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Law and Psychology in Conflict, by James Marshall (1966)

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LAW AND PSYCHOLOGY IN CONFLICT. By James Marshall. New York: Bobbs-Merrill Co., Inc. 1966. Pp. xiv, 119. $5.95.

The author of this book, Mr. James Marshall,[1] quotes approvingly from the closing words of a well-known article by Messrs. Hutchins and Slesinger:[2] "By careful use of [the scientists'] ... proved results in [psychology] and other fields, we may yet build a law of evidence more closely related to the facts of human behavior." Mr. Marshall then declares that "the purpose of this book [is] to carry this line of thought further in the light of more recent studies by social-psychologists."[3] Thus, quite justifiably, one could have expected the author to have tried to construct new rules of evidence which were more in harmony with the findings of modern social-psychology. But, alas, he has not attempted this altogether necessary, though difficult task.

Instead, Mr. Marshall shifts and narrows his focus, saying that *first,* he will consider only "the conflict between the law of evidence and empirical research and the need to press further research to devise means to gain greater accuracy in evidence on which to determine responsibility, damages, and guilt;" and *secondly,* he will discuss "the trial process and its effects on the search for reality."[4] But the fact is that Mr. Marshall does not deliver on these claims either. He does not exhaustively and systematically explore the conflicts between "the law of evidence" (rules of evidence?) and "empirical research." There is much psychological and other "empirical research" left untouched by this book, and only a few of the rules of evidence are mentioned; thus in these respects the author has overstated his claims. In fact, what Mr. Marshall actually does is to limit himself severely to some of the findings of one school of psychology—"transactional psychology"[5]—and to compare these findings with what he believes to be the assumptions underlying the "law of evidence."

Before proceeding further, I think a few of the book's vital statistics would help reveal its fundamental character. The author seeks to achieve his ends in 107 pages which have been divided into three

[1] Mr. Marshall is a lawyer and a member of the New York Bar. He has taught Human Relations in Administration at N.Y.U. and has authored several books, receiving Columbia University's Butler Medal for one of them.

[2] Hutchins & Slesinger, *Some Observations On The Law of Evidence—Memory,* 41 HARV. L. REV. 860, 873 (1928).

[3] P. 3.

[4] *Ibid.* Needless to say, the author is unclear about his aims.

[5] P. 10. See, *e.g.,* EXPLORATIONS IN TRANSACTIONAL PSYCHOLOGY (Kilpatrick ed. 1961).

chapters.[6] Chapter one, of forty pages, is devoted to setting forth "perception," "recollection," and "articulation," as understood in the literature of transactional psychology, and comparing its findings with believed fundamental assumptions of "the law of evidence." Chapter two, of forty-three pages, is a report of some research on "recollection" done by the author with others.[7] Chapter three, of twenty pages, is devoted to a discussion of "Psychological Transactions in the Trial." A conclusion covers four pages. I shall discuss the book as a single unit because its theme consistently clusters around "perception," "recollection," and "articulation," and because these notions are fundamental to the major claims made by the author; that is, they bear on his dominant thrust.[8]

Basically, Mr. Marshall sets out to challenge the "implicit, if not always explicit, . . . assumption [of all the rules of evidence] that witnesses can see accurately, hear accurately, and recall accurately . . . [which] is in fact contradicted by the findings of psychological science."[9] Having set up this straw man, the author proceeds to demolish him, organizing his critical demolitions around the notions of "perception," "recollection," and "articulation." Strangely, the process we call "conceptual" is neither discussed, nor separated out from the other notions, thereby injecting confusion into the book as a whole.

According to transactional psychology the correspondence between an object, or event, and our perception of that object, or event, is never absolutely identical. It is always "close" or "closer" to reality, but never the same as reality. In discrete ways, each physical aspect of our environment, and each event that we witness, *i.e.* "perceive," will vary slightly, or greatly, for each person who witnesses them. The reason is that an individual "perceives" his environment, and environmental events, according to his previous personal experiences. Although there is only one "reality," no two perceptions of that reality will be identical for the reason that no two persons have had identical past, personal experiences.

The factor of personal experience plays a vital role in "perception."

[6] Nothing of substance is added by the Forward contributed by Mr. Lee Loevinger, Commissioner, Federal Communications Commission and former Judge of the Minnesota Supreme Court.

[7] Helge Mansson, Ph.D, and Mr. John VanEsen.

[8] Which, as I understand it, is to consider "the conflict between the law of evidence and empirical research and the need to press further research to devise means to gain greater accuracy in evidence on which to determine responsibility, damages and guilt." P. 3.

[9] P. 8.

We tend to "perceive" things, and events, in such ways as to make them harmonize and "fit in" with our previous experiences.[10] For example, if a person is put in a dark room where he no longer has significant points of reference for what he sees, and if he is then shown a playing card that is twice the size of a conventional playing card, he usually will not "perceive" the actual size of the card because he doesn't have previous experiences that would condition him to have such expectations. Instead, such a person would usually "perceive" the card as being twice as close to him rather than being twice as large. Distortion of distances is "perceived" in order than an individual might harmonize the "reality" with his past, personal experiences. (There are obvious inferences here for automobile injury litigation). A perception is dependent upon the perceiver as well as upon the location of the thing, or event; its nature and the time when it is perceived as well as the circumstances under which it is perceived.

