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January 1963

Review of Society and the Law, by F. James Davis, Henry H. Foster, E. Eugene Davis and C. Ray Jeffery

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Recommended Citation

Sanford N. Katz. "Review of Society and the Law, by F. James Davis, Henry H. Foster, E. Eugene Davis and C. Ray Jeffery." *Indiana Law Journal* 38, (1963): 310-316.

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SOCIETY AND THE LAW. By F. James Davis, Henry H. Foster, Jr., C. Ray Jeffery, and E. Eugene Davis. New York: The Free Press of Glencoe. 1962. Pp. vi, 488. \$6.95.

Two sociologists, a law professor, and a practicing attorney¹ have collaborated to write a book "to persuade the student of sociology that law is relevant to an understanding of society and the student of law that it is always pertinent to look at the social purposes and consequences of a legal rule."² The authors hoped that their work would be adopted as a text in a pre-legal course, or as a law school course, along with being useful to social scientists.

The book is divided into three sections: law and social organization, law and social change, and lawyers as a professional group. Each author has written a chapter in each section either alone, in collaboration with, or assisted by, one or two of the others.

In the first section, law and social organization, Professor Davis gives a survey of the history of the sociological approach to the study of law and notes the contributions made by American and European legal scholars. He is impressed with the legal realists, especially Llewellyn, and is careful to point out that legal realism is not a "school of thought."

15. See Hewitt, *The Principle Factors Affecting Oil Marketing, Now and Tomorrow*, NATIONAL PETROLEUM NEWS, (Dec., 1959).

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1. F. James Davis is Head of the Department of Sociology at Hamline University; C. Ray Jeffery is Associate Professor of Sociology at Arizona State University; Henry H. Foster is Professor of Law at New York University School of Law; E. Eugene Davis is a practicing attorney in Des Moines, Iowa.

2. P. 396.

Llewellyn would have liked this as he abhorred labelling the realists.³ To him legal realism was a way of looking at things. It was a methodology.⁴

In his chapter on law as a type of social control, Professor Davis tells us that law is one means of accomplishing the process of social control. He enlarges on what is sometimes regarded as the traditional definition of law—rules interpreted and enforceable by the courts of a political community. Included in Davis' definition are the agencies and procedures by which the rules are created, applied and enforced. "Law," he says, "is a formal social control because it utilizes explicit rules of conduct, planned sanctions and designated specialists."⁵

In the section about lawyers as a professional group, Professor Jeffery sketches the history of the profession in the United States and in England and the status of the profession in this country and abroad. He presents statistics on the number of lawyers in the United States, informs us how and where they practice, what they earn and the various roles they are asked to play in our society.

In the chapter on legal education, Professor Foster recreates the controversy over the adoption of the case method in law teaching. He relates what Harvard, Yale, Columbia, Chicago and Michigan have done and are doing to present a less traditional program for the study of law.

The section on law and social change is the most provocative part of the book. It begins with Professors Davis' and Foster's description of the judicial process, the meaning of the adversary system and a discussion of legal reasoning. Davis describes legal structures in the United States, discusses the controversy over the value of the jury system, the problems of court congestion and judicial selection and tenure.

In the chapter on public law and social change, Professor Foster gives an account of the segregation problem in the context of law and social change. He shows how law and other institutions in our society are involved and must be utilized to implement the Supreme Court's decision in the "School Segregation Cases."⁶ "In the final analysis," writes Foster, "law with its coercive sanction and its institutional limitations cannot by itself eliminate discrimination in areas where there is unity of opposition rather than a substantial division of opinion and a recognition of values other than white supremacy."⁷ Legal procedures are not in themselves always the sole avenue to take in resolving this

3. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233 (1931).

4. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 509 (1960).

5. P. 60.

6. 347 U.S. 483 (1954).

7. P. 189.

problem. "Legal procedure lends itself to dilatory tactics, is costly, and, due to public trials, may occasion recrimination. . . . Damage suits may be expensive, and again the jury may be unsympathetic to a Negro plaintiff."⁸ In contrast, administrative implementation of civil rights offers a better prospect for effective legal action by eliminating many of the cumbersome procedures of a court trial. An appeal to the courts may be taken from an agency decision, thus preserving constitutional protections. Professor Foster realizes that both administrative and court decisions might be defied. Nevertheless, he cautions against the use of troops or marshals to enforce the law because he feels it tends to increase hostility and resentment. While one can appreciate this caveat, completely convincing alternatives to the sanction of force in support of law are not offered.

