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The Jury and the Defense of Insanity. by Rita James Simon.

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BOOK REVIEWS

THE JURY AND THE DEFENSE OF INSANITY. By Rita James Simon. Boston: Little, Brown & Co., 1967. Pp. 269. \$10.00.

This book reports one of the major studies of the University of Chicago Jury Project. Two cases in which the defense of insanity was raised were presented in tape-recorded reenactments to 98 experimental juries, made up of almost 1200 jurors drawn from actual jury pools in the courts of Chicago, St. Louis, and New York. Their individual positions prior to deliberation were indicated on questionnaires; the deliberations, lasting several hours each, were recorded; and the final verdicts (or failure to reach a verdict in some cases) were reported to the court. The result is a unique examination of the effects of a new legal doctrine, the Durham rule, and of a very old legal institution, the jury. Several questions of major importance were posed, and at least partial answers obtained.

Question 1: What Is the Effect of a Change in the Law on Jury Verdicts?

The judge's instructions on the law were systematically varied, with $\frac{1}{3}$ of the juries getting the Durham rule, $\frac{1}{3}$ the McNaughten rule, and the last $\frac{1}{3}$ a simple instruction that "if the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." The first experimental case was modeled on the original trial of Monte Durham for housebreaking. Compared with jurors given the traditional McNaughten rule, those given the Durham rule were slightly more likely to go into the deliberations favoring a verdict of not guilty by reason of insanity (NGI). Fifty-nine percent of the jurors given the McNaughten rule, 65% of those given the Durham rule, and 76% of those given the instruction which did not attempt to define insanity, favored NGI. No significant difference was found in the final jury verdicts, but too few juries (ten with each of the three instructions) were tested with this case to provide a precise measure of effect on the group level.

In a rather bizarre case of incest with two daughters over a period of years, committed by a respected and otherwise apparently normal fireman, the Durham rule produced 12% more jurors favoring NGI at the start of their deliberations than did the McNaughten rule; 24% of the McNaughten rule jurors favored NGI compared with 36% of those given the Durham rule, and 34% of those given instruction which did not define legal insanity. The jury verdicts were: McNaughten rule, no NGI, 19 Guilty, and one hung; Durham rule, 5 NGI, 15 Guilty, and 6 hung; "no rule," 4 NGI, 14 Guilty, and 4 hung.

The more "liberal" Durham rule thus had a small effect in the expected direction. One reason for the relatively small difference may have been that the criterion of "ability to distinguish right from wrong" has become part of

our culture. While two-thirds of the McNaughten rule juries discussed this criterion in their deliberations, half of the Durham and no-standard juries also discussed it. Unfortunately, individual jurors were not asked directly whether they took such a criterion into account in their decision. Perhaps a specific corrective instruction that inability to tell right from wrong is *not* a necessary criterion would have had more effect; it is obviously necessary if we want to "repeal" a part of accepted "juror law."

Question 2: What Is the Significance of a Verdict of Not Guilty by Reason of Insanity in the Eyes of the Jurors?

Part of the experiment consisted in the judge's telling half the juries in the housebreaking case that the result of a NGI verdict would be commitment of the defendant to a mental institution. This treatment had little effect, however, because over 90% of the jurors believed that this is what would happen even when they were not told so by the judge. Jurors deciding between prison and commitment therefore knew what the alternatives were. But it may be questioned whether those who favored the NGI verdict were more "liberal" than those who favored a guilty verdict. The author summarizes the recorded deliberations on this point:

As most jurors saw it, the realistic choice was between about a five-year prison term and an indefinite confinement to a mental institution. Jurors who advocated commitment to a mental hospital emphasized that if the defendant was found not guilty by reason of insanity, he would be removed from his family and society for a longer period of time than if he was convicted.

The mental institution was thought by many jurors as a means of providing humane custodial care for people from whom society needs protection. There was some discussion of its curative powers, but many thought the defendant would never be cured and released. Conversely, some advocates of prison thought that the defendant would receive psychiatric treatment there, and that his release might be influenced by the results.

Question 3: How Do Jurors Interpret Legal Rules?

The deliberation transcripts provide fascinating insights into jurors' thinking about the "insanity" issue. They had intense discussions of whether the defendant in each case was "insane," "psychotic," "neurotic," or merely "emotionally disturbed," and what the consequences should be for his legal responsibility. In rejecting the Durham rule, courts have argued that "the Durham rule leaves the triers with virtually no standard to guide them The chief criticism directed against the Durham rule is that it leaves the words disease, defect and product, undefined." In their deliberations, the jurors generally drew the line of criminal responsibility between the psychotic person who manifests irrational conduct in many areas of life (as did the defendant in the house-

breaking case), who was not considered legally responsible, and the person who appears generally rational and competent except for the commission of the criminal act itself, who was considered legally responsible, even though that act arises out of deeply rooted psychological problems and an abnormal childhood situation (as in the incest case).

