Montana Law Review

Volume 29
Issue 1 *Fall 1967*

Article 10

7-1-1967

Book Reviews

Book Reviews
University of Montana School of Law

OVERCHARGE

U. S. Senator Lee Metcalf and Vic Reinemer
New York: David McKay Company, Inc., 1967. Pp. 338. $5.95.

I confess to several false starts in reviewing *Overcharge*. The task has been complicated by a personal regard for the authors, Senator Metcalf and his Executive Assistant, Vic Reinemer; and it was not made easier by some past experience as a legislator and short-lived pamphleteer in Montana where both the Senator and the Montana Power Company are considerable political and social forces. In short, the objectivity which a law journal review should have has been strained for and I take pains to admit this at the outset. If I fail in this goal for objectivity I can only excuse myself by observing that there is no truly objective jurist —in my experience, at least, all jurists seem to take their backgrounds and prejudices onto the woolsack.

Most lawyers are aware that a public utility is allowed a fair rate of return on the value of its plant and equipment, its working capital, the value of construction work in progress, and the value of property held for future use. The combination of these items is known as the "rate base." In addition, a utility is allowed to obtain from the customer such expenses as are connected with furnishing utility services. Generally speaking these expenses include such things as maintenance, advertising, promotion, public relations, salaries and wages, pension plans, depreciation, etc. There is a division of authority in the United States on the formula for determining rate base, with the majority of states using original cost of the plant less depreciation, and the minority using the actual cost of the plant and the cost of reproducing the plant new. Just as a matter of interest, Montana follows the minority rule.

The first premise of the book, and the one that gives it its title is that even if one accepts the rate base, any return on that base in excess of an arbitrary fair rate of six per cent is an overcharge. Using statistical information obtained from various sources Metcalf and Reinemer posit that 111 of the 185 largest electric utility companies in the land had a rate of return of seven per cent or more in 1963, and some, including Montana Power Company, had returns in excess of ten per cent. Lest one dismiss an excess of one per cent as of minor importance, they point out that eight large companies each overcharged its consuming public more than $100,000,000 from 1956 to 1962.

However startling those statistics may be, I suspect that the authors are more disturbed by the methods used by utilities to keep the rates high, by their ability to make the public accept the rates, by the apathy of the public and its elected commissions, by the nature of operating expenses passed on to the public, by the extremist right-wing connections of the industry, by the nature of their charitable contributions, by their

failure to transfer tax windfalls and operating expense windfalls back to the public, by injection of their economic concepts into school curricula. All of these subjects, and more, are discussed, argued and documented. In Montana, where we are so close to the Public Service Commission and to the utility companies, the book makes interesting, and sometimes shocking, reading.

For example, the authors note that as a result of the electrical equipment price fixing scandal of the late 1950's, utility companies by 1965 had recovered $400,000,000 which had been overpaid to manufacturers. They contend that the utilities are still getting a six per cent plus return on a rate base that includes original cost of such equipment and that no credit is, or has been, given the consumer for the windfall.

A considerable portion of the book is devoted to the propaganda activities of the investor-owned utilities. One can speculate that the Senator, as a politician, has been on the receiving end of this kind of propaganda, and that Vic Reinemer, as a newsman, recognizes the techniques. In any case, their position seems to be that a monopolistic utility has no real need to advertise to attract customers; that a utility certainly shouldn't be allowed to propagandize the consumer at the consumer's expense to maintain unreasonable rates.

At the close of the book Metcalf and Reinemer propose that one solution to the problem of overcharge lies in competition. Of course by definition a public utility is an effective, legal monopoly, and consumer-owned electric companies (R. E. A. and municipal systems) using available public power are the only sources of possible competition. The joker is that the investor-owned utilities own the expensive transmission lines and are not willing to let the R. E. A.'s and municipals use their lines at a reasonable cost, and sometimes not at all. Understandably enough. The Keating Amendment (to what is not stated) prohibits the Bureau of Reclamation from building transmission lines into areas where the I. O. U.'s "have agreed to wheel the power." In addition, in many states the I. O. U.'s have a statutory competitive edge. (See Sec. 14-530, RCM 1947, and *Montana Power Co. v. Vigilante Electric Co-op,* 143 Mont. 119, 387 P.2d 718 (1963)). Implicit in this discussion of competition is the alternative of public power, and it seems to me that this makes the rest of the book vulnerable. Whether rightly or wrongly, and whether as a result of intensive advertising by the industry, people tend to equate the concept of public power with socialism. Whatever merit there is in the rest of the book (and there is considerable) it is susceptible to effective criticism by otherwise responsible people who will apply the magic shibboleth, "socialism."

