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Book Reviews

BOOKS REVIEWED

Justice Denied: The Case for Reform of the Courts. By Leonard Downie, Jr. New York: Praeger Publishers, Inc. 1971. Pp. 224. $6.95.

"The first thing we do, let's kill all the lawyers."[1] While obviously not embracing the platform advocated by Shakespeare's rebels, Leonard Downie, in *Justice Denied*, is similarly vitriolic toward the legal profession. Even before launching the reader into the ensuing panoptic excursion through the faltering legal system, Downie asserts that probably a lawyer could not have written, and will not find palatable, his critical exposé.[2] Downie heralds his own freedom from the "pressures and narrow traditions of the legal profession" and contrasts the bondage of the lawyer who is taught, starting in law school, to preserve this "best of all possible systems" against attack from those seeking drastic change.[3] Throughout the following excursion, this disillusionment with the legal profession periodically surfaces. Chapter two, for example, depicts a large segment of the criminal defense bar as egregiously incompetent and frequently unethical. This familiar group carries no briefcases, for its repertoire consists solely of plea bargaining. Downie contends that even the more professional defense bar forms a working partnership with the system's other participants to promote efficiency rather than dispense justice.

Chapter four continues the theme. While extolling Legal Aid lawyers—the civil law counterparts to public defenders—for "giving tirelessly of their meagerly remunerated time,"[4] Downie nevertheless castigates them for allegedly regarding indigent clients as "charity cases, with no particular right to free legal help."[5] Downie also criticizes the reluctance to seek meaningful legal confrontation with government or business to alter drastically the power equation between rich and poor. In chapter five, he advocates no fault automobile accident insurance with its underlying economic and mathematical calculations, but asks rhetorically whether lawyers would "find a way to push their way in and knock the plan's economic calculations off kilter."[6] As far as the legal problems of the middle class are concerned, Downie in the same chapter recommends eliminating lawyers in several situations: non-contested divorces, simple probate matters, and home purchasing agreements should be feasible without legal assistance. Finally, chapter seven indicts the legal bureaucracy for self-indulgence and antagonism

1. W. Shakespeare, King Henry VI, Pt. II, Act IV, Scene II.

2. L. Downie, Justice Denied: The Case for Reform of the Courts 7-8 (1971) [hereinafter cited as Downie]. Downie is a journalist.

3. Id. at 7.

4. Id. at 99.

5. Id. at 98. Downie, however, treats more favorably the federally funded Legal Services project of the Office of Economic Opportunity. See id. at 99-100.

6. Id. at 128.

toward criticism or interference and unearths the roots of the problem in the nation's law schools.[7]

Given this recurrent theme, critical review from the profession may seem suspect. Syllogistically building on Downie's premise, the book can be immunized from criticism by legal practitioners and academicians: (1) Those in the profession will disapprove.[8] (2) The reviewer belongs to the profession. (3) *Ergo*, the review will be carping. The invalidity, of course, inheres in the premise. Today, many in the profession, often stimulated and encouraged by academe, urgently strive both to illuminate and remedy the defects in the judicial system. Downie contradictorily concedes this when he credits the profession with the reforms he suggests.[9] Thus, critical review of the book by the profession need not be suspect.

Although Downie properly and skillfully portrays a judicial crisis that merits immediate and sedulous scrutiny, he must be faulted for failing to contribute significantly to solutions. First, he does not always perceive the complex legal and practical dimensions of the problems he poses; second, he attempts too much. With success he panoramically canvasses the judicial system, but in one short book he does not, and probably could not, offer even in non-legalistic jargon the depth required to intelligently suggest reforms. A complete book would be necessary to discuss thoroughly almost each of his uncovered ills and concomitant remedies.[10]

This contrast between good graphic description but poor issue analysis is evident throughout the book. Downie first depicts the criminal courts as the most cynical places in the world where defendants are processed like sausages in a factory rather than treated as individual human beings. Primarily, Downie vents his anger at plea bargaining, a system by which at least 90 percent of all defendants plead guilty.[11] Whether plea bargaining per se or instead the observed lack of due process in plea bargaining should merit the reader's wrath is somewhat unclear. In places, however, Downie seems clearly to be aiming at the concept itself. For example, he criticizes the American Bar Association for, on the one hand, advocating reduced sentences for some defendants who plead guilty while, on the other hand, disfavoring heavier than justified sentences

7. Id. at 195-99. Here the author echoes his introductory remarks. See note 2 supra.

8. Id. at 7-8.

9. Id. at 211.

10. For example, the law professors who authored the recent no fault automobile insurance proposals analyze the issue academically in one lengthy book. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim (1965). In a second, but somewhat less lengthy work, they explain the concept to laymen. R. Keeton & J. O'Connell, After Cars Crash: The Need for Legal and Insurance Reform (1967). Downie in three pages discusses, and urges the reader to assume the merits of the proposal. Downie 126-28.

