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Book Reviews

Ronan E. Degnan (reviewer)

James J. Lenoir (reviewer)

David H. Vernon (reviewer)

David W. Louisell (reviewer)

David Maxwell (reviewer)

BOOK REVIEWS

CASES AND MATERIALS ON EVIDENCE, Fourth Edition. By Morgan, Maguide & Weinstein. Brooklyn: Foundation Press, 1957. Pp. xxiv, 880. $11.00

DEGNAN: Have you had an opportunity to examine the new fourth edition of Morgan, Maguire and Weinstein, *Cases and Materials on Evidence?*

LOUISELL: Yes.

D. Is it really new, or is it just a fourth edition? We have recently heard a lot, from the President of the United States on down, about planned obsolescence, about the production of superficially re-styled goods with no object but that of forcing out of use still serviceable and functionally identical goods. Could that charge be made against this product?

L. Perhaps there is some change that corresponds to higher tail fins and longer, cleaner lines. Footnotes and supplementary notes bristle with late citations. Alone, this might be empty emphasis on currency. But there is technological change as well. A substantial amount of it charts the emergence of new and urgent issues which are likely to become even more important in the future, just as they have gained in importance since appearance of the third edition in 1951. For example, a topic that got rather perfunctory treatment in 1951 has been substantially improved here. This is governmental privilege in its varied aspects—executive, sovereign semi-immunity, security-diplomacy, informer, etc.[1] Another subject elaborated beyond its 1951 acknowledgment is self-incrimination.[2] That problem arises in wider context than it did seven years ago, and our editors make an attempt to cope with the expansion. A pretty good attempt.

In short, this is not the type of new edition that any mechanic skilled in the art could prepare.

D. Is that entirely true? Does it require keen perception to discern that so long as the cold war—political, military, economic and scientific—continues to exist these areas will be both important and hotly contested? Wouldn't any intelligent reader of the newspapers have anticipated at least the general outline of these developments? In fact, only obtuse editors would fail to appreciate this. Astute anticipation of the future is what earns credit in our trade. I hasten to admit that

1. C. 7, sec. 2, A and B, p. 786 *et seq.*
2. C. 7, sec. 1, C, p. 759 *et seq.*

changes of the magnitude described are sufficient excuse for a new edition; I simply say that no plaudits are earned for having done it. The royalties should be reward enough.

L. Aren't you applying inappropriate standards? Charting the future is not the function of a casebook. A law review article is to be commended if it predicts five or ten years of development with reasonable accuracy, if it says "These new and important issues will evolve out of changing conditions, and their solutions will be determined thusly, for these reasons." A treatise must project even further. But a casebook is another animal entirely. Its object is neither short term erudition nor long range vision. We all profess to scorn those who teach each problem as though its importance were measured by the probability that it will appear on the bar examination. It is scarcely more defensible to teach students to get by the first five years without pain: "These are the questions apt to arise, and here are the approximate answers." This is bar cramming without the courage to name it. The polar danger is the attempt to give answers that will last forever. Even this would be only partly defended if the answers given could be shown to be valid. The object of law teaching is to train men capable of making their own answers.

D. Isn't that what I've been preaching to you? But we are here to review a specific book, not to pontificate on the philosophy of education. You cannot charge that this book violates either of your "polar dangers." As I see it, the Morgan and Maguire book has long had three distinctive features, three ways in which it differs in degree or in kind from its competitors. The first of these is its premise that the essentials of evidence law are intellectually tough stuff, and that the way to handle its little problems is first to grapple hard with its big ones.

L. I agree with that. I mean, I agree that the premise is a good one, and that the Morgan book has been built upon it. I cut my teaching teeth on the second edition. But doesn't this one back away from that claim? "[E]xact analysis, exposure of fallacies, hardheaded weighing of values and genuine lawyer-like applied logic" are, according to the preface, but "by-products."[3]

I suggest moreover, that those particular traits are best polished by the study of Relevance—now known as Circumstantial Proof.[4] Determination of relevance is not one single intellectual step; it is the result of a complex equation composed of several variables. The difficulty with doing very much with relevance is that it too much resembles exercises in mathematics, where the answer to any particular equation is a fleeting thing and it is the process that matters. This is

3. P. ix.
4. C. 4.

mere drill, something we can ill afford in these days of crowded curricula.

D. Isn't there relatively more than there was before, however? The preface to the third regretfully announced the decline of relevance as a topic of study.[5] This one seems to announce the decline of its values. But, despite some shifting around of materials (and the unfortunate name Proof rather than Evidence) it seems to me that more attention is given to relevance in this edition than in its predecessor.

L. Perhaps this is an unusual preface in that it claims too little. I do have a general impression that this edition may be as intellectually tough as its ancestors. Some of the notes seem more probing and less content to inform than their counterparts in the third. On the whole, I think that this particular characteristic is played down more in the preface than it is in the structure of the book itself. But you had three characteristics. What are the others?

D. The second is that it views the problems of evidence law as fundamentally problems of judicial administration. It is not content to ask simply whether one form of the rule is better designed to assure discovery of truth than the other, whether the New York rule is better than the Pennsylvania rule.

L. True. At the expense of a clumsy expression, that has always been a most characteristic characteristic. When I first taught this book I thought that the reason for disposing of judicial notice in the first chapter was to define the ambit of our subject and then get on to the study of it in the remaining chapters. I soon found out that the purpose was quite the contrary. Something like "We will learn that the rules of evidence are time-consuming and expensive and intricate at their best. Let us look first at a method of avoiding them. To what extent can we, within the limits of the constitution, tradition and logic, limit the area of their compulsory application?" And the treatment of judicial notice is expanded, not contracted, in this edition.

