Journal of Criminal Law and Criminology

Volume 9 | Issue 3 Article 18

1919

Reviews and Criticisms

REVIEWS AND CRITICISMS

PSYCHO-MOTOR NORMS FOR PRACTICAL DIAGNOSIS: A STUDY OF THE SEGUIN FORM-BOARD, BASED ON THE RECORDS OF 4,072 NORMAL AND ABNORMAL BOYS AND GIRLS, WITH YEARLY AND HALF-YEARLY NORMS. By *J. E. Wallace Wallin. Psychological Monographs,* vol. xxii, No. 2. August, 1916. Whole No. 97. Pp. 102. $1.00.

The idea of this study is indicated by the title. Dr. Wallin applied the Sequin form-board, as modified by Norsworthy and by Goddard to 446 clinic cases observed by him at Pittsburgh and St. Louis to 1,429 school children at Pittsburgh and to 308 epileptics. He has also incorporated in some of his tables data from Sylvester's study of 1,588 children and from Goddard's study of 250 children.

Each child made three trials, in each of which he was urged to do his best. His time was taken with a stop watch from the touching of the first block to the correct placing of the last one; also, a record was made of every false move made, though the study deals practically entirely with the time scores.

The original data are given in very extensive form in a series of tables comprising the final (seventh) chapter of the monograph. Chapter I explains the purpose and method of investigation. Wallin regards the form-board as a most useful device, as "a test of form perception, movement and intelligence—that is, of psycho-motor development." Intelligence, he says, is measured because the test "requires a rapid adjustment to a novel and complicated situation," but in the next paragraph goes on to say, "we need comprehensive scales of motor capacity no less than of intellectual development," which sounds as if the form-board was not much concerned with intellectual development.

In any event, he says rightly that tests are of little value diagnostically unless fortified with reliable age norms and unless the dependence of these norms on other factors, like sex, mental capacity, etc., is also known. The remaining chapters deal with these dependencies.

Chapter II deals with the dependence on age. Speed with the form-board increases with chronological and with mental age, more rapidly in the earlier years, when semi-yearly norms are feasible, more slowly in the later years (after 12), when bi-yearly norms are enough, and at least to 17, though with seeming interruptions at the ages 8 and 13. One rather striking fact is that the averages for normal reported by Wallin are almost invariably faster than those reported by Sylvester or by Goddard—to take an extreme instance, at 4 years Sylvester gives about 46 seconds, Goddard about 39 seconds, Wallin about 29 seconds as standard performance. The discrepancies amount to roughly 1.5 years in age assignments—enough to interfere with clinical inferences, it would seem. Wallin thinks the difference is due to the circumstance that his cases averaged higher in intelligence and were incited more to do their best at every trial. Since Sylvester's and

Goddard's norms are reprinted here, the user of the form-board can take his choice.

Chapter III deals with the dependence on intelligence. The main conclusions are: Bright surpass average and average surpass dull children; children of the same mental age, but differing chronological age differ little in psycho-motor efficiency (the factor of chronological age neutralizes the factor of intelligence); brighter children show their superiority more in the first or second than in the third trial (probably because of making a more rapid initial adjustment).

Chapter IV deals with sex differences. Boys are slightly superior to girls (average about 1.3 seconds), though this difference is lessened in the subnormal. The data are insufficient to show which sex is relatively the more variable. Tentatively, it may be inferred that subnormal males are more dangerous than subnormal females, but that the abler males surpass the abler females. The male superiority is greater in the first or the second than in the third trial, hence, Wallin says, it is desirable to make more than one trial, though the logic is not clear to the reviewer. That the sexes both seem to reach resting plateaus at the same years, 8 and 13, is hard to reconcile with other phenomena of sex growth.

Chapter V deals with the effect of repetition. There is a marked gain in speed from the first to the second and a less gain from the second to the third trial. The gain is greater with subnormal children because their first trial is so slow. Here, again, Wallin argues that the best score to use is the shortest one (almost always the third), though it would seem to me obvious from his own figures that subnormality is best brought out in the first trial. Practice curves, in any case, differ with degree of mentality.

