Montana Law Review

Volume 28
Issue 2 *Spring 1967*

Article 11

1-1-1967

# Book Reviews

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*University of Montana School of Law*

# BOOK REVIEWS

## THE AMERICAN JURY

**Harry Kalven, Jr., and Hans Zeisel**
**Little, Brown and Company, 1966. $15.00**

The book is an impressive compilation of information, carefully interpreted in a ponderous effort to analyze and describe an indescribable enigma—the American jury. Noting that the arguments for and against the jury emanate mostly from the viscera, it became the purpose of the authors to "find out how in fact the jury is performing." It was not intended to determine if the jury is a good institution, although the results are pro jury.

The subject matter creates obvious difficulties for social science techniques. Fully aware of the difficulties, the authors carefully detail the various methods employed to cope with them. Unfortunately the most obvious difficulty cannot be overcome by the methods employed—or perhaps by any method. Can you compare judge and jury? Do you need to compare? Answering both questions affirmatively "[t]rial judges were asked to report, for cases tried before them, how the jury decided the case, and how they would have decided it, had it been tried before them without a jury." If a comparison was to be made this approach was necessary since it is not possible to compare the result of a judge verdict and a jury verdict in the same case, and it would have been futile to make the comparison on similar cases since the difference that causes a case to go to the jury rather than to a judge was under study. Most social science research claiming empirical validity enjoys the minimum verity of analyzing what people did or did not do. Here there is only a statement of what the judge *would have done* followed by his commentaries as to why. (There was an attempt to obtain recordings of actual jury deliberations. The result was a national scandal and public censure.)

The authors are realistically self critical of their methodology and in the final analysis justify it by concluding that they have used the best method available, considering time, money and subject matter.

The study poses two basic questions: "What is the magnitude and direction of the disagreement between judge and jury? And what are the sources of disagreement?" The statistics indicate an agreement in 75% of the cases and disagreement in 25%. The jury was found to be more lenient in 19% of the cases and less lenient in 3%. As might have been expected the disagreement between judge and jury varied substantially according to the crime. The judge and jury agreed in 92% of the kidnapping cases, 88% of the narcotics cases, but in only 53% of the cases on indecent exposure. The jury's tendency to be more lenient than the judge also varied with the crime; in arson cases the jury was only slightly more lenient (5%), whereas the jury was much more lenient in game violation cases (43%).

The various identifiable factors which apparently cause the difference between judge and jury are subsumed under five generic categories: 1) evidence factors, which may relate to difference in evaluation, or difference in the quantity or quality of evidence required to convict; 2) facts only the judge knew, such as a prior criminal record; 3) disparity of counsel; 4) jury sentiments about the individual defendant, old or young, black or white, male or female; and 5) jury sentiment about the law, arson *vis-a-vis* game violations. By evaluating the information detailed in each category, some interesting general conclusions were reached. For example, it was concluded that the jury tends to interpret the norm "beyond a reasonable doubt" more generously than a judge. And, contrary to legal folklore, the jury understands the case it decides and is neither more nor less gullible or skeptical than the judge.

The validity of these statistics and conclusions cannot be verified by actual experimentation. Consequently the authors have been forced to rely on assessment by the trial judge. The justification for trusting the judge—he was there, and he is a professional—are equally valid reasons to question his accuracy as an objective evaluator. He was involved; he is usually a former advocate. The judge's assessment of the reasons for his disagreement with the jury are patently suspect.

Some reasonably objective statistics were accumulated by the study: there were no eyewitnesses in 69% of the cases; the defendant testified in his own behalf in 82% of the cases; the prosecution had expert witnesses in 22% of the cases; and the defendant had expert witnesses in 3% of the cases. The study also scores the over-all imbalance in the average number of witnesses for the prosecution as contrasted with the defense. This is hardly surprising since the prosecution not only has superior resources but is required to prove its case beyond a reasonable doubt.

Although the book is replete with charts and graphs which create an air of pseudo-scientific certainty, it is not wholly convincing either as to its conclusions or the validity of its raw data. The sampling was necessarily limited, comprising only cooperative judges. There was some regional imbalance.. The study notes that jury waiver for major crimes varies from a high of 79% in Wisconsin to a low of 0% in Montana. It claims the determinant is regional custom, failing to consider legal variations. For example, in Montana if a case involving a major crime goes to trial, the jury cannot be waived. Apart from such slips the statistical data, the conclusions and the imaginatively improvised methodology are at least interesting and perhaps will prove to be valuable additions to our understanding of the American jury.

