

Perspectives on Justice

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PERSPECTIVES ON JUSTICE. Evanston, Illinois: Northwestern University Press. 1975. Pp. v + 135.

*Michael A. Murray**

Justice Holmes once noted that the law sharpens the mind by narrowing it. *Perspectives on Justice*, a little volume *about the law and for lawyers* proves the point. By and large this work is a rather narrow view of a large social issue. Unfortunately two-thirds of the volume is also somewhat dull when it could have been provocative.

Perhaps this judgment is pre-determined by the nature of the document. *Perspectives on Justice*, published in 1975 by the Northwestern University Press, is a collection of speeches presented in the Julius Rosenthal Foundation lectures for 1973. Given the two to three year gap between the speech and the publication date, the content was bound to lose some of its punch. This usually happens when speeches are printed later. By its nature a speech must be timely; thus its content is geared to the immediate interests of a specific audience. When the speech is published two or three years later, the immediate issue changes and audience interest changes. In short, something is lost in the transition.

There is another problem, perhaps generic to publishing collections of speeches. This is the lack of a common theme. Good speakers, in order to give a sharp, memorable talk, project their own ideas. Unlike an edited book, which derives from a common theme, a series of lectures is based on individual points of view. While this may be good for the speech, it is awkward when the speeches appear together in print.

Datedness and disassociation are two serious flaws affecting this published volume. There are other comments to be made—some positive, most critical.

The first chapter (and lecture) in the book is "The Concept of Justice and the Laws of War" by Telford Taylor, who brings a remarkable array of credentials to the subject. Professor Taylor asks the abstract and important question: are the laws of war compatible with the concept of justice? Or to put the question another way: does justice wither when war erupts?

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To appreciate Taylor's rather abstract answer to this weighty question, it is probably helpful to take oneself back in time to 1972 and the swirling controversy over Cambodia, Mai Lai, and Lieutenant Calley. This helps to understand the context of the speech but it does little to make Taylor's discourse less abstract.

In essence, Professor Taylor refutes John Rawls' notion of what I will call situational justice. Instead he argues the case for abstract justice: the principle that there are immutable laws of justice between nations which govern the conduct of all wars anywhere. This is simplifying the idea, but this, I gather, is his basic point. The problem I have with Taylor's thesis, given the advantage of hindsight and the recognized failure of our involvement in Vietnam, is that Western concepts of justice simply *do not* apply everywhere in the world. Indeed it seems only our imperialistic pattern to assume that they do.

Professor Taylor argues as a reasonable, rational, Western man, who speaks from a vast knowledge of experience and codified law as it developed in Western society. Nevertheless, for him to assume, even in the abstract, that legal concepts such as justice apply to other countries is to miss the lesson of what is happening in countries abroad. Our models often do not apply. Likewise our concepts of legal or illegal wars do not apply. Consequently it is misleading to argue, as Professor Taylor does, that justice, in order to apply to the conduct of wars, needs only a jurisdictional mechanism. There is more to it than that. There are vast social, political, and cultural differences between countries and between their concepts of war and the legality of war. In Cambodia it is "honorable" for soldiers to eat the hearts and organs of their dead enemies. Is this just or unjust? By whose standards? Professor Taylor, operating in the abstract, uses only Western measures and scales of justice. His talk provides a good survey of the narrow legal principles affecting the question. Unfortunately he did not, in 1973, consider wider social and cultural considerations.

The second chapter is by Constance Baker Motley, a U.S. District Judge, and is titled, "Criminal Law: 'Law and Order' and the Criminal Justice System." Her main thesis is that there is a need to reform the sentencing process. Or to put it another way: there is no "law and order" in the present sentencing process.

The main reason Judge Motley sees sentencing as a central problem is that presently there are no clear guidelines for the criminal justice process. Consequently, much discretion is given to certain key individuals: arresting officers who decide to arrest or not; prosecutors who determine degree and intensity of prosecution; judges who decide bail and sentencing; juries

which can acquit or convict; wardens and prison guards who can invoke a variety of disciplinary sanctions; and parole boards which can hear or not hear cases. In short: "Our criminal justice system, from beginning to end, lacks 'law and order' to a substantial degree" (p. 41).

Judge Motley favors, as a solution, specific guidelines for judges and juries regarding sentencing and perhaps more importantly, legislated mandatory penalties that are graduated, relatively short, and which give every first offender probation. As a result of the kind of mandatory practices which she advocates, Judge Motley argues that sentencing would become impartial in the following ways:

1. The sentence would depend on the crime, not on the status of the person charged, whether rich or poor, black or white, educated or uneducated.