Chapter VI deals with variability of form-board performance, which is considerably greater for subnormal than for normal children, and which decreases from trial to trial and with increasing chronological or mental age.

This monograph represents a deal of tedious work and its tabular summary will be welcomed by other investigators. It remains to be seen how much use can be made of it for the "practical diagnosis" specified in its title.

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THE PHILOSOPHY OF CONDUCT. By *S. A. Martin.* Boston, Richard G. Badger, 1916. Pp. 238. $1.50.

"Men change and times change with them, but the principles of moral truth are older than the earth, and shall abide when the elements shall melt with fervent heat, and the heavens shall be, as an outworn garment, folded up and laid aside, still the laws of nature, moral laws as well as mathematical or physical, shall abide, steadfast and unchanged" (p. 20). That moral truth is immutable and eternal, fixed in the constitution of things, ready-made and awaiting discovery by the moral sense of man—such is the ethical position of Professor Martin. Although he may claim descent from a long and honorable

ancestry, this teacher will find few relatives among contemporary writers on ethics. For some reason, perhaps because his first and foremost purpose was to write a text-book, Professor Martin does not undertake to defend a type of thought which would generally, in this day and age, be considered obsolete. There is a certain charm, it must be said, in the very positiveness with which these views are set forth, and, ethically considered, it is good to hear the voice of Cudworth once more. As an introductory text, the little book has much to recommend it, but it is not likely to be taken up by university teachers, because of its remoteness from modern discussions of the problems of conduct. The more conservative denominational colleges are likely to find in it "safe and sane" views, in keeping with orthodox Christian ethics.

Northwestern University. D. T. HOWARD.

THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY. By *Various Authors*. The Continental Legal History Series, XI. Boston: Little, Brown, and Company, 1918. Pp. xlix, 558.

This is the last notable volume in a notable series. The editorial committee of the series consists of Professors Drake, Freund, Lorenzen, Mikell, and Wigmore (chairman), acting for the Association of American Law Schools. The legal profession owes this learned committee and the Association under which it has acted, a debt of gratitude which probably can never be suitably acknowledged. A handful of men of the type represented by the editorial committee, by reason of command of modern foreign languages and access to foreign legal literatures, was already in at least constructive possession of the historical learning which this great series has assembled; but for most of us, until these translations were published, these materials were intellectually as remote as the great crested grebe. Selfishly, the members of the editorial committee would have profited by reserving this learning to themselves after the fashion of the monopoly enjoyed by the pontifices of early Roman law. The publication of these eleven volumes may therefore be regarded like the ius Flavianum or the ius Aelianum as "a great popular act," and, more than that, a fine expression of idealism.

It would be interesting to know, if the fact were knowable, how often the generation here and to come will capitalize this investment of knowledge. That it will prove one of the foundations of our legal science for years, of that there may be no doubt. Some of the intermediate volumes of the series have not yet been issued, but the value of the enterprise is so apparent that it may be hoped the Association of American Law Schools will decide to continue its history committee, and that from time to time additions shall be made to the series as its program now stands. In that way alone will it be possible for American legal science to keep abreast of the development of historical learning in foreign countries. Perhaps the second series should be given a broader scope including comparative law in all countries, not limiting

the field to the continental group. But in speaking in terms of admiration and enthusiasm of the initiative and labors of the editorial committee, it would be an act of injustice not to point out the indispensable part taken by the translators in the production of these volumes. The editors properly have made due acknowledgment of their arduous services. Without the learning, skill, and labor of the translators, the idea of such a series would have been as the General Preface puts it, "a fruitless dream."