**Larry M. Elison***

*A.B., Idaho State College; L.L.B., University of Utah; S.J.D., University of Michigan; Professor of Law, University of Montana.

**Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, Eighty-ninth Congress, Second Session, pursuant to S. Res. 190, March 7, 1966: The Ombudsman.**

The entrance of democratic societies into the twentieth century has been accompanied by new and perplexing problems. As is comprehended by the democratic process, the solution to these problems may take a variety of institutional forms. One of these forms was the subject of a Hearing before the Senate Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, chaired by Senator Edward V. Long: The *Ombudsman.*

The office and concept of ombudsman, although a prominent part of Swedish law since 1809 and Finnish law since 1919, has failed to generate manifest political enthusiasm until the last two decades. Denmark (1954), West Germany (1957), Norway and New Zealand (1962) have each created the office in varying forms. Public debate on the concept has been active in Canada, England, and Scotland. With the publication of a Parliamentary White Paper in England, passage of legislation for the appointment of a Parliamentary Commissioner for Administration seems imminent.

What is an ombudsman? In Sweden, an informed commentator writes,

> the Justitieombudsman. . .[is a] special official elected by the Swedish Parliament. . .to keep watch over the application of laws and regulations by judicial and administrative officials in matters concerning the public. With the exception of the military—supervised by a Militieombudsman since 1915—[and] State Ministers. . ., the J. O.'s jurisdiction comprehensively covers all the courts, the police system, public prosecutors, administrative agencies, prisons, mental institutions, alcoholic homes, and the officials and employees of the social welfare services.

A simple enumeration of his bailawick, however, does little to illuminate the nature of the ombudsman's activities or the importance of his office in contemporary government.

In earlier times the principal contacts of a citizen with his government were with the judicial and legislative branches. Upon the emergence of an affluent society and a welfare state, however, there has been a congruent ascendancy of the executive branch—administrative law and regulation. The problem inheres in that the proliferation of this regulative authority over private activities has not been accompanied by a corresponding development of administrative safeguards. The ombudsman, although he does not supplant existing protections, is an effective and appropriate residual form of protection against abuse of administrative authority. As Senator Long found, "[T]he concept of 'ombudsman' means a guardian of the people's rights against abuses and malfunctions by government, its programs, and its officials—a sort of watchman over the

law's watchmen." In short, the office is a speedy, inexpensive and readily accessible means of obtaining redress for unfair actions of the government.

The ombudsman is typically a "citizen of known legal ability and outstanding integrity." Frequently he has already had a lengthy career as a jurist or appellate judge. He must be a strong personality, immunized from political pressure, and yet retain the respect of the people, the legislative branch which elects him, and public officials. The effectiveness of the position, however, must lie in the prestige the office imparts to the man, rather than what he lends to the office.

The implements of authority need not be large. Acting on the basis of complaints filed in his office, newspaper reports, and matters revealed in periodic inspections, the ombudsman, with some variation, has the authority to require all courts and civil servants to furnish the information and records considered necessary in each case. He is entitled to attend all deliberations and decisions of the courts and public agencies, but is not allowed to interfere with a case while being decided nor to overturn a decision once made. If he feels a decision is wrong, however, he may write to the proper authorities and present his arguments for changing it. In Sweden the ombudsman is given the power to order prosecution of erring officials, but in modern times, the practice of suggestion and admonition is the most commonly applied sanction.

An important duty of the ombudsman is to call attention to manifest anomalies and deficiencies in the statutory law. A summation of these recommendations and the resolution made of the most important cases are presented to the Legislature in an annual report which is printed and submitted to all government agencies. These reports, though rarely dramatic, are of considerable educational force and are not lightly dismissed.

The impact of the ombudsman is not discernible solely by the frequency with which he criticizes. Senator Long noted that "the ombudsman not only finds faults and corrects wrongs, he also absolves civil servants and government agencies from wrongful charges and unfair accusations of guilt. The net result is to create in the citizenry an atmosphere of increased confidence and respect for their government." The ombudsman has, in sum, protected the public service, not merely attacked it.

Experience has indicated that about nine-tenths of the complaints received are dismissed either initially or after investigation. Some complaints are submitted by inveterate "querulants" while others arise from a simple failure to understand the reasons behind the official action concerning them. The ombudsman directly benefits the public service in both cases. The "querulant" is gotten off the agency's back, while in the second situation, a detailed explication of an agency's ukase is often fully sufficient to satisfy the complaint.