11. Downie 23. The figure is Downie's. The precise figure varies among jurisdictions, depends on whether misdemeanors are included, and eludes precise calculation. Estimates range from 60-90%. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); 1 L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 9 (1965); President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: The Courts 9 (1967).

when " 'the defendant has chosen to require the prosecution to prove his guilt at trial.' "[12] To Downie, this legalistic newspeak[13] succeeds, without constitutional amendment, in abrogating the cherished presumption of innocence. Demonstrating acute perception, he notes that because most defendants plead guilty, the Warren Court's controversial search and seizure and confession rulings remain empty appellate court rhetoric. Too often, this results from sham representation by lawyers, a reality that appellate courts, including the Supreme Court, myopically fail to acknowledge.[14]

This portrayal of injustice accompanies an attack on the inordinate delays in the judicial system. Waiting for cases ultimately to be tried, defendants stagnate in jail, witnesses return repeatedly to court—sometimes losing interest and not returning at all—and police officers either spend expensive overtime hours or take time from their regularly assigned duties. Downie fleetingly acknowledges that drastic population growth, accelerating urbanization leading to increased crime and new criminal procedure rulings expanding the rights of criminal defendants account partially for the delays. But Downie unrealistically insists that the real cause is judicial inefficiency and mismanagement. Hence, he argues that rather than adopting constitutional shortcuts, like plea bargaining, we should concentrate on twentieth century management techniques.[15] Here Downie fails to perceive the actual dimensions of the problem. Given both the substantive reforms he seeks and computerized, well-greased machinery, the system would still most probably grind to a halt without plea bargaining and pre-trial compromises in civil cases. Our courts, both trial and appellate, are simply inundated with cases,[16] so much so that some now seriously urge not only a moratorium on granting criminal defendants new procedural rights but also caution in enacting new

12. Downie 51. Here Downie criticizes the recommendations of ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty § 1.8(b) (1967).

13. Downie's assault on lawyers might win sympathy here. Perhaps only a legal mind can feign understanding of the Association's assertion that those who go to trial under their scheme are not, in fact, punished for this. Characteristic, too, is the Association's euphemistic term "plea discussions" used to replace "plea bargaining," which would conjure up unacceptable practices in the reader's mind. ABA Standards, supra note 12, at 3.

14. The provision for free lawyers in Gideon v. Wainwright, 372 U.S. 335 (1963), is watered down by the obstinate refusal of appellate courts to examine counsel's representation for effectiveness. See, especially, Chambers v. Maroney, 399 U.S. 42 (1970) and McMann v. Richardson, 397 U.S. 759 (1970).

15. Downie 145-47.

16. In 1971 there were 41,290 criminal cases filed just in the federal courts, as opposed to 28,137 in 1960. Although 37,715 cases were disposed of, the number of pending cases increased to 24,485. Only 7,456 had full trials. Admin. Office of the United States Courts, Ann. Report of the Director 144, 192 (1971). The picture for federal appellate courts is just as bleak. In 1971, 14,500 appeals were filed in the eleven circuits, while 4,500 cases were docketed before the nine member Supreme Court. Address by Chief Justice Warren E. Berger, Report on Problems of the Judiciary, Aug. 14, 1972, reprinted at 93 S. Ct. 3, 4 (1972). See also Jones v. Superintendent, 465 F.2d 1091 (4th Cir. 1972), justifying a summary screening procedure because of time limitations.

substantive civil law without first considering the docket impact on the judicial system.[17]

Downie not only fails adequately to inform the reader of the practicalities concerning plea bargaining, but also completely avoids the issue's legal merits. He implies that plea bargaining is inconsistent with the Constitution, a view not universally shared by those who have researched the question. A society is often judged by the way it proceeds against those charged with crime, but Downie offers the reader no basis for intelligently making the important value judgments involved. Downie's views may ultimately be right; the reader, however, is entitled to more than Downie's unsupported opinion.