The present volume (the last of the series) like the first is a symposium. The reader will hardly need to be told that under the title of the book much may be learned from such writers as Alvarez, Baldwin, Charmont, Georg Cohn, Duguit, Gaudemet, Meili, Nippold, Perich, Picard, Reinsch, Ripert, Rocco, Vanni, and Wigmore. Of the countries represented by this array of scholars are Belgium, Chile, France, Italy, Serbia, Switzerland, and the United States. The translators are Layton B. Register of the Philadelphia bar and Ernest Bruncken of Washington, whose abilities are already sufficiently attested in other translations which they have made. The failure to include among the fifteen authors entered and the six countries drawn upon, even a single writer from Austria or Germany arrests one's attention. True enough, there is a Swiss professor who was at one time at Heidelberg, and there is an essay by another Swiss scholar taken from a German publication. From a French authority (Gaudemet) we read of the "bürgerliches Gesetzbuch" as a "masterpiece of method and science . . . the superb epitome of all the results which German text-writers obtained in the 1800s in the field of the pandects." From an Italian (Rocco) we learn of "German leadership in the field of commercial law during the second half of the 1800s." From other writers we get suggestions of important developments in German legal science, of influence on surrounding countries, or of activities important because of their relation to the widespread movement toward international unification of law. Did the writers of Austria and Germany have nothing to say on their own account about these developments? Or is this silence a literary phenomenon of the war? Neither. As to the question of silence we need not go beyond the present volume to discover that Gierke, Menger, and Sohm (not to mention a score of other writers) had discussed the drafts of the civil code of 1896, the formulation of which began some twenty years earlier. On the second question the editorial committee no doubt found what seemed to the committee a better perspective and better discussions of that part of continental legal history among the writings of scholars in other countries. Whether one agrees with the solution or not (and in other times there would be a rebuttable presumption against it) there is sufficient to put the reader on inquiry. However, the fact remains, whether of any importance or not, that neither the background nor the juristic results of the civil code of 1896 receive anything more than subordinate consideration in this volume. But whatever may be thought to be lacking on these points will be found on an extensive scale in another volume of the same series, which was published prac-

tically at the same time as the work under review—Huebner's "History of Germanic Private Law."

But if this compilation shows a predominance of Latin, and, especially, French writing (of which the learned editor is the chief patron in this country) the volume has thereby gained in clarity what it may perhaps have lost in profundity and miscroscopic detail. The moon shines in France—that we know since we have all read apostrophes to "clair de lune"—but there is little moonshine in French scholarship or French legal writing. The French language is, as Fouillée has said, "frank and rectilinear." The ideas presented in this volume by the French group strike out straight from the shoulder, and the reader is quickly informed precisely as to what is under discussion and how the author feels about it. Fouillée in his book ("Modern Idea of Law") has attempted an elaborate explanation of the quality of French writing, but we believe he neglects an important national trait which accounts for the principal part of it—outspoken intellectual and moral courage.

This volume is in three parts which discuss (1) the readjustment of law to changed social conditions, (2) codification, and (3) international uniformity of law. Its fourteen chapters are so arranged in the order in which these topics are discussed, as to make a coherent story of the changes in the law of the principal countries of continental Europe since the French Revolution. There is an informative preface by the editor (Professor Wigmore), and there are sympathetic introductions by Professor Borchard and Sir Frederick Pollock. The dominant chord is the change (and that is doubtless what is meant by "progress") from the individualist standpoint of Roman law and the Code Napoléon to the social régime, as shown in the chapters of Alvarez, Charmont, and Duguit. This is followed by what the harmonists would call a suspension dealing with codification treated by Alvarez, Perich, Gaudemet, Vanni, and Rocco. The authentic cadence, if we may so term it, is an explanation of the movement for the international assimilation of law, by Cohn, Ripert, Reinsch, Meili, Baldwin, Picard, Nippold, and Wigmore.

From what has been said by way of description, it will not be difficult to believe that out of this university of discussion by eminent thinkers in legal science; one may acquire a liberal fund of authoritative information not to be gathered in any other English book on what has been the legal situation on the European continent for a century or more, especially in the fields of private civil law, commercial law, and private international law. What is of chief interest for readers of this JOURNAL—criminal law—does not fall within the scope of this volume, that subject being treated exhaustively in another volume by von Bar in the same series. Nearly all the chapters well deserve special consideration in any review of the volume, but since so extensive an analysis would exceed at once the competence of the present reviewer in so wide a domain, and the space available, we must content ourselves with an examination of a single chapter—that of Duguit.