Senator Metcalf is a lawyer. Judging from his opinions while in the Montana Supreme Court from 1946 to 1952, he is a good one. Vic Reinemer was a newspaper man before he became Senator Metcalf's executive assistant. His credits indicate that he was a good one. The book has the

flavor of partisan impartiality that every brief writer strives for, and it has the touch of outraged public morals that every editorial writer seeks. Together, Metcalf and Reinemer strike a good balance for a book of this kind. As with every good brief and every good editorial, one might expect a startling reaction to the book. Sad to say, the public does not seem to be clamoring for reform even in the absence of an answer by the industry. At $5.95 the book has not had wide dissemination to the consuming public and probably never will have.

As noted, the book is documented. Because it is a polemic rather than a text the inquiring reader might question the authority cited and its application. We as lawyers can treat the "facts" well pleaded as true until they are put in issue. So far they have not been put in issue in the same forum. An answer would be interesting.

The book is a must book for lawyers, whatever side of the fence they occupy, if only because lawyers are by nature political-social animals. It is especially important to Montana lawyers because none of us is ever far removed from the shadows of the utilities and our senators. The book has now been out long enough for us to know that public apathy on this subject is too great to be overcome by the impact of this book. (The telephone company has had a recent round of hearings for rate increase with no public opposition.) But the seed of distrust has been cast and if the premises in the book are sound, the seed will take root somewhere, sometime. This may be all the reward the authors will get. It should be sufficient.

John M. Schiltz*

HUGO BLACK AND THE SUPREME COURT

Edited by Stephen Strickland
Indianapolis, Indiana: The Bobbs-Merrill Company, 1967. Pp. 365, $10.00.

To the great dismay of some, Supreme Court Justice Hugo Black's judicial philosophy cannot be easily categorized. He has been variously described as everything from a "states' righter" to a proponent of powerful central government. He has been referred to as favoring everything from a broad scope of judicial review to judicial self restraint.

The purpose of Stephan Strickland's symposium is to re-examine Justice Black and his philosophy. The nine lawyers, professors and constitutional scholars which comprise the symposium analyze the paradox that is Mr. Black and assess the impact of his thirty years of Court service on the lives, laws, and institutions of the American people. The

*A. B., University of Montana; L. L. B., University of Montana; Partner, Law firm of Hutton, Schiltz & Sheehy, Billings, Montana.

symposium members discuss Justice Black's approach to the changing legal problems confronting our country and his special concerns in the law such as racial equality, antitrust, and tax law.

Justice Black is portrayed as America's senior warrior for individual liberty. He began his career in 1937 as Roosevelt's one man army for promotion of the New Deal. Over the last thirty years, he has not changed significantly, but the problems confronting our country have. He still believes in a living, functioning democracy. For instance, Black stands firmly convinced that the Constitution says what it means about our civil rights and that it means what it says. Throughout his many opinions there runs the same consistent thread: protect the individual and his freedoms.

Although the focus of the symposium is on Hugo Black, the judge, always close at hand is Hugo Black, the man. Many personal elements are included such as his rural Alabama childhood, his service as a local prosecutor and police court judge, his term in the Senate, and his membership in the Ku Klux Klan.

In the end, Strickland casts aside the multitude of labels which have been used to describe Black in the past. The seemingly unexplainable riddle that is Justice Black is opened by Mr. Strickland's newly discovered key: that Black is a Madisonian. Madison's chief fame, as Black himself has often acknowledged, was as "Father of the Constitution" and as defender of every part of it. As Strickland puts it:

> Thus Black can be an "absolutist," albeit "modified," in applying the Bill of Rights; a "states' righter" in supporting the regulatory powers of the states; a "liberal" as regards construction of the Congressional commerce power; and a "libertarian" in applying the law in defense of free speech, free exercise of religion, and free exercise of belief.

