Fordham Law Review

Volume 34 | Issue 4 Article 9

1966

Book Reviews

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Recommended Citation
Book Reviews, 34 Fordham L. Rev. 775 (1966).
Available at: https://ir.lawnet.fordham.edu/flr/vol34/iss4/9

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BOOKS REVIEWED

Southern Justice. Edited by Leon Friedman. New York: Pantheon Books. 1965. Pp. xiii, 306. $5.95.

This is an extremely effective and informative book. It is highly readable, and it does the job it was designed to do. In nineteen essays written predominantly by lawyers about what they did and what they learned as volunteers in representing civil rights activists in the South,[1] *Southern Justice* provides substantial first-hand documentation and scholarly exposition of a state of affairs which has received surface commentary in the northern press and in various periodicals, namely the massive misuse at various times and places of all aspects of the law (legislative enactment, judicial application, and executive enforcement) in reaction against efforts to achieve political, legal, and social justice for southern Negroes.

In one sense, the title of the book is somewhat misleading, for it does not purport to deal with "southern justice" as a whole. There is nothing in this book to indicate that southern justice differs significantly from justice throughout the rest of the United States in its application to members of the southern white community or to northern whites unconnected with civil rights activity. Although civil rights activities in recent years and federal civil rights legislation have probably created some added animosity toward the North and, thus, have had some negative effect upon the application of southern law to northerners, I suspect that the tradition of southern hospitality and moderation has modified the trend toward resentment, and that local hostility toward ordinary outsiders is not much greater in the South than it is throughout other predominantly rural and conservative areas of the nation. This book is not about southern justice in its general operation; it is about southern justice as it applies to a minority in the community which is economically and politically weak on the local scene but capable, nevertheless, of creating great national publicity and local turmoil through the use of peaceful, essentially harmless, and generally lawful confrontations with those representatives of authority who stand adamantly opposed to the achievement of equal rights for Negroes. (It is significant that there have been few, if any, dramatic demonstrations in communities which have set up bi-racial committees to negotiate Negro demands in good faith. It takes a George Wallace, a Ross Barnett, or a Jim Clark to make a truly spectacular confrontation.)

In fairness to the South, one must also point out that it has no monopoly on excessive and retributive reaction to demonstrations and other activities which disturb local tranquillity and call for substantial changes in the status quo. New York City, Berkeley and Syracuse have all seen examples of excessive and inhumane judicial reaction to demonstrations of various kinds. Indeed, "freedom riders" who went by bus from Syracuse, New York, to lend support to demonstrations in Selma, Alabama, received lower bails on the arrests arising out of their activities in Selma than "reverse freedom riders" from Selma received at the hands of Syracuse judges when they came north to demonstrate against alleged employment discrimination. One must point out also that the climate of public opinion in many parts of the South may be substan-

1. Most of the contributors are northern lawyers who have represented civil rights workers and Negroes in the South under the auspices of the Lawyers' Constitutional Defense Committee, now a tax-exempt subsidiary of the American Civil Liberties Union. Five of them are attorneys in the South (four practicing, one retired); two are law professors; and two were law students when their articles were written.

tially different in 1966 from what it was in 1963 and 1964 when the events described in this book occurred.

The moral of the story seems to be that one who "demonstrates" or "agitates" for social change runs a substantial risk, no matter where he is, of becoming the victim of misuse of the law in one form or another. If he has counsel available who are dedicated and tenacious enough to seek a judicial determination and to carry it far enough, he may receive a belated form of legal vindication and moral satisfaction; but, nonetheless, he will pay a high price in days spent in jail, bail-bond fees (if a local bondsman will provide bond, which he often will not in civil rights cases), court appearances, and, possibly, a certain amount of physical punishment from local law-enforcement officials and cellmates in local jails.

On the other side of the coin, the moral of the civil rights story in recent years seems to be that, unless someone pays this price, social injustice will not be dramatized; national publicity will not be created; Congress, the President, and local officials will not act; and the situation will never improve. It is sad but true that American democracy does not function to produce needed changes until some form of extremely strong pressure is brought to bear upon public officials, and that the Negro and other poor and disfranchised persons like him have no money with which to create this pressure. Therefore, they must pay the price of social and legislative change with the only politically negotiable assets they have—their bodies,[2] their homes and their churches. It is a price they and their friends have been willing to pay, and the nation is better for their efforts, even though it often grumbles, regards them as lunatic radicals, and mistreats them, and even though those who demonstrate sometimes go off the deep end into ill-considered and harmful behavior.