Duguit is already well known to American readers of legal litera-

ture through other translations of his writings (in Modern Legal Philosophy Series, Vol. VII, Illinois Law Review, and other publications) as the greatest iconoclast of legal ideas who has appeared in this generation. Although Bentham had been admitted as a bencher of Lincoln's Inn, he withdrew from the legal edifice before he commenced to hurl unfriendly missiles at legal institutions to the discomfiture of many persons of conservative turn of mind, within. But Duguit in his assault upon the idols of the law stands in the center of the temple like a scourging Nazarene. He is a professor of law at Bordeux; he is an authority on public law; he has written numerous law books; he is thoroughly informed on all phases of importance in private law; and, lastly, he is a keen analyst of fundamental legal notions. Like Bentham, he is chiefly occupied in uprooting beliefs long established. Of course, we are all now liberal enough to tolerate this sort of activity. We not only tolerate it, we welcome it. We have seen the three authorities of the ancient world refuted. Our profoundest beliefs have been shown more than once to be illusions. Even the laws of nature are subject to contingency. Each day is a creation ex nihilo. The bouleversement is the thing. When Duguit diverts the course of the river, the Augean stables had not been cleaned for thirty years, no not for twenty centuries!

The first awakening from a peaceful slumber of orthodox dreams came when Duguit denied the personality and also the sovereignty of the state. We rubbed our eyes and asked, can this really be true? We were still asking the same question in a half-awake bewilderment. Before we can gain our composure, Duguit proceeds with a series of bomb-like affirmations—affirmations fortified, too, by keen upper-cut reasoning—which cast a doubt on the validity of an entire series of legal ideas which have done service since the ancient days of Q. Mucius Scaevola. That these allegations of iconoclasm, havoc, and repudiation may not appear too much in the spirit of rhapsody, let the author speak for himself.

"Personally I admit of no dogma in any line of belief whatsoever." (p. 66.)

"It can truthfully be said that such a metaphysical conception [of subjective rights] cannot be maintained in an age of realism and positivism such as our own." (p. 70.)

"The individual has no rights; neither has a group of individuals." (p. 73.)

"Property is not a right; it is a social function." (p. 74.)

"Every metaphysical conception must be banished from the science of law as they have been banished from the other sciences; this is the price of the law's progress." (p. 91.)

"The entire theory [of artificial personality] explains nothing. A group either has no will distinct from its members, and in that case it cannot be a bearer or subject of right, and the law, powerful though it is, cannot produce what is not existent; or a group has in fact a will distinct from that of its members, and in that case, it is naturally, of itself, a sub-

ject of right and the intervention of the legislature or the executive is unnecessary." (p. 93.) . . . "These controversies are entertaining intellectual pursuits—nothing more. They are useless for the excellent reason that the problem . . . does not exist. Are groups, associations, corporations, funds, etc., by nature subjects of right or are they not? I do not know, and the question does not interest me." (p. 95.)

"Whatever may be the case, I maintain . . . that as modern law becomes socialized, it is not the inward will but the declared will that is protected because that alone is an act affecting society." (p. 104.)

"I recognize quite well that often, indeed generally, in practice [a] juridical state of facts represents a relation between two persons, one of whom is bound to perform a positive or negative act, and the other of whom may require such performance. But in contemporary civilization with its social tendencies, this is not essential." (p. 111.)

"As the autonomy of the individual is disappearing so the sovereignty of the state is disappearing. As subjective right in the individual exemplified in its most intense form, dominium, is disappearing, so the subjective right in the state, the imperium, is disappearing. There is no longer any reason why one source of law should not be those rules of conduct established by a compact between groups of society and sanctioned by the material forces of government." (p. 124.)

Duguit stands for realism raised to the "nth" power. These bony fragments excised from a living torso may not be adequate to exhibit fully his position, and certainly they can not do it entire justice, yet enough is disclosed as a basis of discussion.