Past, personal experiences play another, and critical, role. They are relevant when we "select" things, or events, to perceive, and when we "choose" not to perceive. That is, if there are gaps in a person's perceptions, he will tend to "harmonize" (cohere?) them by eliminating the gaps and creating a "perception" which is consistent with that person's overall interpretation of the thing, or event. On the other hand, if a "perception" of a thing, or event, tends to be inconsistent with the overall view, as conditioned by past, personal experience, he will tend to repress and forget that "perception" in an effort to produce the likeliest explanation for what he "sees." It should now be clear that a person's "perceptions" are functions of his personal experiences

[10] See, *e.g.*, Stagner, *Personality Dynamics and Social Conflict*, 17 J. SOCIAL ISSUES 28, 33 (1961). Danger and stress also affect a person's ability to estimate time and distance accurately. See, FESTINGER, A THEORY OF COGNITIVE DISSONANCE 235-43 (1957). This psychological finding is used to criticize the *res gestae* rule which allows spontaneous utterances on the theory that the stress of nervous excitement makes for a spontaneous and sincere response; that is, a witness will not deliberately lie during such circumstances, nor calculate advantages and make self-serving declarations. See Beck v. Dye, 200 Wash. 1, 92 P.2d 1113, (1939). The psychological point is that the impact of trauma distorts the "perception"; but granting this, I fail to see why the author believes that this is fair criticism of the *res gestae* rule, unless he wishes to hold that every utterance is so distorted as to be valueless—a claim he does not make. Also, the quality of the utterance, and hence the evidentiary weight ascribed to it, can be thoroughly tested by cross-examination. If such a statement cannot be so tested, then it is probably hearsay and inadmissible. See MEISENHOLDER, EVIDENCE: LAW AND PRACTICE 380-82 (1965). The general reliability of distance and motion perceptions of witnesses has been discussed in Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); see also Bartley & DeHardt, *A Further Factor in Determining Nearness as a Function of Lateral Orientation in Pictures*, 50 J. PSYCHOLOGY 53 (1960).

as well as the thing, or event, "perceived." Thus, the current dogma of transactional psychology is that the percipient plays an active and vital role and conditions the "perception," perhaps as much as the reality which is being "perceived."[11]

Recollection, too, is subject to the vagaries of the psyche and its social and physical environment. We all know that memory is fallible, and Mr. Marshall presents us with several general illustrations. For example, memory is usually selective, tending to be more powerful when a person recounts his successes rather than his failures,[12] and when a person recalls facts that support rather than contradict his biases.[13] In addition, the accuracy of a recollection, itself, is subject to many influences. It seems to vary with the amount of suggestion,[14] one's educational attainments,[15] social status,[16] punitiveness,[17] and other factors.[18] The point of all this is that "the 'reality' brought to the case is a function not only of the perception of the witness but also of his individual personality. . . ."[19]

"Reality" is also distorted by a witness's articulation. Words are slippery chameleons with varying hues of meaning, and few of us, when we verbalize, take our limitations into account. Words may fail to describe accurately the perception that they report, and it is always possible that they may report an inference made by the witness, rather than observed fact. The manipulation of words is, after all, nothing more than the manipulation of words. Language, itself, forces thought into its word and logic molds, and, in that sense, it becomes a way of

[11] It should be obvious that the word "perception" is used here in two senses: one describes reality seen and the other describes a person's "conceptions" of that reality. By not keeping these two notions distinctly separate, the author has produced a great deal of unclarity and confusion, as has "transactional psychology." The "conceptual process" is clearly different from the "perceptual process."

[12] See Horowitz, *Psychological Need as a Function of Social Environments,* in THE STATE OF THE SOCIAL SCIENCES (White ed. 1956).

[13] See Levine & Murphy, *The Learning and Forgetting of Controversial Material,* in READINGS IN SOCIAL PSYCHOLOGY 44-101 (Macoby, Newcomb & Hartley 3d. ed. 1958). Also, interrupted tasks seem to be better remembered than those which have been completed. See Horowitz, *The Recall of Interrupted Group Tasks,* in GROUP DYNAMICS: RESEARCH AND THEORY 370 (Cartwright & Zender ed. 1960).

[14] See generally MÜNSTERBERG, PSYCHOLOGY: GENERAL AND APPLIED 401-02, *passim* (1914). Clearly, the rule that allows a witness to refresh his recollection can be wrongly used by a lawyer when preparing his case by making certain suggestions as to what a witness should testify, and thereby improperly influencing the witness. Although I agree with the author that this can, and does, occur, it does not militate so much against the rule as against a certain type of lawyer.

[15] P. 49.

[16] P. 52.

[17] P. 70. See also ADORNO, THE AUTHORITARIAN PERSONALITY (1950).

[18] See FROMM, MAN FOR HIMSELF 235 (1947).