The people who have contributed to this book are well aware of the lessons which the history of the civil rights movement has taught. They know that demonstrations and other activities designed to change established customs and structures of political power place a heavy strain upon those who create and administer the law. They have volunteered their time and services in an attempt to minimize miscarriages of local justice and, thus, to protect the system of "southern justice" from doing irreparable injury to itself and to the reputations of those who administer it. It is unfortunate that the prevailing emotional climate prevents moderate local attorneys in the South from volunteering their services in defense of civil rights activists and, thus, necessitates the "invasion" of that area by northern attorneys concerned with the vacuum of justice which is created when lawyers are not available to represent unpopular clients.

Misapplication of law against civil rights activists by some officers and judges is inevitable—some of it intentional and some of it due to mere emotionalism and honest error—for all men are human and subject to the consequences of the circumstances into which they were born and the environment in which they grew to adulthood. But this does not mean that abuse of constitutional rights must be condoned or ignored. It means precisely the opposite: If the activities of civil rights workers create a danger of irrational and retributive official acts against them, those judges and elected officials who have the power to correct such abuses must be especially watchful and quick to correct them, for, if such abuses of individual rights are not quickly remedied, those rights become meaningless for practical purposes. A right that cannot be safely exercised is not worth very much. This book demonstrates, through abundant graphic examples, the fact that the Bill of Rights has not really

2. See Mississippi Black Paper (1965), published by Random House, in which there appear 57 affidavits describing incidents of physical abuse of civil rights workers by state officials.

existed for Negroes in many parts of this country since the ephemeral rights established during Reconstruction were finally obliterated by an angry white citizenry around the turn of the century. And the Bill of Rights never will exist for this huge segment of our population until the lessons contained in it are accepted in general by a substantial majority of Americans, regardless of geography, and somehow taught specifically to policemen, sheriffs, state troopers, justices of the peace, and municipal court judges all over America. (Imagine, for a moment, what the results might be if a simple test on the nature and limits of personal constitutional rights were to be devised by the Supreme Court and administered to all local law-enforcement officials and lower court judges throughout the country. The results might be appalling, for individual background and views vary widely, and the fundamentals of civil rights and civil liberties are not necessarily a matter of common knowledge. Yet, these are the people who determine the nature, indeed the existence, of constitutional rights in the real world.)

It is staggering even to consider the task of teaching the rudiments of fundamental constitutional rights to the thousands of officials who administer justice at the grass roots level throughout America. Yet, the assumption that such rights are generally known and applied is, to say the least, rather näive. Ask any experienced practitioner of criminal law what his chances are of prevailing in the trial courts of his state with a constitutional argument, no matter how unassailable it may prove to be on appeal. If you load your question by stipulating that the defendant is a civil rights activist who was arrested while quietly and peacefully picketing on a public sidewalk against alleged racial discrimination and that the unassailable argument has to do with the first amendment, you will get an even more depressing, but accurate, assessment of what the Constitution really means at the local trial level. Even if your case should happen to be "on all fours" with a recent Supreme Court ruling, victory at trial could not confidently be predicted. New York is supposed to be an extremely "liberal" state, and, in some respects, it is. But here, too, civil rights workers tend to get short shrift before many trial judges.

The most dramatic and practical difference between the courts of New York and those of Mississippi or Alabama is to be found in the disposition of appeals. In New York, sound constitutional arguments tend to be accepted by the lower appellate courts; in the South they apparently have a tendency, where civil rights activity is involved, to plod unheeded (and often delayed) through the state appellate processes to the United States Supreme Court. When this happens, the ordinary citizen does not have constitutional rights; he has a right, whenever he does something unpopular but constitutionally protected, to participate, at great expense of time, money, and legal effort, in the ponderous operation of the judicial process. One county official in Mississippi, quoted in this book, put the matter honestly and bluntly to a group of NAACP officials: "In Neshoba County you haven't got any civil rights."[3] With official attitudes like this, it is no wonder that democracy does not function properly in many parts of this country.