D. Not just judicial notice. Most evidence rules deal with testimonial and documentary evidence. A certain gentleman from San Francisco has recently attracted national attention by his crusade for the "more adequate award." Such verdicts are obtained (if not retained) primarily by dramatizing the evidence with displays and models and charts and other visual aids. This has created serious problems of judicial administration. Most of the dispute has been over whether awards are either adequate or inadequate, whether the injured are to be left destitute or the insurance companies protected from ruinous judgments and impossible premiums. Still the only "rule" that exists is that handling of the evidence material on which the crusade is

5. MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE vii, ix (3d ed. (1951).

based rests in the discretion of the trial judge. This most unenlightening and useless standard is met[6] by our editors on what seems the proper ground—how shall the trial judge exercise his discretion? That is where the real issue lies and that is the place to attack the problem, not in passing judgment on whether Mr. Belli is plumed knight or charlatan.

L. Stop, please! I do not entirely agree with you. Rules of evidence are but a small part of the overriding moral problem of how society provides for such losses. Of course, an evidence book cannot attack them all; this one is to be complimented for doing what it can. What is your third feature?

D. The prior editions were more concerned with discovering what was wrong with evidence law and how it could be changed than they were with teaching the stuff of what courts will do in fact. Morgan and Maguire were diagnosticians. They tore doctrines down to the bare bones of point and purpose and then reconstructed them. When the rules that exist did not conform, Morgan and Maguire were ruthless in the cry for change. If they found diseased tissue, they offered strong medicine for treatment. If they found aberrant growth, they cut it out. They had no sentimental attachment for once useful but now obsolete appendages.

This edition is more frankly designed to teach the existing law. According to the preface, evidence law is often irrational. But the elimination of irrationality is not yet "near in sight."[7]

L. So you think the tranquillizer has taken its place along with the scalpel in this book? If you can't get rid of your problems, learn to live with them? I think I detect this general change in tone in the book as well as in the preface. But it is far from consistent. An increased concern with the practical and recurring problems of the law of evidence should have led them to a greater awareness of the problems of privilege than they have shown in the past. Yet this book gives even less attention than before. Oh, they have expanded the man-and-government privilege, all right, and they have wisely revised their Fifth Amendment approach. But the privileges based on man-and-man confidential relationships generally are given even shorter shrift[8] than in prior editions. We see an ever increasing multiplication of social workers, welfare workers, marriage counselors, psychotherapists, clinical and industrial psychologists and the like. They are asserting claims for protection of confidence. Because they are human, some claim too much. But our editors concede them too little when they

6. Pp. 97-120, 409-416.
7. P. ix.
8. Pp. 827-843.

dispose of those claims as peremptorily as they do.[9] This seemingly inflexible hostility to confidence-type privileges seems to me wrong on two grounds. One goes to the merits; I have expressed elsewhere[10] my view that such privileges are too little understood by their violent critics. The other is a matter of teaching; shouldn't students be somewhat informed about the underlying problems? Shouldn't they rather than the editors make the decisions?

D. Without outrightly joining in what I regard as your rather extreme views on the confidence privileges, I will say that I am inclined to present more of privilege in class than the *Morgan* book allows for.

How about hearsay? Is there any significant difference in treatment of that doctrine in this edition? Both Morgan and Maguire have made significant personal contributions in this field. Morgan especially.

L. Do you mean treatment of the exclusionary rule itself, or treatment of the exceptions? The rule itself, as well as the dangers it is designed to avoid, get the same treatment they got before.[11] There are a few case substitutions, but (without the advantage of having taught them) I hazard the view that the only reason for preferring the new over the old is just that they are newer. The space alloted to exceptions, however, has been cut by more than one-third; dictated as they are by considerations of tradition, precedent and convenience, they seem the "practical" kind of stuff that the preface promises to deal with because we must live with them, although often irrational.

D. I think I will stick by my guns on this one; they are being more "practical." Much attention was given to the exceptions in the prior editions because they too served as vehicles for continuous running attacks on the rule itself. What appears in this edition is, in a general way, more frankly informative, more "The principal case represents the general rule." So I urge that, somewhat paradoxically, the very fact that coverage of exceptions has been reduced is strong evidence that the frontal assault on the hearsay rule has tapered off into a sniping campaign. My evidence is less clear on privilege, but I think that the same inference is permissible there.

L. I will not argne your hearsay point. It is at least tenable. But can it be that Professor Morgan has given up the battle he fought so nobly and so long?

D. I think not. He has recently repeated with no show of diminished conviction his long standing view that if we took the trouble really to understand the hearsay rule in its entirety we would probably

9. P. 843.
10. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957).
11. Pp. 517-544.

abolish it altogether.[12] Perhaps, however, the changes we think we detect have nothing to do with either Morgan or Maguire. This edition is Morgan, Maguire and WEINSTEIN. Isn't it likely that we are reviewing only the last of these? Isn't he the one who prefers "Proof" to "Evidence?"

L. Perhaps so. It is hard to make an accurate guess at this stage. The best we could do is wonder what the inevitable fifth edition will show by way of transformation.

D. I interpret that as a suggestion that such speculation is somewhat beyond the scope of a legitimate book review—or even of one like this. But as an aside remark, isn't it curious that Professor Weinstein, who wrote one of the best[13] (PARDON ME! One of the *two* best)[14] articles on privilege in recent years seems uninclined to develop the policy analysis he there employed?