In other chapters, Downie focuses on the rest of the judicial spectrum. Like others, he seeks the decriminalization of victimless crimes: crimes relating to gambling, narcotics, sex, and alcohol. Again, however, he fails to present a basis for intelligent judgment. At least with respect to narcotics, especially heroin, strong counterarguments can be raised. Nevertheless, perhaps Downie's realistic portrait of the defendants involved and the courts of horror through which they are processed will awaken awareness of the present system's injustice. Downie also graphically depicts the plight of the poor against wealthier and more powerful merchants, and identifies the holder in due course doctrine as the latter's primary weapon of exploitation.[18] Typically, however, he fails to inform the reader of the commercial and economic arguments that can be marshaled to defend the doctrine.

Lest the book be taken only as a plea for the poor, a succeeding chapter describes some of the myriad ways in which the bureaucratic legal system likewise exploits the middle class: traffic court, a system "devoid of legal purpose and of justice;"[19] personal injury litigation, a system fraught with delay, perjury and excessively high attorney's fees; divorce; probate; and consumer contracts. Finally, Downie decries the lack of judicial temperament he too often observed in the courtroom. Certainly here the profession has been unforgivably reluctant in first admitting, and then denouncing, the contemptible behavior exhibited by too many judges. Downie renders a service by venturing where lawyers and scholars have feared to tread.

Downie's proposal for legal education reflects the same shallowness of analysis evident whenever he moves from mere depiction to advocating reform. He recommends a curriculum emphasizing trial skills and "the conditions that actually exist in trial courts."[20] Not until his first accident case, Downie argues, does a lawyer realize that knowledge of the law is less important than trial and negotiation techniques; likewise, knowledge in bargaining for reduced sentences is more valuable to the criminal defense lawyer than appellate case law.[21]

17. See Address by Chief Justice Burger, supra note 16, at 5 advocating the latter.

18. Downie 77-79.

19. Id. at 118.

20. Id. at 195.

21. This criticism cannot be sloughed off cavalierly. For example, in a basic criminal procedure course, this reviewer recently completed 45 hours emphasizing the defendant's

Downie ignores, however, the intense scholarly debate on this issue that has raged over the decades. Arguably, for example, with extensive training in the nuances of constitutional doctrine, novices may pursue every possible legal defense, rather than improperly bargain. Downie is not necessarily wrong; rather, the point is that he summarily assumes in a few pages what others have not resolved in books. The reader finds no basis for independent judgment.

In short, while accurately depicting the many injustices in the legal system, *Justice Denied* cannot mobilize support for change. Limited by his choice to canvass the entire spectrum, Downie does not, and could not, prepare his reader for intelligent choice. In fact, the long range effects of his approach can be counterproductive. The emotional portrayal of facts beckoning the reader to seize upon facile solutions, not thoroughly reasoned, has already become the too familiar technique of those seeking repression rather than innovative reform.[22] The public critically needs nonlegalistic commentary, but to make intelligent choices in seeking change, it also needs fair and complete treatment of the complex issues involved and solutions proposed.

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Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect. By Millard L. Midonick. New York: Practicing Law Institute. 1972. Pp. xiii, 209. $15.00.

Measured by the volume of legal literature which it has generated, *In re Gault*[1] is one of the most seminal opinions ever written by the United States Supreme Court. *Gault* is now five years old, and it continues to attract authors writing generally about the significance of *Gault* vis-à-vis juvenile justice;[2] or writing specifically about the significance of Gault vis-à-vis juvenile courts.[3] Nevertheless, most practicing lawyers are still looking for some kind of handy, easy-to-

fourth, fifth and sixth amendment rights with little discussion of guilty pleas. At the least, the student, like his layman counterpart, might come away feeling that defendants now do enjoy every advantage. Reality, of course, is that defendants fare little better now than they did prior to the so-called revolution in criminal justice.

22. Thus the new Supreme Court, chosen by similar appeals to public emotionalism, has already started to erode constitutional rights so recently protected. See Kirby v. Illinois, 406 U.S. 682 (1972); Harris v. New York, 401 U.S. 222 (1971). See also Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198 (1971).