This book is written for the general public, and it should prove to be both interesting and a bit shocking to most readers. To the lawyer who has had no previous introduction to these tales of bizarre distortion of our legal system, the book will be even more interesting and disturbing, for it is written by lawyers and designed primarily to dramatize an alarming failure of justice in American law and, consequently, the need to correct this unfortunate situation. But its nineteen essays should be read one or two at a time, by lawyers and laymen alike. Although each essay

3. Burns, The Federal Government and Civil Rights in Southern Justice 241 (Friedman ed. 1965).

focuses upon a different aspect of southern justice as it applies to civil rights workers and Negroes, the point of view is roughly uniform throughout the nineteen articles, and each of them is replete with examples of the particular abuse of law with which it is concerned. The cumulative effect is a bit stupefying if one tries to take in too much of this book at once, for these essays really present a single, monumental social and legal problem from nineteen different angles.

The problem arises because powerful and violent emotional reactions are inevitably generated by pervasive social and political change. When circumstances begin to produce a shift of political, economic, and social power from one group to another, the change is always fought tooth and nail by some of those who stand to lose by it. Those who wish to maintain their power tend to see even a small loss of established control as an unmitigated disaster. Visions of horrible consequences are conjured up and believed by persons who would react differently if the situation did not involve them personally. Reason departs. Fear and anger reign. Brutal acts are done. And the orderly functioning of society is endangered.

In other countries, there are riots involving millions of people or murderous revolutions whenever social change takes place and the time comes for it to be recognized politically. In America, we have democratic institutions designed to control public emotion by channeling its energies into orderly and constructive paths. One such institution is our judicial system of federal and state courts.

The movement of the American Negro toward equal rights under law and a full voice in government is by no means completed, but its success is inevitable. The social tension created by this movement is placing a terrible strain upon our legal system and producing some serious malfunctions and distortions in certain parts of it. This book illustrates with graphic detail how policemen, legislators, judges, jurors, and elected officials have at times been carried away by the emotions aroused by the Negro civil rights movement. It shows how these emotions have made victims of both white officials (who, in some cases, have lost their judgment and their sense of humanity) and the southern Negro (who has been mistreated too long and too often). *Southern Justice* and other books like it are a good deal more significant than the average reader may realize, for they provide documentation of the breakdown of justice which has taken place at the local level in some parts of America. As such documentation multiplies, it will be increasingly difficult for such institutions as the organized bar and the Supreme Court to maintain the fiction that our legal system provides effective and meaningful protection for the fundamental rights of all Americans. Much of the time it simply does not. When we finally admit that fact, we will be in a position, at long last, to do something about it.

Mr. Leon Friedman and the eighteen other contributors to this book[4] have done the law a substantial service. They should be very proud of the work they have produced. It should have a substantial impact upon the future of American law.

I would like very much to see a sequel to this book prepared by lawyers who have had experience with the handling of civil rights cases in the North. Such a book would demonstrate, I think, that we northern lawyers have no secure basis for self-righteous criticism of "southern justice." We have a nationwide problem of insuring justice for unpopular "agitators" in a time of serious social and political change. This problem should be faced and resolved by all members of the bench and

4. Professor Mark De Wolf Howe; Paul G. Chevigny; James B. Wilson; Clifford J. Durr; Peter R. Teachout; Jeremiah H. Gutman; Marvin Braiterman; Jesse H. Brenner; Robert P. Schulman; Robert F. Collins; Nils R. Douglas and Lolis E. Elie (co-authors); Jack Oppenheim; Michael Meltsner; Charles Morgan, Jr.; Gerald E. Stern; Haywood Burns; Professor Louis Lusky.

bar in a spirit of common dedication to the fundamental principles of American justice.

BRADLEY R. BREWER*

Contraception: A History of Its Treatment by the Catholic Theologians and Canonists. By John T. Noonan, Jr. Cambridge: Belknap Press (Harvard). 1965. Pp. xii, 561. $7.95.

Birth control has become a major legal and political issue during the 1960's. The validity of existing state legislation regarding the dissemination of contraceptive materials has been challenged; and, in a direct counterattack on previous governmental policy, state and federal grants are being sought for birth control clinics. What was once regarded as criminal is now being championed as nationally essential. From a larger point of view, this controversy over birth control is only one aspect of a far-ranging dispute over the law and politics of sex. The entire Anglo-American legal treatment of sex and family life has been challenged repeatedly during the last twenty years. Whether it be fornication, adultery, abortion, homosexuality, or divorce, the practices hitherto condemned by our law have been reexamined, reevaluated, and—at least by some—re-championed.