Professor Keedy in a thoughtful article in Pennsylvania Law Review some months ago undertook to show that each age is dominated by an organic unity of ideas. The present epoch clearly proves his point in presenting such a unity or rather a congeries of unities each struggling with the others for ascendency. The realism of M. Duguit has its affines with such unrelated things as intuitionism in philosophy, post-impressionism in painting, vers libre in poetry, and modernism in religion. It may appear somewhat venturesome to group a jurist like Duguit with Richard Strauss, Cèzanne, or Rimbaud, and yet they all in their different fields of expression show the eternal conflict between the rational and the factual, the struggle between form and matter, the opposition of classicism and romanticism.

Roman law was a system conspicuous for its elegance of form—at least it became such when it had been worked up and polished in the hands of specialists. Its underlying concepts have traversed the world. Even the Common Law however free it may be of Roman doctrine is thoroughly dominated by the Roman legal technic of underlying legal conceptions. M. Duguit would abolish this conceptional technic root and branch, and deal with the facts of life solely from the standpoint of a purpose crystallized in the idea of solidarity or social interdependence as he prefers to call it. But is not M. Duguit in this realistic program attempting an impossible feat of prestidigitation? Is he not trying in effect to pump water without pipes? We can have an administration of justice without rules as Salmond teaches, but can we have a system of law without rules? As we understand the term law

—the ordinary sense—we think not. Some years ago an American legal scholar, Professor Bingham, vigorously defended the thesis that the law does not consist of *rules,* but of *events.* The present reviewer at that time attempted to argue the point in favor of the traditional belief, but the controversy ended in the usual way—neither writer able to get the point of the other. That incident and hundreds of others which have come under our observation makes us despair of the utility of a book review which does not accept an author as a whole, or of any other controversial discussion. As has been said in another connection, such writing is interesting to those who engage in it, and it tires no one but the reader. A proof of this misery lies under our hand. The first philosophical journal selected at random contains this sentence under the title of Discussion: "Professor X's reply to my note so far misses the point I have tried to make that it seems worth while, etc." How many thousands of times has this familiar complaint not been registered in print! We hardly have the courage to go on. . . . Reference to the other debate is relevant in this that M. Duguit has completed the labor of demolition of his American colleague without either being aware of the constructive-destructive efforts of the other. Professor Bingham has annihilated rules of law and M. Duguit has abolished legal concepts. With this unhappy situation confronting us, there is manifestly nothing left for lawyers to do but to become sociologists, or perhaps statisticians of social events.

Professor Duguit's quarrel is not with Michoud, Planiol, or Saleilles, or yet with Gierke, Jellinek, or Bekker, but rather with legal science itself. We are constrained to believe that the major part of M. Duguit's argument rests on an analytical misconception. In tracing the movement toward objectivism, or rather as seems more correct to say, factualism, he thinks he finds a progressive cutting down of legal rights (literally translated "subjective right" which is a German usage likely to produce an erroneous connotation in English). He looks forward to a time when the law will become thoroughly socialized, and proleptically discards, as was shown, the idea of legal right, as a metaphysical abstraction. In this he follows Comte who however eminent he may have been in other fields of thought could hardly be rated as a jurist or what requires much less knowledge of law, a legal philosopher. It is customary with the positivists to employ the term "metaphysical" as an epithet. It has otherwise no significance. The point of view taken is aided verbally by the unfortunate legal idiom "abuse of rights," or as the translators and editors have preferred to put it "misuse of rights." Now a right cannot be "abused" or "misused." It cannot even be used except in a receptive sense. No jurist is more aware of this than M. Duguit himself as a quotation above from his chapter clearly shows.