Question 4: Do Jurors Follow Instructions on the Law?

In the incest case 26 experimental juries received the Durham instruction that "where such acts stem from and are the product of mental disease or defect, there is no legal responsibility on the part of the defendant." They heard expert medical testimony that the defendant was a "psychoneurotic" of long standing with an "oedipus complex." Yet only 36% of the individual jurors so instructed went into their deliberations favoring the NGI verdict, and only 19% of these juries brought back such a verdict. It is not clear whether failure to bring in a NGI verdict in this case should be described as defiance of the instructions, however, since many jurors appear to have argued that a neurosis of the kind the defendant suffered from was not a "mental disease" of the sort envisaged by the instruction.

In the housebreaking case, the majority of jurors given the McNaughten rule still voted for NGI; unfortunately, in the experiment the psychiatric witnesses gave no opinion of the defendant's ability to tell right from wrong. If the experiment were run again with clear psychiatric testimony that he could tell right from wrong, we could get evidence of the extent to which jurors are willing to follow the McNaughten rule where the defendant is pretty clearly suffering from a severe and general mental illness. Even in the incest case where the psychiatrists all testified that the defendant *was* able to distinguish right from wrong, 24% of the jurors given the McNaughten rule favored NGI at the beginning of the deliberations. We may speculate that most jurors accept neither rule literally, but devise their own criteria of how "sick" someone has to be before he is relieved of responsibility for his acts.

The book reports many subsidiary findings of interest, concerning the effects of giving "model" psychiatric testimony to the jurors, the relation of jurors' background and attitudes to acceptance of the insanity plea, the relative length of deliberations under the different instructions, and the jurors' preference for one or the other rule.

The book is well written and presents its statistical materials very clearly; it also contains a wealth of quotations from the jurors themselves, which should be of interest to lawyers. It is a model presentation of the application of social science methods to a legal problem—as providing useful evidence and conceptual clarification, but not necessarily the last definitive word on what should be done.

Beyond its immediate findings, the book raises an important possibility for further work. We have a common law tradition, centuries old, of minute

examination of what judges say in their case decisions. The jury too is centuries old as a device for bringing public attitudes and understanding into the courtroom process; juries continue to decide so many cases and influence the settlements of so many more that juror opinions too are a central part of our legal system. But actual jury verdicts leave the jurors' reasons hidden, except where judges, lawyers or reporters interview them; these interviews are often hurried and inadequate, and many judges discourage or forbid them. A continuing program of experimental jury deliberations, sponsored by the courts and covering a wide range of legal topics, would permit us to examine what jurors say in arriving at their case decisions. This would make available to the law the wisdom or foolishness of the jury so that reasonable instructions and trial procedures could be developed, and it would make available to the judicial and political lawmakers the operating "sense of justice" of the public on major legal issues. The deliberations of experimental juries who have been exposed to concrete cases and argument on both sides can provide a much more valuable and thoughtful form of public opinion data on legal issues than the normal public opinion polls. The Simon study is a prototype for such ventures.

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HONESTY AND COMPETITION: FALSE-ADVERTISING LAW AND POLICY UNDER FTC ADMINISTRATION. By George J. Alexander. Syracuse: Syracuse University Press, 1967. Pp. 315. \$10.

This excellent book packs into several hundred pages a summary of the precedents and problems to which the Federal Trade Commission has given birth since it first won clear authority to stop false or misleading advertising practices.¹ An additional reason why it will be well worth its space on the desk of any attorney who counsels those who market goods across state lines is that George J. Alexander, professor and associate dean at Syracuse University College of Law, has avoided three of the most damaging pitfalls facing the scholar who adds to the law books in print.

The first pitfall lies in the mounting tendency of the scholar to combine a string of theoretical generalizations without explaining them by examples or hypothetical instances. The result, quite frequently, is a failure of communication for which any judge or client would be justifiably upbraided. Dean

1. See *FTC v. Gratz*, 253 U.S. 421, 428 (1920) where complaint of tie-in sales of jute bagging with baling wire for cotton was held not proven an unfair method of competition, *inter alia*, because no proof of deception or misrepresentation was produced by the Commission. See also G.J. Alexander, *Honesty and Competition 1-6* (1967) (thumbnail sketch of the sources of Commission jurisdiction).