Laurence E. Eck

THE JURY AND THE DEFENSE OF INSANITY

Rita James Simon
Boston: Little, Brown and Co.; 1967. Pp. 246. $10.00.

The Jury and the Defense of Insanity, as part of the University of Chicago Jury Project, describes the reactions of ninety-six juries to two experimental trials involving the defense of insanity. The author is an Associate Professor of Sociology at the University of Illinois and has served as Research Associate at the Law School, University of Chicago. Professor Simon bases the experiment on two actual cases: a housebreaking case, *United States v. Durham,* 130 F. Supp. 445, 214 F.2d 862 (1954), and an incest case, *United States v. King,* Dkt. No. 655-5 (D. C.

Cir. 1956). The trials were edited and recorded; the juries were chosen from jury pools in Chicago, St. Louis, and Minneapolis; and the jurors were told at the outset that their deliberations would be recorded.

The study centers on the distinction between two criteria to determine legal insanity. The M'Naghten rule, a doctrine used in almost all states and federal jurisdictions, asserts that the defendant is excused only if he did not know what he was doing or did not know that what he was doing was wrong. The Durham rule, adopted in the District of Columbia in 1954, states, in brief, that a defendant is excused if his act was the product of a mental disease or defect. The adoption of the Durham rule was hailed by many as the beginning of a new era where the law would work more closely with psychiatry in the disposition of criminal cases involving the insane. But others, who were more skeptical, wondered how the Durham rule would fare in the hands of the jury. In the attempt to find an answer, Professor Simon divided the experimental juries into three groups: one-third were instructed according to the M'Naghten rule, one-third to the Durham rule, and one-third were merely told to find the defendant not guilty by reason of insanity if he were insane at the time of the crime.

The Durham rule has been criticized on two grounds: it would increase greatly the number of defendants acquitted on the grounds of insanity and the psychiatrist's testimony would dominate the trial to such an extent that the jury would become little more than the rubber stamp of medical experts. Evidence from this study shows that jurors who received no instructions as to the criterion of responsibility had the highest proportion of not guilty by reason of insanity verdicts. Jurors who were exposed to the Durham rule had a slightly lower proportion, and M'Naghten jurors were lowest. Jurors exposed to the Durham rule were twelve percent more likely to return a verdict of not guilty by reason of insanity than those exposed to M'Naghten. But the important of this figure is diminished by the fact that there was very little difference between the verdicts of uninstructed juries and Durham juries. The author suggests that such a finding indicates that the Durham rule is closer to a juror's natural sense of justice than the M'Naghten rule. It was also found that Durham juries deliberated significantly longer than M'Naghten juries. On this basis the author contends that the evidence does not support the criticism that the Durham rule would deprive the jury of its basic responsibility. Taken together, the findings show that the Durham rule will fare in the hands of the jury as well as, if not better than, the M'Naghten rule.

The author seems to share the view of most psychiatrists that the Durham rule would improve the quality of psychiatrists' testimony and be easier to work with in the courtroom, but she is careful to preserve the scientific accuracy of the experiment by setting aside personal bias. In any experiment designed to measure the reactions of many juries to a particular trial, the experimenter must face the problem of reproducing

the trial many times without changing even the slightest detail. Professor Simon chose to record the trial on tape as a necessary step to maintain control of the experiment. Although recording narrows the utility of the results to determine a jury's reaction in an actual trial, the results are not so narrow as to be inapplicable to actual trials. *The Jury and the Defense of Insanity* will be especially helpful to an attorney faced with a trial involving the defense of insanity, but is significant and informative to anyone concerned with the process by which our juries administer justice.

James P. Murphy, Jr.

LAWYERS AND JUDGES

Joel B. Grossman
New York: John Wiley and Sons, Inc., 1965. Pp. 228. $6.75.

As early as 1908, the American Bar Association expressed an interest in the Federal judicial selection process. *Lawyers and Judges* is a perceptive analysis of the progression from this mere interest to an active participation by the ABA in today's selection process.

