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Book Reviews

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LAW AND PSYCHOLOGY IN CONFLICT. By James Marshall. Indianapolis: Bobbs-Merrill, 1966. Pp. 119. \$5.95.

Mr. Marshall has collected and explained a series of psychological studies that "scientifically" indicate the unreliability of witnesses' perception, recollection, and articulation of observed events. They are interesting. None of the conclusions reached is seriously questioned by psychologists. Many of the conclusions may be unknown to persons of legal training, and most of them should be considered by legal experts who are modifying the "rules of evidence." To know that scientific evidence buttresses reasons for or against a rule is to be more certain of the wisdom of its application.

In addition to describing these studies, Mr. Marshall asserts that more scientific research would be helpful, particularly on the problem of developing legal techniques to avoid the distortions now prevalent in testimony. Most persons in the legal profession would probably agree that there is a need for joint research by lawyers and social scientists as to the reliability of evidence which depends upon observation and recollection.

It is unfortunate that the foregoing ideas should be distorted and buried in an incredibly poor analysis. Mr. Marshall confuses his reader and does a disservice to efforts to reform evidence law with a morass of overstatements and overgeneralizations as well as misstatements of the purpose of the "rules of evidence." At page eight he reveals the basic thesis of his book when he states, "the assumption that witnesses can see accurately, hear accurately, and recall accurately . . . which is the keystone 'As If' of the law of evidence, is in fact contradicted by the findings of psychological science." At page forty he asserts that the psychological studies revealing inaccuracies in testimony makes more acute the need "for a complete reconsideration of the rules of evidence to conform them overall instead of piece-meal to what we know of the human condition."

Marshall's incorrect notion that the "rules of evidence" are based upon a belief in the accuracy of witnesses' testimony is what leads him to raise a hue and cry for a total revamping of the entire law of evidence.

Wigmore gives a wholly different perspective:

Our system of Evidence is . . . based on *experience of human nature* That human nature is represented in the witnesses, the counsel, and the jurors. All three, in their weaknesses, have been kept in mind by the law of Evidence. The multifold untrustworthinesses of witnesses; the constant partisan zeal, the lurking chicanery, the needless unpreparedness, of counsel; the crude reasoning, the strong irrational emotions, the testimonial inexperience, of jurors,—all these elements have been considered. Tens of thousands of trials have forced them out into the open,

where thousands of judges have observed them; and their observations have profited by them, in thinking out principles and formulating rules.

All this has not been created out of nothing; it rested on a solid basis of experience in human nature at trials. And that human nature has not essentially changed. . . .

. . . And there will always have to be some apparatus for testing and checking those weaknesses. We can expect to improve the apparatus, but not to ignore the weaknesses. And just as long as man continues to be a reasoning animal, and to desire to profit in his narrow personal task by the combined experience of others, just so long will trial judges crave and devise generalized rules for making some headway through the welter of lies and errors and doubts and inferences that is heaped up before them at a trial.¹

The trial itself and the calling of various witnesses exist because of the long recognized fact of unreliability of a witness's testimony. The rules of evidence are largely rules of exclusion which do not permit the introduction of certain testimony because it is thought to be especially untrustworthy or confusing to a jury. The general value of the scientific studies that Mr. Marshall has collected is that they tend to prove that the development of the law of evidence has been sound as a whole, *i.e.*, it *does* conform overall to what is scientifically known of the human condition. Mr. Marshall has asserted that the converse is true because he does not understand that the basic rules of evidence are exclusionary and that the reasons for each exclusionary rule and its exceptions have been based on observations of unreliability in thousands of trials.

The need for reforms in the law of evidence is certainly well accepted. Current controversy concerns how to do it. Significant practical value from psychological studies can come only in the "scientific" validation or rejection of the reasons for the rules. This requires piecemeal application of particularized results to each specific rule of evidence to ascertain whether that rule does achieve its underlying purpose of furthering the reliability of evidence. *Law and Psychology in Conflict* may have been titled differently and would have been a much more worthwhile book had Mr. Marshall addressed himself to that task.

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DECADE OF FEAR: SENATOR AND CIVIL LIBERTIES. By Donald J. Kemper. Columbia: The University of Missouri Press. 1965. Pp. xi, 252. \$5.95.

Somewhere Professor Arthur Schlesinger, Sr., has suggested that the measure of a period is best taken in one of its secondary, rather than its frontline, figures. Through either coincidence or design, Father Donald J. Kemper of the Newman Center of Missouri University has followed the suggestion and has reviewed the constitutional impact of the Cold War between 1950 and 1960 in terms of the career and public philosophy of the late Thomas Carey Hennings, Jr. There is also a subtheme in his book: the Hennings tragedy.

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1. 1 WIGMORE, EVIDENCE § 8c at 262 (3d ed. 1940).

Or perhaps one might say, the two Hennings tragedies. The first was the Senator's untimely death at the age of fifty-seven. The other was the fact that when he died he fitted the Schlesinger formula by being a secondary figure of his times. Yet one of the last eulogies to him—a few brief and elegant remarks by John F. Kennedy in the closing days of 1960—doubtless prompted some to reflect that, had the thread of fate been twisted just a little differently, the late Senator from Missouri rather than the Senator from Massachusetts might have stood at the threshold of the presidency. And certainly, had anyone been asked at the beginning of 1935 to speculate on the presidential possibilities of the new members of the Missouri delegation to Congress, he probably would have given the young prosecutor from St. Louis an equal chance with the county judge from Independence.