We do not contend that Professor Duguit has mistaken the legal phenomena which he describes as facts, but we think his interpretation of them has led to erroneous conclusions. No doubt something has been cut down in the last hundred years, and especially in the last twenty years, and yet more especially in the last four years—but not rights—not those metaphysical abstractions, if they must be so de-

nominated. What has progressively been cut down is *liberty* and not right. We insist that Professor Duguit has confused these terms, and that such confusion is disastrous. We approach here a field of analytical discussion much too extensive for the present purpose, but we believe an examination of the ground will disclose that legal rights far from having been eliminated have been little affected by the social movement, and that the jurisprudential result has been a circumscribing of the non juridical idea of liberty in favor of a larger group of legal rights. In other words, the effect has been an increase in the range and bulk of legal rights instead of their gradual absorption by the notion of solidarity. The changes in social régime do not require the abolition of Roman legal concepts. Indeed, as long as there is a reign of law and not pure discretion as in the family life of early law, it is impossible to conceive that the idea of concrete rights can be dispensed with. Even in ancient Japanese law where the nearest equivalent of right meant "share" the basic idea was still implicit.

It cannot be denied, however, that many Roman legal concepts have been overhauled. There are two classes of such concepts—formal and normative.

An example of a formal legal concept is the notion that every right must have a subject, a bearer, an owner. M. Duguit, as we have seen, denies this for the case of associations whether private or public. In the ordinary case which arises it is not technically important, but when the legal character of the bearer of the right is in question, there is no escape from the problem—some kind of technic must be resorted to if we are to have a coherent science of law, and it will not do, at least it will not suffice in jurisprudence, to decide in a teleological fashion without regard to other considerations. We do not emphasize "elegantia" as an end in itself, but we do insist on intelligibility and a reasonable amount of coherence. It will not do therefore to say that such problems are of no interest to a modern jurist. This does not require that we go to the extreme which in certain recurring epochs have been witnessed in the administration of justice, where the realities of life have been stretched on a bed of Procrustean form. Our criticisms here of Professor Duguit, and it is submitted with the deep respect and homage due to one of his brilliant talents, is that he is an extremist in these matters. We would for our own part prefer a middle ground between a rigid scholasticism and an unbridled teleology. The personality of a corporation, is, it is true, a fiction, but it is no more of a fiction, it is submitted, than the "persona" attributed by the law to a human being; nor is the fiction more difficult, or less necessary.

The other kind of legal concepts, the normative, are only relatively fundamental. An example is the Roman law principle of no liability without "culpa" which governed the administration of justice in the courts pretty consistently for two thousand years. This principle is breaking down in many varieties of legal relations; but this breakdown is not annihilating legal ideas, it is not destroying rights, and it is not abolishing jural relations. All that progress means here is a change of principle from the outworn and now unworkable idea of

responsibility full of psychological absurdities and economic inequalities to that of accountability. Rights and jural relations still remain and they would continue to exist even though the whole field of tort law were put on a causation basis of liability.

It is interesting and hopeful to find that from the practical side, the United States is not as far behind in social legislation as might have been supposed. An alarm has sometimes been sounded against contamination by foreign legal ideas. An inspection of this volume, having in mind our own legislation, will show that we are already considerably contaminated, and it is not unlikely that we shall become more contaminated with social ideas with the passage of years. Nor is the risk of contamination altogether unilateral in these matters since it appears that some American ideas (e.g. the homestead system, the probation system) have spread to foreign countries. The problems of this, a transitional epoch, have not commonly been discussed by our own jurists with the same broad outlook as by the jurists of France and Italy, but since these problems are part of a world-movement and can not be put aside in an attitude of conservatism or even a fear of contamination, it may be anticipated that our jurists with the inspiration of this and other similar volumes sponsored by the Association of American Law Schools, will relate more often than has heretofore been the case the daily problems of the law not simply, as is customary, to a traditional, historical, and dogmatic technic, but to the larger movements which are everywhere overtaking legal systems. In other words, our legal problems must be considered henceforth not alone in the light of a fixed system dominated by the economic requirements of an age which is behind us, but in view of a new social regimentation, whether we like it or not, which is too real to be ignored. The mission of the lawyer in this era is more important than it has ever been before. Enlightenment now is necessary in order that legal science may not be obliterated in the surge of coming events. Without this enlightenment, the enlightenment of such a volume as this one, the lawyer truly must be as Cicero has it, a chanter of formulas (cantor formularum) and a fowler of technicalities (auceps syllabarum).

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