L. To the latter, yes. To the former, no. I don't think that such speculation is beyond the scope of a book review. Let me repeat the question we asked at the very beginning: Is this really new, or is it just a fourth edition? We both seem satisfied that it is a good job, that some important and well-advised changes have been made, and that it will serve well its function, the teaching of the traditional course in evidence. Isn't the compelling need that of breaking with tradition and teaching a radically different course? If that were done, this book would be neither usable nor useful. Nor would any existing casebook.

D. In other words, it is just a fourth edition and not *really* new? But the die is pretty well cast in this field. Any book produced will bear a basic resemblance to those already in existence.

L. But should it? I wonder whether the impulse to come back to your question of newness is perhaps generated by a deep feeling, or at least *quaere,* as to whether there should be something *radically new* in the teaching of evidence—something as truly original as was the case method itself?

D. Are you thinking of the need to teach how to dig up evidence, how to realize what is needed to prove a case, and how to go about getting what is needed? This book devotes five whole pages to that.[15] Quantitatively this is little; relatively it is a lot. The prior edition had none. Isn't it true that our approach is almost exclusively neg-

12. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 166-168, *passim* (1956); Degnan, Book Review, 5 UTAH L. REV. 285 (1956).

13. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction,* 56 COLUM. L. REV. 535 (1956).

14. See note 10, *supra;* see also Louisell and Crippin, *Evidentiary Privileges,* 40 MINN. L. REV. 413 (1956).

15. I have elsewhere expressed my views on such "coverage" of the matter. Degnan, Book Review, 36 TEX. L. REV. 127, 129 (1957).

ative—the exclusionary rules? The new techniques of science, physical and social alike, are expanding every day. Take, for example, opinion polls. Isn't the important question not whether they are hearsay but how to organize and use them?[16]

L. I think Marshall Houts in his "From Evidence to Proof"[17] has already made that case. What you say points up why I am so fond of McCormick's separate section on Scientific Evidence,[18] although from the viewpoint of your question or Houts' book, it is of course not adequate. But I think treatment of scientific evidence raises a problem even more serious than Houts'. I would be the last to deprecate the fullest possible use of reliable scientific devices in fact finding,[19] provided only that they do not involve an infringement of essential personal freedoms. And the problem is not only one of weighing the scientific validity of the new devices as they come along—actually a relatively simply process and one the courts do face up to, despite the charge too readily made, I sometimes think, of cultural lag. The problem is one of weighing the value of the new device against its impingement on human freedom. I'm thinking, of course, of electronic eavesdropping, investigative narcoanalysis and the like. Things like these concededly may be efficient tools in exposing the facts, and to that extent the darlings of "modern" judicial administration. Finding out the facts is important in lawsuits; but it can be too costly. There are things even more important than reaching correct decisions in lawsuits. In the long run, all the facts in the world won't produce viable truth, if the price paid is the violation and distortion of the human personality. We can go a long way with the layman—be he scientist, businessman, or public relations expert—in promoting efficiency in judicial administration and adapting to that end all feasible scientific techniques and devices. But I know you are too sophisticated ever to fall for the line that the problems of evidence are simply those of efficiency, like those of business administration. After all, Evidence, like the law itself, is *per se* concerned with liberty; business and science are not.

D. Now stop. I do not think "truth" the only virtue. But I am less sophisticated than you seem to assume, for I cannot join in your happy willingness to sacrifice the truth without more assurance than I have been given that the *quid* is equal to the *quo*. However, I didn't mean to get you back on privileges again. When you suggested the

16. See the interesting opinion of Wyzanski, J., in *American Luggage Works v. United States Trunk Co.*, 158 F. Supp. 50 (D. Mass. 1957).

17. HOUTS, FROM EVIDENCE TO PROOF (1956).

18. MCCORMICK, CASES AND MATERIALS ON THE LAW OF EVIDENCE c. 6, sec. 7 (3d ed. 1956).

19. Louisell, *The Psychologist in Today's Legal World: Part I*, 39 MINN. L. REV. 235 (1955).

possibility of something radically new, what did you have in mind?

L. Are you satisfied with the teaching of Evidence almost exclusively from appellate opinions? In doing so, don't you ever have the feeling that you are living in an unreal world? You won't deny, will you, ". . . that there is a world of difference between Evidence as it is practiced and applied in the busy trial court, with lawyers of varying degrees of excellence and mediocrity under varying and often conflicting pressures for speed and thoroughness before judges of varying quantums of patience and impatience, and Evidence as it is taught by analysis of polished appellate opinions . . .?"[20]

D. Would you present the student with a series of trial court transcripts? The fourth edition drops the old trial record "partly for lack of space, partly for doubt as to whether it was much used."[21]

L. I noticed that. I wonder if the omission is not at least partially compensated for by opinions which quote more copiously from trial court transcripts than did those of previous editions. But I'm not quarreling with the decision to drop that hypothetical record; I agree it was infrequently used. Dropping it, however, does represent a recession from *something* of an attempt to get away from exclusive reliance on appellate opinions.

D. I have heard you say most of this before. Let's get down to specifics. I warn you that those profound questions that pass for wisdom over the lunch table will not do in cold print. A lot of us feel that something is both amiss and missing. What would you have us and the editors do?

L. Ah, the man who faces up to this point will *really* produce something new. But the point will not easily be attained; certainly not by substituting for meaty appellate opinions superficial trial court "how to do it" techniques. Keep the meat, but serve it at the table of every day trial court life, not only at the annual gourmet's picnic in the appellate chambers. That's the formula, if not the specifics.