Without question, two of the greatest factors in this revision of our attitudes towards sex and family life have been the greater opportunities for sexual indulgence and the greater control we enjoy over the consequences of our acts. The more knowledge and the more leisure we have, the more pressing become the questions of personal morality. For many, of course, these decisions are not left simply to the individual conscience—there are religious commitments, and the teachings of the various churches carry enormous weight with their believers. The prominence of the Catholic Church in the legal and political fights over sex and family life is a matter of daily record. If the Catholic position were simple and uncontroverted, we might, perhaps, have reached some kind of legal equilibrium in the United States; but, as it is, the Catholic position is officially under a process of restudy by the Pope himself. It is for these reasons that the times could not have been more propitious for the appearance of a book like *Contraception.* It is a full-dress review of the factors that have been active in the formulation of Catholic doctrine on birth control from the beginnings of Christianity until the present day.

Contraception is a study in theological history. As such, it demanded special skills of its author. A familiarity with the Fathers of the Church, with the principal scholastic authors, and with the leading post-Tridentine theologians was indispensable. Fortunately, Professor Noonan had already demonstrated his competence in his earlier work, *The Scholastic Analysis of Usury.* It would be risky to predict which area of intellectual history will occupy Mr. Noonan next, but *Usury* and *Contraception* surely establish him as one of the masters of the resources of Catholic thought.

Any intellectual history has its periods of ebb and flow. Noonan picks 450, 1450, and 1750 as the dividing lines for the major developments in the Catholic doctrine on contraception. In his introduction, he tells us that the "key terms in my history are tension, reaction, option, and development. All of these metaphors imply that a human process is going on, that what is happening is not the unilateral action of God making His Will increasingly evident."[1] Noonan never ceases to emphasize the *context* of the Church's teachings and the alternatives which were either rejected or ignored.

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1. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 5 (1965).

Whether he is explaining Augustine or Abelard, he is never content to present the doctrine *in vacuo*. This is what gives both solidity to his work as a critic and true dimension to the positions which the Church has adopted at different moments in history.

That the Church has changed her positions from time to time will be abundantly clear to anyone who studies the carefully documented pages of *Contraception*. There has, of course, been a fundamental unity to the doctrine: marriage and sex are indeed for the procreation and education of children. But are they *only* for procreation and education? Professor Noonan lists four areas in which there has been a demonstrable and significant change of opinion by the Church over the centuries:

"That intercourse must be only for a procreative purpose, that intercourse in menstruation is mortal sin, that intercourse in pregnancy is forbidden, that intercourse has a natural position—all these were once common opinions of the theologians and are so no more."[2]

In addition to these changes in sexual practice, there has been a development within the Church on the doctrine of conjugal love. Noonan explains this very well in the last chapter of *Contraception*, but he is even clearer in a recent article in *Commonweal*.[3] Vatican II expressly denied that it intended to propose any concrete solutions directly to the problems connected with contraception, but, says Noonan, it has set up "the main pillars of any solution: procreation and education are indissolubly linked goods; conjugal love is in itself a legitimate and laudable purpose of intercourse; embryonic life is to be guarded; the dignity of the person is to provide norms; there is an element of divine law in previous teaching by the Church on contraception, but not all existing law on contraception is immutable."[4]

The slow development of this conciliar emphasis on the mutual love of spouses and the legitimacy of sexual activity as an expression of conjugal love has led some commentators to reflect on the role which the celibacy of the clergy has played in the Church's doctrine on contraception. Noonan himself is quite aware of this influence, and also rightly insists that the Church's preference of virginity over matrimony was an important limiting factor in her praise of sexuality. He is also quite aware that, if the clergy had not been so celibate, it probably would not have taken them nineteen centuries to realize what sex could mean in human fulfillment to a man and wife.

The present position of the Catholic Church on the legal and political issues associated with contraception is derivative from the theological positions she has taken in the past. Those theological positions are currently under the most serious type of reassessment by a commission established by Pope Paul VI. It is possible that, even as this issue reaches the reader, those positions will have been reaffirmed substantially without change, or that they will have been modified in accord with the spirit of Vatican II and the main tendencies of twentieth century Catholic thought. Whichever way the decision goes under the guidance of the Spirit, it will have been the contribution of Professor Noonan to give us light and hope for the future in terms of the insights and intricacies of the past.

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2. Id. at 532.
3. Noonan, Contraception and the Council, 83 Commonweal 657 (1966).
4. Id. at 662.

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