Author, Joel Grossman, an assistant professor of political science at the University of Wisconsin, analyzes the process of selecting Federal judges prior to discussing the role of the ABA in that process. He examines extensively the political overtones of judicial selection. Since the ABA involvement stemmed from a recognition that judicial fitness is not always commensurate with political popularity, the author thus leads into a historical examination of the ABA's consultant role in the judicial selection process today.

The ABA's Committee on the Federal Judiciary has attained its present position as a consultant to the Attorney General, who makes the final recommendation to the President, largely because of its decision to temporarily forego attempts to make judicial selection non-partisan. The height of the Committee's influence was achieved during the Eisenhower administration when it possessed a virtual veto power over unfit candidates. The relative instability of the Committee's influence is shown by its relegation to a consultant position during the Kennedy administration. Although the amount of power which the Committee has been allowed has varied, Grossman believes the Committee has contributed to a continuing improvement in the process of selection. He also feels that from the standpoint of society, the ABA's present role as consultant is the proper position for an independent group to maintain. If any further power were given, such as the veto-like power of the 1950's, there would be too much control over appointment of judges vested in a committee with limited investigative sources and methods and over which there is

no public control. Also to be considered is the fact that the ABA numbers fewer than one-half of the lawyers in the nation as its members.

The exhaustive research that went into *Lawyers and Judges* is evidenced by the large number of illustrative tables and the references to personal interviews conducted by the author. The book is well organized and, though it is by no means as readable as a novel, it does maintain the reader's interest throughout. The author's avowed intention to raise questions rather than to give answers was only partically successful in that most of the questions raised were also thoroughly answered.

For the practicing lawyer, the worth of this book is twofold. First, *Lawyers and Judges* gives a detailed description of how the Federal judges before whom he practices are selected. Second, the book serves to show how he may have a voice in that selection process.

Gary L. Graham

PSYCHIATRY AND CRIMINAL LAW
ILLUSIONS, FICTIONS, AND MYTHS

Sol Rubin

Dobbs Ferry, N. Y.: Oceana Publications Incorporated, 1965. Pp. 219. $6.00.

Mr. Rubin begins his examination of the interrelationship of psychiatry and criminal law by discussing the relative merits of the M'Naughten Rule and the Durham Rule. These are the principal rules used by courts to determine whether a defendant can be held responsible for his unlawful act. The M'Naughten Rule states that a defendant is not criminally responsible if he was incapable of knowing whether his act was right or wrong. The more recently announced Durham Rule exculpates those who committed a crime while "suffering from a mental disease or defect which produced the unlawful act."

While at first glance the latter rule seems to be more liberal and progressive, Mr. Rubin points out that in practicality the Durham Rule does not result in a more just and humane treatment of mentally ill offenders. Durham Rule jurisdictions often require automatic committment to a state mental hospital for an indefinite period following exculpation in criminal proceedings. An offender subjected to this civil confinement is not eligible for parole, and due to overcrowding of state mental facilities the treatment afforded such patients is usually limited to confinement. In addition the offender is often confined longer than he would have been under criminal statutes. As a result many defendants in Durham Rule jurisdictions refuse to admit their mental problems rather than face civil confinement.

Montana Law Review, Vol. 29 [1967], Iss. 1, Art. 10

Mr. Rubin believes that all jurisdictions should use the M'Naughten Rule because its application is limited to defendants who have serious mental disabilities. If the M'Naughten Rule is followed, offenders suffering from less serious forms of mental illness will be sentenced under criminal laws. He argues that a psychiatrically-oriented correction system would be best for most mentally disturbed defendants, and that penal institutions are quite capable of providing adequate psychiatric care for persons with less serious mental problems.

In the author's opinion the Model Sentencing Act would insure that most mentally ill defendants would be sentenced to penal institutions. The Act is designed to fit the sentence imposed to the individual offender. In all felony cases a pre-sentence social investigation is made to determine which offenders pose a real threat to society. Such persons are labelled "dangerous offenders." They are persons who commit crimes which endanger the lives of others, and who suffer from severe personality disorders that indicate a propensity for crime. A complete psychiatric report on all such "dangerous offenders" must be furnished a judge before he pronounces sentence.