D. Come, come, specifics please.

L. As often, diagnosing is easier than prescribing. I have a notion that the skilled diagnosticians would reduce it to this: deciding evidence points on appeal is so different from deciding them below as to render the former process a psychologically invalid predicate for the realistic study of evidence. I'm reminded of the classic dispute between Judge Clark and Judge Frank in *Arnstein v. Porter*.[22] The formula of Fed. R. Civ. P. 56 for summary judgments is an eminently logical and reasonable one—summary judgments should be granted when

20. Louisell, Book Review, 37 MINN. L. REV. 499, 500 (1953).

21. P. xii.

22. 154 F.2d 464 (2d Cir. 1946); 158 F.2d 795 (2d Cir. 1947), *cert. denied*, 330 U.S. 851 (1947).

there is no genuine issue of fact. But no verbal formula however sound can obviate the psychological reality that assessment of the genuineness is one thing when based on a written record, and another when based on testimony in open court.

D. There is this to be said for your view. Once upon a time (a formula for a fairy tale or recourse to history, as you will), a collection of wisely selected appellate opinion gave an accurate sample of trial court rulings and a representative picture of the mechanical and decisional processes of trial. (Not perfect, of course, but as perfect as any casebook was or is). All error was reversible. So law above was law below—at the second trial if not at the first.

L. Yes, but as I have noted, the atmosphere is not the same. Trial judges are hurried and harried and irritated. Trial lawyers are the same.

D. True. And modern appellate courts have abandoned the fallacy of thinking that it is as easy for the trial judge as it is for them. Somewhat indiscriminately, they say either (1) that the ruling below was wrong but not prejudicial, or (2) that admission is a matter of judgment, of more or less, to be disturbed only if grossly wrong. Sometimes one device excels, sometimes the other. But both lead to the same result.

L. Doubtless most people think this an advance from the standpoint of judicial administration. But it has seriously undermined what value appellate opinions had as teaching materials. Even that, however, is only a part of my problem. In other words, the opinions aren't (and I still think never were) an accurate picture of evidence law in action. And they get worse instead of better, since they still consist primarily of review of evidence questions arising in trial courts, most often before a jury. Consider the following variations of context of evidence questions and test the validity of our sample against them. The application of evidence rules (1) on discovery, where they are progressively departing from rules for admission at trial, (2) at hearings followed by de novo trials—how "anew" is a de novo trial?, (3) on free review on the record of a prior administrative or non-judicial decision—review de novo rather than trial de novo, (4) on review "on the whole record" (5) when review is limited by the test of "clearly erroneous" (6) when "non-reviewable" action is involved, (7) when immunity exists for good faith judgments of public officers, (8) when administrative or executive rule making is in question, and (9) when legislative judgment is in question.

D. Certainly these present problems this casebook does not explore. Nor does any other in the field. I too am disappointed in several respects. The book really does mention most of the points you catalog

above. But it does so under the peculiar heading "Freedom to Ignore the Rules," which either (1) does not describe the subject matter or (2) positively mispresents the principle involved. Worth quoting in its entirety is the following:[23]

> "(4) Commercial arbitration has become a common enough procedure to make worth while the consideration of its evidentiary problems. 61 Harv. L. Rev. 1022, 1023n. 15 (1948)."

Might a "consideration" be that the flight to arbitration is largely to escape the very rules that arbitrators have "freedom to ignore?"

L. Now you are being unfair. You give the editors a hard choice. One is to go back to the old Morgan and Maguire approach—eliminate the nonsense so that people will not be driven to arbitration. Yet a while ago you approved their shift to the "practical." Their other alternative would be to produce some materials on evidence rules and problems in commercial arbitration. I suggest that that is hardly feasible, if desirable.

D. Well, what is? Would it be possible to prepare materials which would present in any way the peculiar problems of evidence raised in your list above? Wouldn't such materials be sadly lacking in intellectual content when compared to this casebook?

L. I fear so. Perhaps this book represents what should be done in casebooks, assuming a simultaneous realistic trial court in which students are forced to live what they have learned in class. I have one parting remark. Let's be really frank. Don't you honestly think that it would have been a wonderful thing if the scholarship, effort and achievement of this fourth edition had gone into a text instead—lest too few texts monopolize the field? There were three well-known casebooks before this one—the third edition of this book, McCormick's[24] and Ladd's.[25] They are all good. It is doubtful if choosing one in preference over others would have any appreciable effect upon the understanding and knowledge of the student at the end of the course. After all, the overwhelming factor is what the particular teacher does with the book he uses, not the name of the book chosen. Isn't the need for another first class evidence text far more compelling than the need for one or for a dozen new casebooks? In a text the author can come directly to the point he wishes to make and argue it as forcefully as he will, while in a casebook he is limited to subtly or slyly suggesting the solution he prefers. Texts can openly compete for men's minds; casebooks really compete only for royalties.

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23. P. 515. See Degnan, Book Review, 36 TEX. L. REV. 127, 129 (1957).
24. CASES AND MATERIALS ON THE LAW OF EVIDENCE (3d ed. 1956).
25 CASES AND MATERIALS ON THE LAW OF EVIDENCE (2d ed. 1955).

D. There are, after all, publishers. But what are you doing about this?

L. Collecting opinions for my own casebook, of course.

D. Let's collaborate.

RONAN E. DEGNAN*
DAVID W. LOUISELL†

ESTATE PLANNING AND TAXATION. Two volumes. By William J. Bowe. Buffalo: Dennis & Company, Inc., 1957. Vol. I, pp. lvi, 590; Vol. II, pp. viii, 614.