But whatever the imponderables of politics, certainly Tom Hennings faced them with an abundance of political assets. Most obvious were athletic good looks, that indefinable quality which theatre people call "presence," a warm baritone voice, and a sense of timing tailor-made for political debate. There were others. Listed in the Social Register, Hennings' easy but reserved affability and long-time political activity made him at home in all sections of St. Louis life. Grandson of one of the largest slaveowners in Georgia, he was a strong proponent of civil rights legislation long before the cause obtained popularity. And above all, there was an instinct of courtesy in the most literal sense, an ability to be *suaviter in modo, fortiter in re*, or, as the *New York Times* put it, to be "a fighter who had the respect of his opponents." Certainly the endowment paid off handsomely in a political career which won every election undertaken and which carried him to the United States Senate. Yet for all of this, there was a gap between promise and fulfillment. Perhaps it was a case of too much too soon, of everything coming too easily and bringing a set of problems and frustrations of its own.

However, Father Kemper writes essentially as a political scientist rather than a biographer, and with obvious regret passes over much biographical material to focus on his basic theme—that the transition of Hennings "from a hesitant spokesman for civil liberties in the House to an aggressive defender of individual rights in the Senate" affords a unique point of view to explore the constitutional controversies of the Cold War. The theme is then unfolded in three interrelated topics: the Hennings subcommittee on constitutional rights, the Senator's defense of the Supreme Court, and his several passes-at-arms with the late Senator McCarthy.

The successive clashes between Hennings and McCarthy constitute the most dramatic and spectacular part of the book, for the two men seemed to have star-crossed careers. They came to the Senate within two years of each other, and both died in office after approximately a decade of service. They first crossed swords in the closing days of Hennings' initial senatorial campaign and had repeated confrontations through their years of common Senate service. Less vivid, but perhaps more significant historically, was Hennings' defense of the traditional jurisdiction of the Supreme Court. The work, or perhaps just the in-

stitution, of the subcommittee on constitutional rights was certainly least productive in immediate terms, but was possibly the most fruitful in the long run. These in brief are the three strands of the study. They are developed in research which includes not only the conventional sources, but personal interviews as well, and are expressed in a journalistic style.

If the book is to be criticized, it is not for what it contains but what it does not. On a purely editorial note, the collation of court cases in the bibliography would have been the better for a brief statement as to the holding in each. More regrettable substantively is the virtual omission of what both ally and opponent in the Senate pronounced as Hennings' finest hour—his sustained exegesis of law and history in upholding the historic powers of the presidency in the conduct of foreign affairs against a proposed constitutional amendment which would limit their range and scope. In its way the amendment was also a product of the Cold War, proposing to expand Congressional power at the expense of the presidency and thus complementing the suggestions for an amplified Congressional check upon the Supreme Court. To both proposals the Missouri Senator rose in opposition, defending what he liked to call the "living checks of the three departments."

Fittingly, the most moving testimonial has come from those who opposed him. Particularly noteworthy are the comments of Senator Dirksen, who resubmitted the so-called Bricker Amendment less than an hour before he spoke at the Hennings memorial proceedings and who recalled the earlier struggle over that proposal in his remarks:

Of all the scholarly, documented speeches that were made on that subject, probably none was more profound than that of Tom Hennings. . . . He was convinced that my position was wrong. I was convinced that his position was wrong. But he advanced his cause like the great warrior he was. . . .

That is how I shall remember Tom Hennings . . . big in body and heart, amiable and patient, energetic and dedicated, friendly and scrupulously fair, always courteous, ever courageous. He was indeed a happy warrior.

To be sure, Father Kemper does touch on the decisive role Hennings played in preserving the historic boundaries of the presidential powers. But this is done only by way of the anecdotal illustration that after carrying off the laurels of a hard-fought victory won by the narrowest of margins, Hennings was met by prearrangement by a group of newspapermen who were expecting an interview in depth and who were completely nonplussed when the Senator chatted briefly and then, courteously but firmly, excused himself.

Perhaps better than anyone else, however, the incident epitomized the complex combination of characteristics which came to its end in September of 1960 amid eulogies ranging as far afield as the *London Times*. Yet for all the eulogies, the historical judgment on Senator Hennings would have to be the scriptural injunction that to whom much is given, much is expected, and by such standard, his accomplishment fell short of his talent. There is a terse rejoinder to this:

Whose does not? There is also a longer one—that Senator Hennings did leave a memorial of distinction. His was the emphasis on the continuing relevance of the Bill of Rights, the impetus to the struggle against corrupt electoral practices and juvenile delinquency, the freedom of information (indeed, shortly before these lines were written, President Johnson signed into law the statute which Hennings had forcefully urged during his lifetime), and above all, a renewal of the tradition of civility—that it is possible to disagree without being disagreeable.

Happily, it is in this tradition that Father Kemper writes, for while the author's views and values are apparent, he manages to turn out a history of a turbulent and controversial decade which on the whole is a study rather than a polemic. Future students of the period, particularly those interested in political science and constitutional law, will find it of value; friends and admirers of the Senator will esteem it; and, quite apart from his own involvement, Tom Hennings would have liked it.

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