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1. 387 U.S. 1 (1967).

2. E.g., Popkin, Lippert & Keiter, Another Look at the Role of Due Process in Juvenile Court, 6 Fam. L.Q. 233 (1972).

3. E.g., E. Lemert, Social Action and Legal Change; Revolution Within the Juvenile Court 220-22 (1970).

read, desk manual-type volume that will enable them to do a creditable job of representing a child in a delinquency proceeding. Ever faithful to its mission, the Practising Law Institute has come to the rescue with the publication of Judge Millard Midonick's book: *Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect.*

Unfortunately, Judge Midonick and PLI may have obscured the ultimate worth of this book by selecting such a wordy and pretentious title. In fact, the book does not deal with Children *qua* Children; it generally ignores Parents; it simply assumes the existence of Courts; it takes Delinquency as a given; and it merely peeks at Ungovernability and Neglect. What, then, makes this book such a worthy contribution? The answer is, quite simply, that this book is just what the practicing lawyer has been looking for—a handy, easy-to-read, desk manual-type volume that takes the mystery out of juvenile delinquency proceedings.

Even the format is a practical one. Topics are arranged in the same sequence that a case normally takes—from jurisdiction and investigation to trial and sentencing (Judge Midonick refers to sentencing as "disposition," which is the correct euphemism for sentencing in a delinquency proceeding). The book points out the similarities, and the differences, between adult criminal justice and juvenile delinquency justice as they exist at every stage of the proceedings. Consequently, each section of the book demonstrates the degree to which criminal law and procedure have spilled over into the law and procedure of juvenile delinquency. Recent developments in criminal law and procedure are discussed in terms of the parallel developments in juvenile justice. Therefore, any lawyer who is at least moderately familiar with criminal law can learn quickly from this book.

Judge Midonick does not stop to question the validity of maintaining two similar but distinct legal sanctioning systems—one for adults and one for juveniles. Instead, he concentrates on the parallels between the two systems. His text is arranged in short sections, each containing a concise discussion of a specific issue. With a few exceptions, he makes no attempt to belabor any particular issue or to pontificate at any point—he simply tells it like it is. Significant footnotes are provided in each section thus enabling a reader to pursue any particular subject at length, if he cares to do so. Perhaps the book should be faulted in that the footnotes overemphasize the law of New York, the jurisdiction in which Judge Midonick practices. For example, the book contains a two-page discussion of something called "Ungovernability,"[4] a concept which might fill a gap in the jurisdiction of the New York Family Court. Because of some peculiar language in the New York statutes, the Family Court lacks jurisdiction to deal with minor kinds of offensive juvenile conduct. That matter obviously concerns Judge Midonick, and it may concern New York lawyers, but one might suspect that the rest of the nation will be less fascinated with it. On the other hand, all of us are

4. M. Midonick, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect 9-11 (1972) [hereinafter cited as Children, Parents and the Courts].

concerned about how delinquency should be defined legally.[5] Judge Midonick treats that issue in three sentences, the substance of which is that the reader should refer to his local statutes.[6]

A major fault with the book is its failure to discuss fully the role a lawyer plays in juvenile delinquency proceedings. Juvenile delinquency proceedings present unique dilemmas particularly for a lawyer whose prior experience is limited to more traditional courtroom settings. Lawyers feel secure in their role as advocates when they play out that role within the adversary system of justice. But juvenile courts are not patterned on the adversary system of justice; instead, they reflect the notion of *parens patriae*. Who does the lawyer represent in such a setting—the child, the parent of the child, or both?[7] A juvenile delinquency proceeding is designed to "do what is best" for the child, rather than to "punish" the child, so how does a lawyer "win" his case? Does he "get the child off" or does he tacitly submit the child to the jurisdiction of the court in order to obtain "what is best for the child"?[8] It seems reasonable to expect some suggestions from Judge Midonick as to how a lawyer should go about solving those dilemmas. Indeed, Judge Midonick appreciates the problem, and he discusses it in a section entitled "Interrelation of Court and Counsel."[9] However, the Judge offers no suggestions; nor does he explore any of the alternatives. He merely leaves us with his opinion that "from personal observation it is evident that the gulf between the juvenile and even the most dedicated judge has been accented by the presence of counsel."[10]