This two volume work, authored by one of the leading teachers and practitioners in the field of taxation and estate planning, is designed for use by lawyers practicing in any part of the United States. In the preface the author states that the work was not intended to be an authoritative source of reference materials, but rather "primarily for reading and study by the lawyer who would familiarize himself with the field of estate planning." Material is presented which will not only assist the practitioner in formulating estate plans suited to the needs and desires of his clients, but which also offers suggestive tools in the way of illustrative clauses and "forms" which can be used to effectuate the plans which he recommends.

Perhaps special attention should be drawn to Professor Bowe's treatment of the subject of tax planning for an estate. In volume 1 he does an excellent job of clarifying some of the more difficult problems that confront the practitioner in this type of work. Professor Bowe has not only had broad practical experience in this field, but has also conducted seminars on this subject for practicing lawyers and trust men from all parts of the country.

Volume 1 is divided into three parts—Transfer at Death, Transfers During Life, and Business Purchase Agreements. Each of these parts is broken down so that there is fairly complete coverage of each part. For example, part I briefly covers the Federal Estate Tax, the Marital Deduction, Residuary Bequests of Principal and Income, Other Bequests and Will Provisions, Will Substitutes, and concludes with a chapter on Forms—Model Wills and Will Substitutes. The other two parts likewise conclude with a chapter on forms covering the various subjects treated.

The forms following each part should be particularly helpful, not only to the practitioner who might wish to check and compare his work with them, but also to the less experienced attorney to whom they offer suggestive forms for study. The forms concluding part I— Trans-

* Visiting Lecturer-in-Law, University of California, Berkeley, California.
† Professor of Law, University of Califorina, Berkeley, Califorina.

fers at Death—are particularly interesting. They consist of Will of Widow, Leaving Entire Estate in Trust for Son for Life, with Broadest Permissible Special Powers of Appointment by Deed and by Will; Will of Husband Creating Marital Deduction Trust for Wife, Residuary Trusts for Two Children, with Income from the Children's Trust Payable to Wife During Her Life; Will of Husband Creating Marital Deduction Trust for Wife, Residuary Trusts with Wife and Children as Discretionary Income and Principal Beneficiaries, Containing Broadest Type of Sprinkle Clause; Revocable Life Insurance Trust with Estate Tax Marital Deduction Gift to Wife; Pour-Over Will into Revocable Trust; Revocable Trust, with Outright Disposition on Death of Grantor; and Deferred Compensation Contract, with Revocable Beneficiary Designation.

Part II concludes with a chapter on Forms for Inter Vivos Trusts—Marital Deduction Trust; Sprinkle Family Trust; Trust for Minor Designed to Obtain Gift Tax Exclusion Under Code Section 2503 (c); Short Term (10 Year and a Day) Trust; and Irrevocable Life Insurance Trust. Part III concludes with a paragraph setting forth various forms for business purchase agreements.

The first part of volume 1, pp. xxxi-lii contains a summary both of the forms set forth in volume 1, referred to above, and of the legal documents in volume 2 presented as suggestions for effectuating various types of estate plans. This summary is divided into three parts: Wills, Trusts, and Contracts. It indicates the section, the page on which each form appears, and gives in brief the contents of the form appearing in the text. The summaries should prove most helpful to the attorney in indicating, in somewhat of a check list manner, the contents of the particular form.

The material presented in volume 2 consists of a summary of state death and gift taxes, along with a number of specimen estate plans prepared by lawyers from different sections of the country. Each hypothetical plan is relatively complete in that it sets forth the plan for an estate, along with suggested drafts designed to effectuate the particular plan. The various plans are as follows: Plan for a Relatively Modest Estate; Plan for a Substantial Estate; Plan Involving Jointly Owned Property and Oil Interest; Plan Involving Charitable Foundation; Plan Involving Farm Interests; Plan Involving Liquidity Problem, Close Corporation; Plan Involving Business Purchase Agreement, Partnership; Community Property Plan (Texas); and Community Property Plan (California). Volume 2 concludes with a chapter setting forth complete estate, gift and fiduciary income tax returns.

The plans in volume 2 drawn up for the community property states of Texas and California indicate the author's desire "to give emphasis

to particular sectional problems" and are consistent with his endeavor throughout the text to include community property aspects of estate planning. The Texas plan is complete (and long), whereas the California plan is relatively short. From these two plans the reader gets a fairly good view of the legal problems which lawyers must consider in two of the community property states. He also can see that the community property states differ from each other in their treatment of estate planning problems. Inasmuch as there are in all eight community property states it behooves the practicing lawyer to know the community property law of the particular state involved.

The summary of the state death and gift taxes, comprising some seventy pages of volume 2, should be most helpful to estate planners who are called upon to plan estates involving property in several jurisdictions. In a footnote there is a warning reminding the reader that since state legislatures are constantly enacting new legislation, he should check with the statutes of the particular state before recommending a final estate plan. The reviewer noticed that this advice was pertinent to his own local jurisdiction. Several important changes in the Arizona Estate Tax Act of 1953 are not noted in this summary.

The author and those who collaborated with him are to be commended for the publication of these two volumes. Along with the penetrating casebook by Casner, Trachtman's little monograph, and a few other works, these two volumes greatly enrich the literature in this field. There are, however, certain warnings that should not be overlooked. There is a danger, as every one knows, that busy practitioners will blindly copy a form, or use the form without carefully analyzing it. This danger is inherent in this two volume work. Moreover, there are dangers in any attempt to simplify the complicated subjects involved in estate matters.