Sir Ronald Algie, former law professor and current Speaker of the House in New Zealand has offered his view on the striking success of the ombudsman:

> The ombudsman system probably would not work well everywhere. It works well in New Zealand because we have a fine public service. Corruption is so rare as to be deemed virtually nonexistent. Officials generally seek to serve rather than to defeat citizens. They give cases careful consideration, though of course that doesn't mean they invariably reach the best possible result. Our ombudsman may stimulate officials to be even a little bit better than they have been. But the ombudsman system is succeeding here precisely because, really, there isn't a staggering lot for it to do.

An increasing cognizance of the effectiveness of the ombudsman is evident in this country on both a national and state level. Senator Long and Representative Reuss of Wisconsin have consistently urged the adaptation of the concept to fit in our administrative system, and at the present count, thirteen ombudsman bills have been introduced in state legislatures. It is on this level that the office can be most effective. Montana would do well to begin study of the ombudsman concept and in a further way make our government more responsive and more responsible to the needs of its citizenry.

The Senate Hearing provides an excellent collation of testimony and republished article by those most involved in the institution or ombudsman and is a recommended point of embarkation for its study.

**Harry B. Endsley III.**

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## STATE LEGISLATURES IN AMERICAN POLITICS

**Edited by Alexander Heard**
**Englewood Cliffs, N. J.: Prentice-Hall, 1966. Pp. 182. $3.95**

Reform is not a new word to state legislatures. Attempts to make these institutions more effective are as old as the states themselves. One of the most significant achievements was made as late as 1962, when the Supreme Court of the United States in *Baker* v. *Carr* advanced the "one man, one vote" principle. The ultimate effect of that decision is as yet unknown, but such a forward step does serve to accentuate what the contributors to *State Legislatures in American Politics* term the "institutional lag." This inability of nineteenth century institutions to handle twentieth century problems requires closer scrutiny of our state law-making bodies.

If reform is demanded, the question is how to make it most effective. The answer provided is that state legislatures must be placed in context. Effective reform is directly related to a recognition and understanding of the environmental influences which mold legislative output.

For example, the peculiar economic, political and social makeup of a state is important. A rich state is able to tax more; a state legislature dominated by a single interest group is not likely to be flexible; and a rural state will have different needs than its urban counterpart.

Other influences include the effect of burgeoning federal power. The matching funds required by the federal grant-in-aid programs greatly restrict a state's volition. Also, a legislature's effectiveness is limited by the caliber of its members. A body of disinterested amateurs will be very ineffective, particularly if the state has a powerful governor.

What all this means to the potential reformer is that his criticism must recognize environmental realities. He must begin with the assumption that a state's government is only a reflection of the state and its people. Only in this context can he subject his proposed reform to the final test: will it cause state government to better represent the people; and will it enable the state law-making bodies to "legitimize" their decisions in the eyes of the electorate? These tests are posed by the contributors to this book as the essential functions of state legislatures in a democratic society.

This book does not purport to present a definitive plan to cure all the ills of state governments, it is designed to create an awareness of the nature and source of the problems. For this reason the book is highly recommended to the legislator, the student and the concerned citizen.

**Sidney J. Strong.**

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## THE CHALLENGE OF CRIME IN A FREE SOCIETY

**A report by the President's Commission on Law Enforcement and Administration of Justice, Government Printing Office, February, 1967, Pp. 309. $2.25.**

"This report is about crime in America—about those who commit it, about those who are its victims, and about what can be done to reduce it."

Through a comprehensive examination of crime in the United States and the administrative procedures for dealing with criminals, the President's report details the system's deficiencies and makes two hundred specific recommendations for improvement. A plethora of statistics and graphs indicate the omnipresence of crime and the public's manifest but exaggerated fear of it.[1]

[1]The Commission conducted a survey in a prevalent crime area and found that 43% of the respondents stay in at night because of their fear of crime. Thirty-five per cent refused to speak to strangers for the same reason. Contrasting studies indicated that only 12.2% of murders, 33% of forcible rapes and 25% of aggravated assaults are committed by strangers. There is also prevalent among urban whites a fear of

Particular emphasis is placed upon crime prevention. Because crime is peculiar to urban youths,[2] the Commission recommends that preventive measures be directed primarily toward this group. The conditions which spawn crime—poverty, lack of employment and educational opportunities—should be ameliorated. Efforts should be intensified to provide counseling and therapy, to improve housing and recreational facilities, and to re-examine welfare regulations. The Commission further suggests that Youth Service Bureaus be instituted in many communities to deal with juveniles referred to them by the police, school officials and others. This program would operate on a voluntary basis and provide for "individually tailored work with troublemaking youths." Its function would include counseling, work-recreational programs, and special remedial and vocational education. Juvenile court procedures should also be modernized with juveniles being afforded more of the basic procedural rights granted to adults.