Fortunately, the book treats other issues in juvenile justice in much greater detail and with much more insight. In fact, several sections are extremely innovative. For instance, Judge Midonick's discussion of the burgeoning notion of right to treatment,[11] and its application to the juvenile justice system, is clearly at the forefront of current legal thought.[12]

Child abuse is another subject that the Judge discusses with special clarity and insight.[13] There are few reported opinions in this area of the law. Nevertheless, some delicate legal issues are involved, such as the balance between the parents' right to privacy on the one hand, and the state's right to investigate and

5. See Comment, "Delinquent Child": A Legal Term Without Meaning, 21 Baylor L. Rev. 352 (1969).

6. Children, Parents and the Courts 9.

7. See Ferster, Courtless & Snethen, The Juvenile Justice System: In Search of the Role of Counsel, 39 Fordham L. Rev. 375, 384-91, 398-401 (1971).

8. See McMillian & McMurtry, The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?, 14 St. Louis U.L.J. 561 (1970).

9. Children, Parents and the Courts 171-73.

10. Id. at 173.

11. Id. at 18-26.

12. See generally Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960); Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

13. Children, Parents and the Courts 64-72.

police child abuse on the other hand.[14] The Judge approaches that particular problem by drawing analogies to *Camara v. Municipal Court*[15] and *Wyman v. James*.[16] In *Camara* the United States Supreme Court held that the reasonableness of a search can only be determined by balancing the need to search against the character of invasion which that search entails.[17] In *Wyman* the Supreme Court held that requiring welfare recipients to permit home visits by case workers was reasonable.[18] These cases, among others, lead Judge Midonick to the conclusion that case workers investigating incidents of child abuse should have the right to make uninvited entries into a home, at least in those cases where the child abuse will be dealt with in a family court with no criminal prosecution involved.

Juvenile delinquency proceedings have always been characterized as civil. However, *Gault* made it clear that the mere label, "civil," cannot be used to deny basic constitutional guarantees to a person whose liberty is being taken by the state.[19] Therefore, *Gault* left in its wake the troublesome issue of when to apply criminal standards and when to apply civil standards in a juvenile delinquency proceeding.[20] Judge Midonick's book contains some intriguing comparisons between rules of criminal proceedings and rules of civil proceedings. His analysis of criminal rules and civil rules at the pretrial discovery stage exemplifies a balanced and thoughtful approach to the inherent tension between the two systems.[21] The Judge also raises some interesting equal protection questions, viz., since an adult can secure his release on bail, even though there is a likelihood that he will abscond, how can a juvenile in similar circumstances be detained without bail?[22] And, if an adult has a statutory right to a preliminary hearing, should a juvenile have a corresponding right?[23]

The law of juvenile delinquency is developing so rapidly that this book serves, at best, only as a benchmark along the way. Nevertheless, it is a valuable contribution, especially for the busy practicing lawyer. Although the treatment of the subject matter is often perfunctory, all of the stages of a juvenile proceeding

14. See State v. Hunt, 2 Ariz. App. 6, 12, 406 P.2d 208, 214 (1965), aff'd, 8 Ariz. App. 514, 447 P.2d 896 (1968) (the court suggested that under the applicable statute a peace officer with reasonable cause had not only the right but also the duty to enter premises, investigate, and take the child into custody, if necessary, with or without a search warrant).

15. 387 U.S. 523 (1967).

16. 400 U.S. 309 (1971).

17. 387 U.S. at 536-37.

18. 400 U.S. at 326.

19. 387 U.S. at 49.

20. Compare In re Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt, a standard required by the due process clause in criminal trials, is also required during the adjudicatory stage of a juvenile delinquency proceeding) with McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (trial by jury, a right required by the due process clause in criminal trials, is not required during the adjudicatory stage of a juvenile delinquency proceeding).

21. Children, Parents and the Courts 83-87.

22. Id. at 78.

23. Id. at 80.

are dealt with. More important, perhaps, is the fact that the book presents the law and procedure in a way that emphasizes those aspects unique to juvenile courts. In addition, the author has included some very thought-provoking material that could be used as the basis for new and original approaches to some of the issues in a juvenile delinquency case.

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