Likewise, one can hope that in future editions, the system of reference will be changed, to facilitate the use of the volumes. In the Table of Contents references are to chapters and sections and not to pages. And in the Table of Cases references are to sections and not to pages; the same is true of the Index references at the end of volume 2. This makes for cumbersome reference, since the section numbers do not even appear on each page. For example, in the Table of Cases, where the references are to sections only, one must not only find the particular section in which the case is discussed, but also must locate the right page. Fortunately, this criticism does not apply to the carefully prepared summary of forms which appears in the first part of volume 1.

In conclusion it may be stated that here is an excellent work that not only clarifies some of the more complicated phases of estate planning, but also contains a helpful variety of suggested forms. Several

practitioners in the reviewer's acquaintance are finding the volumes of great practical benefit, and it is believed that the work will become a standard treatise in law offices as well as in trust departments, throughout the country. In addition it will be a useful work for the constantly increasing number of courses in estate planning that are being offered in the law schools. In recognition of the value of the work in estate planning courses the publishers have a special student's edition made up of volume 1 of this work.

JAMES J. LENOIR*

THE SANCTITY OF LIFE AND THE CRIMINAL LAW. By Glanville Williams. New York: Alfred A. Knopf, 1957. Pp. xi, 350. $5.00.

Glanville Williams, although a lawyer and law teacher, has prepared a volume emphasizing the theological, medical, and social rather than the more strictly legal aspects of such problem areas as infanticide, sterilization, birth control, artificial insemination, abortion, suicide and euthanasia.[1] Despite the author's statement that "the connecting thread is the extent to which human life, actual or potential, is or ought to be protected under the criminal law," (Preface at ix) my feeling on reading the book is that the connecting thread is the constant query as to the relationship between religion, science, society and the law. Mr. Williams repudiates all absolutes as controlling what he regards as human-social problems. He rejects what he refers to as "the pretensions of the moral theologian, sitting in the calm of his study, to dictatorial powers of moral interpretation." (317) His approach to every problem is pragmatic, looking to the human-social effect of the various solutions.

In his rejection of all moral absolutes, Mr. Williams concentrates his discussion on the doctrines of the Anglican and Roman Catholic churches. His own solution is always couched in social terms. Thus in answer to the Roman Catholic position that the use of the contraceptive method of birth control is "morally evil and seriously sinful,"[2] he says:

> The practice of contraception, which has persisted despite religious and governmental hostility or apathy, has been found to have other beneficial effects than that of raising economic standards. Not only can children in small or medium sized family be better educated and looked after,

* Professor of Law, University of Arizona.

1. The volume being reviewed is based on a series of lectures delivered by Mr. Williams as Carpentier Lecturer at the Columbia Law School.

2. Hassett, *Freedom and Order Before God: A Catholic View,* 31 N.Y.U.L. REV. 1170, 1173 (1956).

> resulting in greater physical, social and cultural improvement, but the status of the mother, emancipated from the burden of over-fecundity, is vastly improved. The practice of contraception, too, greatly reduces the crude and wasteful methods of family limitation—abortion and infanticide —that tend otherwise to be resorted to. . . . (46)

In effect, Mr. Williams asks how a practice with such obviously desirable human-social results can be thought to be "morally evil and seriously sinful."

Further, he can see no logic in a position that maintains the validity of the "rhythm" method of birth control while rejecting all other methods as being "against the law of God and of Nature."[3] Once any method of birth control is accepted as "moral", Mr. Williams feels that the area of controversy is necessarily narrowed down to a determination of the efficiency of the competing methods. (58) On the basis of efficiency, "rhythm" must be rejected. He points out that religious objections to contraceptives has done "much to retard medical exploration of this field of knowledge," (46) and he feels that "when religious opinions are embodied in the law, the cramping effect upon free scientific inquiry is . . . disastrous." (46)

In some areas of his discussion, as in his treatment of abortion, Mr. Williams quarrels with the scientific validity of the theological position. The Roman Catholic opposition to therapeutic abortion has been stated as follows:

> In light of the moral law, the simplicity of the matter leaves little more to be said. Briefly, every living human fetus, regardless of its stage of development, is a human person and any act which is a deliberate and direct destruction of that innocent life is therefore an act of murder. . . . Moral law unhesitatingly brands every therapeutic abortion as murder in each and every case in which so-called medical "authorities" teach its indication.[4]

Mr. Williams recognizes that no rational argument can sway an opinion based upon the absolute moral proposition that the human personality begins with conception.[5] However, he rejects that as the only starting point of life, again seeking the social answer. He asks:

> [W]hy does the moral theologian . . . draw the line at impregnation rather than at some time else—say, the time of quickening, or of viability? If the line is to be drawn by reference to social considerations and human

3. McFADDEN, MEDICAL ETHICS c. 5 (4th ed. 1956).
4. *Id.* at 141.
5. *Id.* at 150. In discussing the problem facing a rape victim, Father McFadden suggests that conception may not take place for ten hours after the rape and he says that "for this reason . . . the victim of a criminal attack might use all necessary means to eject or destroy the semen up to ten hours after the offense took place." After that length of time has elapsed, however, Father McFadden says that it would be immoral for doctors "to do anything which would produce the death or abortion of a fertilized ovum present in the uterus."

> happiness, then pretty obviously the time of impregnation is the wrong one to take. What other argument is there for taking this time? The theologian may perhaps claim some direct access to God. If so, it can only be said that moral dogma of this kind cannot be dealt with on an intellectual basis. (226)

Perhaps the most effective method of conveying the color of Mr. Williams' thinking and of imparting some of the flavor of the volume, and that is all a review can hope to do, is to set forth rather fully a statement by the author concerning the problems of artificial insemination, and alongside this, to set forth statements on the same subject by various Roman Catholic writers.