The maximum sentence for "dangerous offenders" is thirty years and for others it is five. In theory, extremely long sentences provide more problems for prison administrators and very little rehabilitation, while shorter sentences are sufficient for social retraining. A minimum sentence is never required, and even "dangerous offenders" can be paroled at any time. Mentally ill "non-dangerous offenders" would receive short criminal sentences. The author feels this is preferable to the indeterminate civil confinement awaiting them in Durham Rule jurisdictions should the defendants acknowledge their mental problems. Application of the Act is also discussed in relation to problems of sentencing sex offenders, narcotics addicts, and recidivists. Mr. Rubin demonstrates how the Act would provide more intelligent and flexible sentencing procedures than present systems.

Mr. Rubin argues persuasively in support of his thesis and in so doing illuminates many important problem areas. However, the book is basically an argument in support of the Model Sentencing Act and is too one-sided. The discussion of the problems concerning sentencing of mentally ill offenders makes book worth reading, but it is not recommended to the reader who desires an overview of psychiatry and its relationship to criminal law.

Alan F. Cain

DETECTION OF CRIME

Lawrence P. Tiffany, Donald M. McIntyre, Jr., and Daniel L. Rottenberg
Boston: Little, Brown and Company, 1967. Pp. 286. $10.00.

In the procedural journey to a successful criminal prosecution, the police officer usually takes the first step, that of detecting the crime and making the arrest. The authors of *Detection of Crime** offer a systematic study of detection practices used by the police departments of Chicago and Detroit. Throughout the book the authors repeatedly ask whether these practices fulfill the legitimate desire of police to be effective, and the judiciary's commitment to a system which conforms to appropriate standards of fairness.

Although the authors do not arrive at an ultimate answer, they do provide an in-depth study of police practices in the areas of Stopping and Questioning, Search and Seizure, and Encouragement and Entrapment. This study revealed, for example, that police do stop people on mere "suspicion"; that lacking probable cause, they do search without a warrant; and that they do aggressively tempt women to solicit them.

But the book does not limit its criticism to police practices. The authors note that some administrative and judicial procedures now required are ill-designed to cope with many crimes. For example, the victimless crimes involving narcotics traffic, liquor violations, prostitution and homosexuality can be committed with disturbing the surface tranquility of the community. Their perpetrators can easily dispose of incriminating evidence. Hence, the strict evidentiary requirements necessary to obtain a search warrant, and the time consumed in so doing, often make such a procedure futile. As a result, warrants are used primarily when police desire to prosecute only the upper echelon of an organized syndicate. In such a case, the warrant is applied for only after a systematic study of the organization's movements and practices. The warrant then enables the police to make simultaneous raids, and insures that the evidence seized will be admissible in court.

Procedural law is not the only cause of police frustration. In many cases the definition of the substantive crime contributes to the dilemma. To illustrate this problem, the authors point to the crime of solicitation. In many states it is uncertain whether the crime is committed by all women who engage in sexual intercourse for money or only those who engage in aggressive public solicitation. This ambiguity forces the police to act at their peril in choosing acceptable detection methods. Judicial interpretations which define only what the crime is not, shed little light on the positive elements required for conviction. To partially correct this, the authors suggest that both police and legislatures take greater initiative in the positive formulation of acceptable practices.

*This book is part of the Administration of Justice Series. See 28 Mont. L. Rev. 143 (1966) for a review of the first issue of the series.

The reader of *Detection of Crime* will be disappointed if he looks for an answer to every question posed. But he will become more aware of current police practices and problems. By informing the readers, the authors have achieved their purpose of aiding in the establishment of crime detection methods which are effective and yet in accord with appropriate standards of fairness.

Thomas A. Harney

A NEW LOOK AT CONFESSIONS: ESCOBEDO—THE SECOND ROUND

Edited by B. James George, Jr.
Ann Arbor, Mich.: Institute of Continuing Legal Education, 1967. Pp. 304.
$20.00

A New Look at Confessions is a commentary on the renowned *Miranda* decision. *Miranda,* decided in June of 1966, pronounced a "new set of standards governing introduction in evidence of statements obtained from the defendant through police interrogation." The Institute of Continuing Legal Education conducted national seminars on the meaning and prospective effects of *Miranda.* Lectures and group discussions presented at the seminars compose the material for the book.