[19] P. 31.

viewing the world,[20] and constitutes a rigidifying process,[21]—all of which can distort the reality that is reported by a witness at trial.

Not only do all these psychological processes affect the capacity of a witness to testify accurately at trial, but they also apply to the judge and jury and affect them. For a juryman, or for a judge, the "event" of reality is the testimony of the witness at trial, or the "seeing" of a physical thing introduced into evidence. It is not the actual reality itself. Everything is secondary and derivative in the courtroom. Thus, all the vagaries that affect a witness's perceptions, recollection, and articulations are bound together in the testimony which becomes the juryman's "reality." The juryman moreover, has a psyche and his reality is subject to psychological distortions of perception, recollection, and articulation. Thus, legal reality may be a product of at least dual distortion, not to mention the intentional confusions which a lawyer might introduce. The net result of the entire legal process then, is an awkward and humanly imperfect way of arriving at primary "truth."[22] And, of course, one party's preponderance is another's failure of proof.

But, even so, Mr. Marshall presents us with neither an alternative, nor the broad outlines of one.[23] In fact, he fails even to set forth clearly the exact nature of the conflicts to which he alludes as existing between the rules of evidence and the findings of transactional psychology.[24] What he does do is erect a straw man of the omniscient

[20] See KLUCKHOHN, MIRROR FOR MAN 113-30 (1959).

[21] See generally FODOR & KATZ, THE STRUCTURE OF LANGUAGE (1966); KORZYBSKI, SCIENCE AND SANITY (1941); MORRIS, SIGNS, LANGUAGE AND BEHAVIOR (1946); and OGDEN & RICHARDS, THE MEANING OF MEANING (1925).

[22] This has been emphasized by Jerome Frank; see his LAW AND THE MODERN MIND (1930), and COURTS ON TRIAL (1949).

[23] At times he seems to suggest that we should do away with the adversary system itself: "courtroom combat, this 'adversary duel,' is a sublimation of more direct forms of hostile aggression in primitive societies ... the combat, the duel, the game are certainly not the best ways to discover truth...." Pp. 6-7, 35. Apart from this being sheer rubbish, the author contradictorily calls for a "liberalization of certain rules... within the framework of litigation as an adversary proceeding." P. 40.

[24] At 14 he notes that rumor, which is excluded from testimony by the hearsay rule, might form a portion of a person's previous experience, thereby conditioning his "perception," to which a witness is allowed to testify. However, he does not consider whether cross-examination might either reveal or eliminate the bias. At 16, Mr. Marshall refers to the *res gestae* rule; see note 10 *supra*. At 29, he holds that the rule permitting refreshment of recollection might be used by a lawyer to suggest testimony to a witness; see note 14 *supra*. On two pages (38-40) the author deals with the rules involving declarations against interest, self-serving declarations and testifying to conclusions without relating them to his prior discussion of "perception," "recollection" or "articulation." He contends, without proof, that declarations against interest are neither more, nor less, "truthful" than self-serving declarations for the reason that, from a psychological point of view each "is motivated by, and is an expression of, a need." This statement utterly confuses the cause of an utterance [a psychological need]with its substantive content [whether

witness who accurately perceives all, recalls all and verbalizes all, and then asserts that this conception underlies the rules of evidence generally. He, then, produces his psychological findings to demolish that straw man, which he does very well, showing that fallible humans are humanly fallible. So much was noted over two thousand years ago by Thucydides when he said that we make up individualistic versions of the past "adhering as closely as possible to the general sense of what was really said."[25] Recognizing this well-worn truth, Anglo-American legal practice has developed the art of cross-examination, one purpose of which is to show the unreliability of a witness's testimony, whether it falters on "perception," "recollection," or "articulation." But nowhere in his book does Mr. Marshall consider the ameliorative effects of cross-examination. This is of crucial significance because the rules of evidence operate in a legal context which includes cross-examination, and other safeguards such as timely objections.

After reading this book I can agree with the author that we need to establish a "closer relation between law and psychology"[26] and that, perhaps, by a careful use of materials from psychology and other fields, "we may yet build a law of evidence more closely related to the facts of human behavior."[27] I can agree with him, and still conclude that the task remains unfulfilled by this volume.

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it is true or not]. Secondly, it simply is not true that "the rules of the game of litigation are founded on the belief that self-serving declarations will be taken literally and must be excluded." They are excluded because they are hearsay, and not because they are self-serving. See *In re* Witte's Estate, 21 Wn. 2d 112, 150, P.2d. 595 (1944) and cases cited therein. See also, Palin v. General Const. Co., 47 Wn. 2d. 246, 287 P.2d 325 (1955); MEISENHOLDER, EVIDENCE: LAW AND PRACTICE 380-82 (1965). Finally, he asserts that although a witness may not testify as to his reasons or his conclusions, a witness frequently does so under the guise of his conclusion being a part of his observations. Once again, the author must assume that there can be no cross-examination, or objections made at the trial.

[25] THUCYDIDES, COMPLETE WRITINGS 14 (Modern Library ed. Crawley transl. 1951).

[26] P. 103.

[27] P. 3.

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