Williams, *The Sanctity of Life.*

It is a remarkable fact that the Catholic and Anglican churches, which have made no pronouncement against the procreation of deaf mutes and other children doomed to serious congenital disability, gird themselves against donor insemination, which generally results in the birth of children above the average in their genetic endowment (since the donor is chosen with some care). Equally remarkable is the fact that although these churches have always been at pains to emphasize the view that the procreation and rearing of children is the principal if not the only legitimate end of marriage, as well as a duty of marriage, they reject a procedure which science has devised to serve that very purpose. The reason for their opposition seems to be a rather sad example of the theology of conceptions.

. . .

When one gets down to rock bottom, the real objection to adultery is that it is a particularly

Risk, *The Law of Catholic Marriage*

Canon 1013 § I The primary end of marriage is the procreation and education of children; its secondary end is mutual help and allaying of concupiscense.[6]

Pope Pius XII, *Speech to the 4th International Convention of Catholic Physicians* (1949).

First, the practice of artificial insemination, when it is applied to man, cannot be considered exclusively, nor even principally, from a biological and medical viewpoint, while leaving aside the viewpoint of morality and law.

Second, artificial insemination outside of marriage is to be condemned purely and simply as immoral. . . .

Third, artificial insemination in marriage, with the use of an active element from a third person, is equally immoral and as such to be rejected summarily.[7]

Hassett, *Freedom and Order Before God: A Catholic View.* The exclusiveness of the marriage

6. RISK, THE LAW OF CATHOLIC MARRIAGE 3 (1957).
7. Quoted, MCFADDEN, MEDICAL ETHICS 69 (4th ed. 1956).

gross kind of infidelity to the marital partner. . . . A.I.D. in standard medical practice is so far from being an act of infidelity that it is intended by all parties to turn a barren marriage into a fruitful one; and sometimes it repairs a marriage that, because of the wife's sense of frustration, is on the brink of disaster. . . .

To sum up, although it is possible for the moral meaning of adultery to differ from the legal one, there is no realistic way in which A.I.D. performed with the husband's consent can be said to be adultery in morals, even if it is adultery in law.

The remaining theological issue is the Catholic contention that masturbation is not only a sin, but so sinful that it cannot be permitted whatever good results may follow from it. That masturbation is sinful, when it is a means of obtaining venereal pleasure without the prospect of fertilization, follows, of course, from Augustinian doctrine. But in this instance the donor does not perform the act for this purpose; on the contrary, he performs it for the biological purpose of begetting. Consequently, the Catholic position needs some authority for saying that masturbation is sinful *per se* and irrespective of its purpose. (136)

bond, which excludes sexual intercourse with a third person as adulterous, also excludes the semen of the donor. Adultery is adultery whether or not the husband consents to his wife's having sexual relations with another man. It is not rendered less adulterous by nature of the fact that the semen has been artificially introduced.[8]

McFadden, *Medical Ethics.* From the moral standpoint, one must state immediately and without qualification that artificial insemination . . . is repulsive to every decent tendency of human nature. . . . It is impossible to imagine a Christian woman submitting to such an unnatural act.[9]

Hassett, *Freedom and Order Before God: A Catholic View* There is another moral problem involved in A.I.D. which we have not mentioned up to the present. It is this. The normal way in which semen is obtained from donors is through a deliberate act of masturbation. But this itself is immoral. It is a perversion of the sexual faculty. And the fact that the semen is labeled for use in artificial insemination does not change the nature of the act any more than the telling of a deliberate and serious lie for a good purpose makes lying morally good.[10]

8. 31 N.Y.U.L. REV. 1170, 1179 (1956).
9. MCFADDEN, MEDICAL ETHICS 68 (4th ed. 1956).
10. 31 N.Y.U.L. REV. 1170, 1180 (1956).

In his discussion of the sanctity of life, Mr. Williams rejects the proposition that "one can never determine the morality of an act simply by a consideration of the physical and temporal benefits it can produce."[11] He makes no attempt to summarize his thoughts concerning the relationship of law to society. Rather, he presents a series of propositions, all of which are consistent in their concentration on the dignity of man and the sanctity of his life, and all of which are consistent in their emphasis on the human-social aspects of the problems presented. Whether or not one agrees with his position—with his absolute rejection of absolutes—the book should be read. The views of Mr. Williams have been stated firmly and clearly. He deserves to have a hearing.

DAVID H. VERNON*

CURRENT LEGAL PROBLEMS 1957. Edited by G. W. Keeton & G. Schwarzenberger. London: Stevens & Sons, Ltd., 1957. Pp. v, 313. $5.95

This is a collection of public lectures on the law, which were delivered during the sessions of 1956-57 at, and under the auspices of the faculty of, University College, London, England.

To this reviewer it recalled the older style of law book—the sort which cultivated the law, rather than piling it in heaps, like grains of sand. Such a book as, for instance, *The Mirrour of the Justices,* or, in my home jurisdiction of the Commonwealth of Pennsylvania, Mitchell's *Motions and Rules,* or Amram's *Pamphlets on Pennsylvania Practice.*

There is here brevity, compactness, an emphasis on principle, rather than authority, and good literary style. These, without sacrifice of the thoroughness essential in sound legal exposition. It contains probably most of the recent advances in English law, in a package that can be carried in an overcoat pocket, and there is a good index to this, and to the entire series, of which this is the tenth, and a table of cases, statutes, and, quite important, treaties.

