis on the protection and promotion of religious liberty. The author points out that the search for the original meaning and historical purpose underlying this language has yielded inconclusive results and in the end the Supreme Court is free to give the First Amendment language whatever meaning it chooses because it is futile to look to Jefferson and Madison for answers to contemporary problems.

The author notes three reasons for the paucity of decisions by the Supreme Court in interpreting the establishment of religion language: (1) the difficulty for any person to acquire proper standing to raise the First Amendment issue; (2) state constitutional provisions prohibiting the use of governmental funds for particular religious activities; and (3) the fact that the Supreme Court's application of the First Amendment to the states via the Fourteenth Amendment is a recent development.

At this point, the author examines and gives a brief account of six decisions in which the establishment of religion clause has played a major part: the *Everson*,[4] *McCollum*,[5] *Zorach*,[6] *McGowan*,[7] *Engel*[8] *and Schempp*[9] cases. In three of these cases, namely those involving bus transportation for public school children, Sunday closing, and released time off the school premises, the court found no violation of the establishment of religion clause. In the other three cases, violations were found in the case involving released time on school premises and in the two cases dealing with prayer and Bible-reading exercises in public schools.

The opinions in these cases lead the author to the formulation of three theories in his interpretation of the establishment of religion clause:

1. *The Strict Separation Theory.* This theory found its first expression in the opinion by Mr. Justice Black in the *Everson* case. The main concept that emerges from *Everson* is described as the principle of "no-aid", namely, that government cannot by its programs, policies or laws do anything to aid or support religion or religious activities.

2. *The Neutrality Theory.* This theory finds its expression in the opinion by Mr. Justice Clark in the *Schempp* case. After reviewing all

4. Everson v. Board of Education, 330 U.S. 1 (1947).
5. McCollum v. Board of Education, 333 U.S. 203 (1948).
6. Zorach v. Clauson, 343 U.S. 306 (1952).
7. McGowan v. Maryland, 366 U.S. 420 (1961).
8. Engel v. Vitale, 370 U.S. 421 (1962).
9. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

the cases in this area, he said what the Constitution requires is "wholesome neutrality".

3. *The Accommodation Theory.* This theory, which the author adopts, finds its expression in the *Zorach* case by Mr. Justice Douglas. The principal thrust of this theory is that in some instances government may and, in others, must grant a preferred treatment to religious liberty.

The author states that it would be a mistake to suggest that the theory of accommodation, which seems to be accepted by the majority of the court, is unrelated to the other theories that have been developed. Rather, the accommodation theory, instead of being viewed as a wholly independent theory, should be viewed as a modification of the strict separation theory and the neutrality theory—a pragmatic rather than a conceptualistic approach.

In the last chapter, the author applies his accommodation theory to the church-related institutions in our pluralistic society. The discussion proceeds on the assumption that religion is relevant to life and, therefore, to our secular, political and constitutional order.

The author examines the subject of religion in state-supported public schools and universities, as well as the social welfare and education benefits being furnished to church-related hospitals, and schools at both the primary and secondary levels. He analyzes the reasons why federal grants and subsidies might be given to all colleges and universities, including church-related colleges and universities.

The climax of the book comes when the author ventures a personal opinion as to the constitutional issue of appropriating federal funds to parochial schools and the risks inherent in the acceptance of such funds by church-related institutions. The author states:

> The resolution of the constitutional issue as it arises under the First Amendment is not foreclosed by the Supreme Court's prior decisions, and it is hazardous to predict what the court will do with this question if and when the issue is properly presented. I am inclined to think, however, that the use of federal funds to provide overall aid to parochial schools—including support of operating costs (in particular teacher's salaries), even as part of a program in support of all schools—will be declared unconstitutional as a form of aid to religion forbidden by the establishment clause (p. 112).
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> The Supreme Court has already upheld the constitutionality of using public funds to provide bus transportation for

> children attending parochial schools and to provide free secular textbooks to children attending all schools, including parochial schools. Likewise, consistent with the denial of support of the overall program which involves substantial elements of religious instruction the possibility may be open for limited assistance in financing special programs and in acquiring physical facilities and equipment related to such distinctively secular subjects as science, foreign languages, mathematics, and physical education (p. 113).

This magnum opus is both timely and challenging. The book stimulates a new and enlarged interest in an old problem shared by lawyers, churchmen and the general public. It removes many of the misconceptions, misunderstandings, and misstatements on the interrelationship that exists, or should exist, between church and government. Many will not agree with some of the things that the author has written, but this is to be expected, for he is writing in a highly emotional, controversial, and volatile area. However, it is indeed fortunate that an authority of Professor Kauper's stature has seen fit to write on this difficult subject. Professor Kauper's works are always of the highest quality, but we are truly indebted to him for his excellent research, organizational skill, clarity of style, and mostly for his legal analysis, in this particuar book. This book by design is concise—brief but complete.

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