Professor Foster's reliance is on social movement to help implement court decisions. He wisely calls for a continuation of the really significant "Crusade" that we are seeing in our time—that of Dr. Martin Luther King and organizations like CORE—in effectuating the complete breakdown of the old segregated order. In one of the concluding paragraphs to this chapter, Foster writes:

It may not be an exaggeration to say that desegregation is the most important and difficult social experiment ever undertaken by our government, that our democratic society will be imperiled if it fails, and that our future as a nation and a world power depends upon its successful conclusion. For the solution of the myriad problems incident to this social change, lawyers and social scientists will be needed to combine their skills and insights. Never before has there been such an opportunity to study, test, and apply the principles and knowledge of sociology and psychology, and never have law-trained men had such an urgent need for research and help from other disciplines.⁹

Here is one place where the noble objectives of the book become meaningful and useful.

There is much about which to argue in the chapter on criminal justice and social change. Professor Jeffery is concerned with the emphasis placed on psychiatry and the social services in the criminal law field. He states, "The advocates of the psychiatric approach want therapy in place of punishment, mental hospitals in place of prisons; inmates are regarded

8. P. 188.

9. P. 189.

as sick people, and crime is a social illness."¹⁰ Jeffery criticizes the psychiatric approach in three ways: there is no evidence that mental disease causes criminal behavior; there is no evidence that psychiatry can reform criminals or non-criminals; there is no evidence that psychiatry is a science. He attacks psychiatrists for ignoring their critics, for ignoring the fact that "crime is a social reaction to behavior, just as therapy is a social reaction to behavior,"¹¹ for assuming that "the only objective of criminal law is to rehabilitate criminals,"¹² for ignoring the social aspects of punishment, for ignoring the fact that man is a social animal who must meet the demands of society, and, most of all, for trying to take over criminal law.

"The insanity plea is the most overrated and most over-discussed issue in criminal law. More has been written on it than any other aspect of law, yet in practice it is of minor importance," writes Jeffery.¹³ He believes that if capital punishment were eliminated, there would be comparatively few cases involving insanity pleas. Jeffery thinks that the psychiatrist's testimony should be relevant in sentencing, not in the determination of guilt. He feels that psychiatrists assume that the guilt of a defendant is not important; they want to testify as to how the case ought to be disposed of. Psychiatrists want "the defendant to go to a mental hospital rather than an electric chair."¹⁴

These latter statements seem unsophisticated and unenlightened, especially from a sociology professor. With the number of mentally ill in this country, the over-crowded conditions in mental hospitals, understaffed mental health clinics and the dearth of psychiatrists, it seems highly dubious whether all psychiatrists, or for that matter, many psychiatrists, are preoccupied with criminal law. There is evidence that they are, in fact, reluctant to become involved with criminal trials.¹⁵ Psychiatrists are, for the most part, independent thinkers and while some doubt the deterrent effect of punishment,¹⁶ there are some distinguished psychiatrists who have recognized the important social function of pun-

10. P. 290.

11. P. 296.

12. P. 296.

13. P. 297.

14. P. 298.

15. See, e.g., Salzman, *Psychiatric Interviews as Evidence: The Role of the Psychiatrist in Court—Some Suggestions and Case Histories*, 30 GEO. WASH. L. REV. 853 (1962).

16. See, e.g., Schmideberg, *Offender's Attitude to Punishment*, 51 J. CRIM. L., C. & P.S. 328 (1960).

ishment and explicitly state that psychiatry cannot take the place of justice.¹⁷

Perhaps it is a sign of our times that thoughtful persons have concerned themselves with investigating the bridge between psychiatry and the law and have written a good deal about the field. That the insanity plea is the subject matter of many law review articles is hardly a matter for scorn. One need only read recent opinions involving the insanity defense to realize that many of these scholarly articles have had significant impact on the judges.¹⁸

Jeffery has equally severe remarks for social workers. He believes social work concepts have had a great influence on the juvenile court movement and regrets this. "Whenever social services are rendered by means of criminal law, procedural safeguards protecting the rights of individuals are ignored or slighted."¹⁹ As a statement, this may be true. However, whether the statement applies to juvenile courts generally is a totally different matter. Jeffery does not point out the important distinction between the function of the judge in a juvenile court and the social service staff. The judge is a decision-maker; the social worker carries out an entirely different function. Generally, a social worker (other than a probation officer who may or may not be a social worker) in juvenile court proceedings provides casework or counseling services to the juvenile offender as well as helps the judge understand the offender and recommends a disposition fitted to the offender's specific needs.²⁰