In the treatment of its topics, this set of lectures is perhaps more parochial than the volume that appeared last year. But it would be wrong to suppose, for that reason, that it has no message for practitioners outside of the United Kingdom.

As an example, one might notice, in the lecture—"Recent Trends in Criminal Justice," by G. J. Webber, LL.D., Reader in English Law in the University of London,—that the McNaughten Rules have been a subject of discussion since as early as 1954 in England, as they were

11. MCFADDEN, MEDICAL ETHICS 140 (4th ed. 1956).

* Assistant Professor of Law, The University of New Mexico.

here in the United States,[1] after the decision in *Durham v. United States*.[2] Parenthetically, in his leisure, Webber (p. 131, Current Legal Problems) says, "The truth seems to be that it is not a legal, but a social or ethical issue. Thus Lord Keith regarded it as a question of penal reform. Discussing murder in Scotland, he spoke of 'diminished responsibility' as something less than insanity which reduces the crime to culpable homicide."

The table of contents gives a far better idea of the scope of this little volume than can be had otherwise. The first two lectures concern the vital modern problem of divorce. Before the Bentham Club of the University of London, its President, the Rt. Honorable the Lord Justice Hodson, read the opening paper, "Some Aspects of Divorce Law and Practice," reviewing changes in the husband and wife status since the enactment of the Married Causes Act of 1857, in concept and practice. Taking the form of a tract against divorce, the lecture, "A Century of Divorce Jurisdiction (1857-1957)" by R. O'Sullivan, Q.C., Honorary Lecturer in Laws, University College, London, presents a view entertained by a powerful body of public opinion both in England and in this Country.

Thereafter follows, "The Right to Work," by Professor Dennis Lloyd, M.A., LL.D., Quain Professor of Jurisprudence in the University of London, discussing an interesting English case, *Harkness v. Electrical Trade Union* (the *Bank Holiday* case), from the point of view of the Labor Union as a club society;

"The International Labour Organisation Under Pressure," by L. C. Green, LL.B., Lecturer in Laws, University College, London, presenting the struggle now going on in the I.L.O. between labor groups in the free nations, and those of countries under Communist domination;

"Compensation for Industrial Injuries," D. J. Payne, LL.B., Lecturer in Laws, University College, London, a valuable dissertation on private as opposed to state insurance, and law reform.

A delightful treatise, "The Unreasonableness of the Reasonable Man," by Professor R. Powell, D.C.L., Professor of Roman Law in the University of London and Vice-Dean of the Faculty of Laws, University College, London, breaks into components the use, and misuse, by lawyers and courts of the "Reasonable Man" rule laid down by B. Alderson in the historic *Blythe v. Birmingham Water Works* case[3] (Professor Powell says, "Sir Alan Herbert made an English Court hold that the 'Reasonable Woman' does not exist in English Law. As my contribution to ambiguity I offer, the 'Reasonable Luna-

1. Hall, *Disability and Law: In Defense of the McNaughten Rules*, 42 A.B.A.J. 917 (1956).

2. 214 F.2d 873 (D.C. Cir. 1954).

3. 11 Ex. 781, 156 Eng. Rep. 1047 (1856).

tic,' and the 'Reasonable Prostitute'" and, later, "The Man Who is 'Reasonably Reasonable'") Professor Powell is well armed for this assault by experience in psychological testing with the British Armed Forces.

A special bit for British Lawyers, is "Reform of the Settled Land Act," by E. H. Scamell, LL.M., which American readers probably could skip.

But no American lawyer would want to miss the next lecture, "The New Law of Copyright," by A. Goodman, M.A., LL.B. (Cantab) LL.M. Solicitor of the English Supreme Court, which concerns not only the British Copyright Act of 1956, but much material on international copyright, generally. While copyright practice is specialized, all lawyers usually dream of publishing something, and Mr. Goodman's lecture will be found quite instructive.

Limited in aspect, but by no means so in effect, is the discussion by E. R. Hardy-Ivamy, Ph.D., Reader in Law in the University of London, of "Shipping Law Revision," recommending codification of the British Laws on shipping from the Merchant Shipping Act of 1894, and The Bills of Lading Act of 1855, on down.

B. Cheng, Ph.D. Lic.-En-Dr., Lecturer in Laws in University College, London, who also compiled the cumulative index to this volume of "Current Legal Problems," contributes a useful essay outlining recent trends in air law away from the desired goal of international uniformity, in "Centrifugal Tendencies in Air Law."

There follow three more lectures, "The Changing Commonwealth," Professor R. C. Fitzgerald, LL.B., F.R.S.A., Professor of English Law in the University of London and Dean of The Faculty of Laws, University College, London, "The Constitutional Challenge of Cyprus and Singapore," by D. C. Holland, M.A., Lecturer in Laws, and Sub-Dean of the Faculty of Laws, University College, London, and the final lecture, which I hope other readers will not find as abstruse as I did, "The Forms of Sovereignty," by one of the editors, G. Schwarzenberger, Ph. D., Dr. Jur., Reader in International Law in the University of London, and Director of Studies, London Institute of World Affairs.

From what has been said, above, one may infer that the current legal problems confronting the English practitioner are not so unlike those which face the American lawyer that he cannot profit from a view of how his English brother at the Bar approaches them.

As the Law Times is reported to have said in its review of this work, "All the papers repay reading, both for the wealth of information they convey, and for the interest they arouse."

This reviewer found the work for the most part highly entertaining as well as informative, although there is a touch of the academic