2. Parole boards would exist only to consider humanitarian requests, not to shorten sentences, since there would be minimum mandatory sentences.

3. Juries would be more willing to convict when the punishment fits the crime; presently they acquit a guilty person when punishment is too harsh.

4. The police would be more willing to arrest for a crime committed in their presence if sentences were not unduly harsh.

5. Lawless actions by prison officials would be eliminated.

6. Victimless crimes would be outside a criminal justice system and guilty persons would be placed (by the legal system?) in treatment centers.

It is easy to see where mandatory penalties, both graduated and short, might provide clear guidelines for sentencing judges and for jury decisions. It is less obvious how mandatory penalties would affect arresting officers and prosecutors. It is common knowledge that the arresting process is closely linked to bias and attitude, and that prosecutorial patterns are frequently dependent on staff availability, docket backlog, and sometimes political considerations.

The biggest issue, however, is how mandatory penalties would prevent wardens and prison-guards from lawless activities. Removing discretion from sentencing will not itself prevent arbitrary use of sanctions in prison. The non-imprisoned public stays far away from the scene and prisons usually are built far from population centers. Relatives of prisoners see them infrequently and only through a screen. When prisoner complaints are voiced they are often used as proof that "these people" are liars, ingrates, or worse. Watchdog committees do not see a normal day in prison; rather they see a cleaned-up version of what occurs. Physical and verbal abuse

will not stop with the introduction of mandatory penalties: it will stop only when there is a prisoner advocate system which *includes* prisoners and has sufficient "clout" to enforce institutional change.

What does all of this have to do with Motley's procedural proposals? The point is that if prisons themselves are part of the unjust system, why offer procedural reforms which only marginally change these institutionalized patterns of abuse? This is one way of noting that Judge Motley's procedural reforms, in effect, are designed to serve the interests of the legal profession, *i.e.*, judges, juries, lawyers, officers, and wardens. They do little to enhance the lives of those who suffer most from the lawlessness of the system. For example, Judge Motley says that victimless crimes, under her reform, would be removed from mandatory judicial penalties and would be placed within a "treatment system." This of course is a continuing problem in the legal system: dumping people in mental hospitals and in alcoholic treatment centers when the law is uncomfortable with them. If the legal system does not want to deal with alcoholism, drug abuse, prostitution, and other victimless crimes, then it should stop labeling these activities as criminal.

Two serious criticisms of her proposals emerge. First, the mandatory penalties process is a way of alleviating some of the problems of discretion within the legal community, but it does little to soften the most painful blows of discretionary punishment now borne by the non-legal community. Second, the reform seeks procedural change and does little to question the purposes and consequences of the correctional system, particularly prisons. In summary, the reform offered represents a rather narrow legal point of view.

If the first lecture was culture-bound, the second was profession-bound. Fortunately the third lecture overcame these limiting factors. Professor James K. Feibleman gets to the heart of the series and discusses, "Philosophical Perspectives on Justice." Professor Feibleman is not a lawyer, but I found his remarks perceptive and provocative. Perhaps it is my bias that "law is too important to be left to the lawyers," which colors this critique.

In searching for the theory of justice and the definition of justice, Feibleman recognizes the essential fact that definitions and theories vary according to situations and conditions. Justice, in a word, is indeterminate; this is not to say the concept is useless.

On the contrary, justice, as defined by Professor Feibleman, is "the demand for order: everything in its proper place or relation" (p. 98). He continues by noting that justice obviously requires a system of administra-

tion to put and keep things in place. Thus, justice becomes the demand for a system of laws. He considers the concept of justice from many points of view: the legal, the moral, the philosophical, and the historical. His expertise in these areas is impressive and he gives us a lively and interesting survey of the concepts involved. While some of his ideas are undoubtedly abstract, the chapter as a whole is readable and interesting.

It is easy after reading Professor Feibleman to sense the importance which this series of lectures, and ultimately this edition, represents. Perhaps, if I had read the chapters in reverse order it would have put things in perspective. As it is, my "perspective on justice" was limited to a very legalistic discourse on international law, a procedural blueprint for court reform, and finally a philosophical treatise on concepts of justice. These general criticisms and comments should not dissuade the reader from selecting one or another of the chapters. Individually and in the context of its time, each chapter is a useful contribution. However, presented in 1975 as a composite *Perspective on Justice*, these three dissociated viewpoints do not hold together.