Police administration is incisively examined. The Commission urges the establishment of better community relations, especially with minority groups. One suggested approach is the employment of qualified minority group members as police officers. The Commission also recommends the adoption of hiring practices aimed at recruiting college graduates. Of course, it is recognized that to attract more qualified officers, salary reforms will have to be instituted.

Three types of personnel are suggested to perform police work: first, *police agents* who have at least two years of college experience would be assigned to the most demanding and sensitive jobs; second, *police officers* would perform the tasks of enforcement and investigation; and third, *community service officers,* young men between seventeen and twenty-one, would act as apprentice policemen. The Commission believed that such a system would attract better qualified individuals into law enforcement work.

If the criminal justice system is to function effectively, it is necessary that the unfairness inherent in the courts and the administration of criminal prosecutions be eliminated. The report strongly urges that the lower courts at both the state and national levels be abolished or at least overhauled; the ostensible purpose being to avoid, what the Commission terms, "assembly line justice." Furthermore, a more realistic approach

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Negroes. Yet the Commission found that a white person is more often victimized by a person of his own race—88% of the rapes studied involved persons of the same race; and only 12 out of 172 murders were interracial. The public fears most, crimes of violence. Yet, these are the least likely to occur.

[2]In 1965 more than 44% of all persons arrested for forcible rape, more than 39% arrested for robbery, and more than 26% arrested for wilful homicide were in the 18-24 year old age group. Yet this age bracket represented only 10.2% of the population. Nearly 50% of all those arrested for burglary and larceny and more than 60% arrested for auto theft are under 18 years of age. This age group represented only 13.2% of the population. The study further indicates that 26 large cities with less than 18% of the total population account for more than 50% of all reported crimes against property.

should be taken with respect to bail reforms, individual rights, and the unnecessarily long delays between arrest and trial. Commissions should be set up to provide fair and uniform sentencing. As with the police, the Commission advocates the infusion into the system of more qualified individuals to act as judges. Citing the Missouri Plan for the selection of judges, the report recommended that the Governor appoint judges from a panel selected by a commission of lawyers and laymen. At the end of each term the voters are asked whether the judge's record justifies his retention. The Plan assures tenure and thereby attracts more qualified individuals, increasing the likelihood of better performance.

Correctional institutions should inaugurate practices more likely to rehabilitate their inmates. According to the Commission, small community-oriented institutions should be the format for the future. Such facilities, when combined with community centered job training, and educational counseling services, would provide needed flexible treatment of prisoners. Penal reform should also examine the feasibility of utilizing half-way houses and work release programs. At the local level, misdemeanants should be provided with rehabilitation programs.

The report specifically examines the areas of organized crime, narcotics, drunkenness, control of firearms, and the utilization of science and technology in law enforcement work. Of note is the Commission's recommendations that drunkenness not be treated as a crime. Rather, larger cities should build detoxification centers supplemented by after-care facilities. Within the framework of the law, legislation allowing for the civil commitment of narcotic addicts would be a desirable alternative to incarceration. In the field of science and technology, the report notes the increased use of computers as dispatching agents and memory banks. Increased efficiency at lower costs were the advantages cited.

The report concludes that crime can be controlled—though not eliminated. However, it will be a gargantuan endeavor and will require the coordinated effort of all levels of government, industry and the community. The projected cost is enormous—several hundred million dollars a year over a decade. But in light of what crime costs society each year—twenty-one billion dollars—there seems little choice. According to the report, federal support should bear the brunt of the initial cost. However, the Commission recognizes that the cost will fall ultimately on the public and its cooperation is therefore vital.

The report is not recommended for the casual reader. Occasionally its detail and copious statistics make it tedious. However, as a definitive statement of the incidence of crime in America and suggestions for improvement, it is unexcelled.

**Larry Petersen.**