Miranda holds that statements obtained by police from criminal defendants during "custodial interrogation" will not be admitted into evidence unless the privilege against self-incrimination has been effectively safeguarded. The police must warn the defendant that he has a right to remain silent, that anything he says may be used as evidence against him and that he has a right to counsel, either retained or appointed, during interrogation. Failure to give these warnings will render any statements elicited during interrogation inadmissible as evidence.

Custodial interrogation was defined in *Miranda* as, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Judge George Edwards, United States Circuit Court of Appeals (Sixth Circuit), suggested that "the warnings may be required in situations other than station house interrigations." Whether the warnings must be given depends on the circumstances in each case. The Honorable Thomas C. Linch, Attorney General of California, articulated the criterion with which to determine whether the warnings must be given. He said that "compulsion [is] the new standard." If a situation arises in which the defendant's Constitutional rights may be prejudiced through compulsion by the police, the warnings must be given.

A statement made during custodial interrogation, to be admitted into evidence, must demonstrate that the defendant has made an effective

waiver of his rights. *Miranda* states: "[T]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If the waiver is not unequivocally shown there will be a presumption of illegitimacy of the evidence, and the confession or statement will not be admitted." It has been suggested that valid waivers, measured by the criteria established in *Miranda,* will be almost impossible to establish. Most authorities, including Judge Edwards, do not believe that it will be that difficult.

Several methods for overcoming the "presumed illegitimacy" of waivers have been suggested. The use of a printed form has been extensively advocated. The signed document will not be conclusive proof of a valid waiver for the court will inquire into the background, conduct and experience of the accused. If it appears that there was no knowledgeable waiver, the confession will be discarded. Prof. B. James George, Jr., of the University of Michigan Law School, warned that many criminal prosecutions may be prejudiced if the police consider the form a panacea and follow it by rote. The interrogator must be sensitive to the particular circumstances of each case. If there is any doubt about the efficacy of the weiver it is probable that any statement made pursuant to it will be barred as evidence.

Justice Edward E. Pringle, Colorado Supreme Court, endorsed the use of magistrates similar to that required by Rule 5 of the Federal Rules of Criminal Procedure. Under this system the defendant would be taken before a magistrate who would explain his constitutional rights. The magistrate would determine whether the waiver was knowing and voluntary. Proponents of this method maintain that the magistrate would be a disinterested third party, who would reduce the possibility of coercion, in the police dominated atmosphere in which compulsion breeds.

The jurists, law professors, and law enforcement officials are not in unanimity in interpreting *Miranda,* or in answering the questions which it raises. The lectures and group discussions, from which the material for the book was taken, were held only a few months after *Miranda* was decided. Consequently, the authors could only support their propositions with theory and informed conjecture. Some of the potential problems they wrestled with may never develop.

A New Look at Confessions is an understandable analysis of *Miranda.* It is not a technical guide for criminal procedure but a general presentation of the problems related to warning and waiver.

Peter Michael Kirwan

DEDICATION

At the completion of Spring Semester, 1968, Professor David R. Mason retired as a full-time professor of law at the University of Montana. He thus concluded a period of service to the University which began in 1927. The contributions and achievements of this man during his professional career have been discussed at length elsewhere. What has not been mentioned, and what the Montana Law Review wishes to acknowledge at this time, is the role Professor Mason has played in the successful publication of the Law Review at the University of Montana.

In 1939 Professor Mason was the Acting Dean of the law School. In that position he gave formal approval and support to the first issue of the Montana Law Review. Since that time, Professor Mason has been the largest single contributor to this publication. He has authored or co-authored nine articles, and has acted in an advisory capacity on countless others. In gratitude for our first breath of life, and for this continuing source of scholarship and wisdom, the editorial staff of the Montana Law Review is honored to dedicate this issue to Professor Mason.

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK

INTENTIONAL BLANK