There are many juvenile courts in the United States. Some jurisdictions have separate courts and separate judges for juveniles, some include juvenile matters in family law courts, some provide for probate, circuit, county or municipal court judges to sit as juvenile court judges.²¹ It is

17. De. Melitta Schmideberg, President of the Association for the Psychiatric Treatment of Offenders, has written:

Punishment is a necessary tool of justice and the community's expression of censure. Each trial not only asserts that a particular offender is guilty, but reasserts that the particular act is wrong in the strongest terms of disapproval the community has at its disposal. Thus, it not only deters, but educates and socializes. Psychiatry can only adjust the offender to existing laws and social mores; it cannot create anything to take the place of such laws. Psychiatrists should not have the powers rightfully belonging to the courts—passing on a person's guilt or innocence and deciding the length of an offender's incarceration. Schmideberg, *The Promise of Psychiatry: Hopes of Disillusionment*, 57 Nw. L. Rev. 19, 27 (1962).

18. See, e.g., Mr. Justice Clark's dissenting opinion in *Lynch v. Overholser*, 82 S. Ct. 1063, 1072-77 (1962); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

19. P. 289.

20. Silverman, *Lawyers and Social Workers in Juvenile Proceedings*, 6 CRIME & DELINQUENCY 262 (1960).

21. Hearings Before a Subcommittee of the Senate Committee of the Judiciary, 86th Cong., 2d Sess. 1414 (1960).

difficult to generalize about juvenile courts and certainly much too sweeping to write: "Because the juvenile court is both a legal agency and a social work agency, these two functions are often confused . . . The court procedure is viewed as a welfare procedure rather than a criminal trial. As a result, the juvenile is denied certain basic rights available to adults."²² There is some evidence of social agencies having a less than healthy influence on juvenile courts.²³ In some jurisdictions, the juvenile court judge has no control over probation and parole officers who are appointed by welfare agencies. In one state the welfare commissioner appoints juvenile court judges. However, the Juvenile Court in the District of Columbia, for example, cannot be said to use welfare procedures. And, one need only read some of the United States Senate hearings on juvenile delinquency to learn that this court is not alone in this respect.²⁴

One of the major problems in juvenile courts today is determining whether those brought before it are sufficiently protected in their constitutional rights. On the one hand there must be a continuation of the underlying philosophy of the court—that of treating the youngsters as juvenile offenders, not criminals, impressing upon them the fact that they have been involved in anti-social behavior and, if necessary, providing them with social services so that they will be able to develop as healthy adults. On the other hand, the child brought before the court should be apprised of a particular breach of conduct; should be able to confront his accuser, and generally, in keeping with the philosophy of the court, be afforded the protection of the Constitution. Jeffery does not discuss this vital problem in any depth. This is unfortunate because it is precisely in this area where there is so much misunderstanding on the part of social scientists and lawyers.

Professor Foster in his chapter on family law in a changing society thinks social workers have played and can play a most useful role in the family law field. Foster has in mind the tremendous work being done by social workers in family law courts. With their specialized knowledge in understanding human relationships, social workers are called upon to assist in marriage and divorce problems.

Professor Foster questions the concept of fault which has permeated our divorce laws. The grounds for divorce, as well as the defenses to divorce, are based on this concept. The "innocent and injured spouse"

22. P. 289.

23. Hearings, *op. cit. supra* note 11, at 1411-12.

24. Hearings, *op. cit. supra* note 11, at 1419-23; Hearings Before a Subcommittee of the Senate Committee of the Judiciary, 86th Cong., 1st Sess. 1163-71 (1960); Hearings Before a Subcommittee of the Senate Committee of the Judiciary, 86th Cong., 1st Sess. 1002-13 (1959).

is the subject of divorce procedures. Fault is so often relational in a marriage break-up that it is not useful to talk in these terms. In contrast, the "therapeutic approach" to divorce proceedings is both enlightening and progressive.

It is difficult to evaluate a book that attempts to do so much for so many. I think the book can provide sociologists with an interesting account of law's relation to society. I worry about the book's total impact on undergraduates. Can much be gained in describing for these people court congestion problems, what foundations are doing to promote the behavioral sciences in the law schools, or the impact women lawyers are making on the profession? The value of the book to this reviewer is in the chapters, especially those written by Professor Foster and Professor Davis, which are sturdy enough to provide law students with insight into familiar areas. Foster's piece on family law would complement case-book treatment of that subject. His chapter on public law could put constitutional law problems in their proper perspective. Professor Davis' contribution to the book can complement courses in jurisprudence. For these purposes *Society and the Law* is recommended.

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