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# Book Reviews

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**Modern Criminal Procedure.** By Roy Moreland. Indianapolis. The Bobbs-Merrill Company, Inc., 1959. Pp. x, 336; with table of treatises, articles and notes, table of cases, and index. $10.00.

No matter how long he has been practicing, a lawyer is apt to have a vivid recollection of his first criminal case. Not necessarily pleasant — but vivid. The drama and the high stakes involved may help to account for this, but the newness and strangeness of the task contribute as much to the powerful and lasting impression made. Such newness and strangeness is in part due to the tendency of criminal procedure to slip between the cracks of the law school curriculum. Treatment of procedural matters in the course in Criminal Law may be limited to the most basic matters, with vague promises of more to come. Teachers of Constitutional Law, Evidence and Civil Procedure often find it comfortable to assume that the student already knows all about criminal procedure.

Professor Moreland's MODERN CRIMINAL PROCEDURE will be a good starting point for the law student or puzzled young practitioner whose legal education in this area leaves something to be desired. There is very little of single volume length in the field,[1] and so a treatise as useful as this one is especially valuable. This is a basic text, most useful if used as an orientation device and read from beginning to end in a few sittings. There is no attempt at exhaustive

[1] Valuable single volume works are AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947); PERKINS, ELEMENTS OF POLICE SCIENCE (1942).

citation of authorities or painstaking collection of local distinctions and deviations. The book presents the important doctrines of criminal procedure in their historical settings and summarizes existing law, treating some of the important cases in considerable detail. (It is planned to issue pocket parts as required by developments in the law.) Furthermore, as the author promises in his preface: "In every instance the rule is either justified in the light of present social needs or a change is suggested." It should be useful to the interested and intelligent layman as well as to the inexperienced practitioner and the law student.

The book is divided into five parts, dealing in turn with arrest problems, obtaining evidence, proceedings prior to trial, trial and appeal, and sentencing. The parts are further divided into 22 chapters,[2] running from 7 to 35 pages in length.[3] The core material of criminal procedure is present in the book. To some extent the question of what should be included and what left out reduces itself to a matter of personal taste. This reader missed, in particular, a chapter on the scope of review of the judgments of trial courts by way of direct appeal and such collateral proceedings as *habeas corpus*. Also, the brief discussion, in connection with the state's right of appeal, of the topic of double jeopardy (pp. 277-278) seems insufficient. Some treatment of territorial jurisdiction, entrapment, and the emerging problem of furnishing indigent appellants with trial transcripts would be welcome. On the other hand, the essentials of the problems surrounding the grand jury, indictments and informations, and the right to an impartial tribunal could perhaps be presented more concisely.

The author tells us not only what the law is, but what he thinks it ought to be. He consistently prefers the protection of civil liberties to "efficient" police methods in

[2] The chapter headings are: Arrest Without a Warrant; Arrest With a Warrant; The Use of Force in Effecting or Resisting Arrest; Questioning of Private Persons Without Arrest; Self-Incrimination; The "Third Degree"; Search and Seizure; Admissibility of Evidence Obtained Through Unreasonable Search and Seizure; Wire Tapping and Other Scientific Devices for Obtaining Evidence of the Commission of Crime; Preliminary Examination; Courts of Summary Jurisdiction — The Inferior Court System; Right to Counsel Prior to Trial; The Right to Bail; The Grand Jury; The Short Indictment and/or Information; Right to Counsel During Trial and Thereafter; Right to an Impartial Tribunal; Essentials of a Fair Trial; Right of Appeal by the State; Existing Sentencing Procedures; Reform of Sentencing Procedures; Parole.

[3] Some of the chapters have further subdivisions marked by boldface headings in the text. It would be an improvement to expand and make more consistent the system of subheadings and to reproduce them in the table of contents and again at the beginnings of the appropriate chapters. In a work of this sort, such a thing is at least as useful as an index.

arrests, gathering evidence, and the like, wherever there is any conflict between the two. He favors the rule which excludes evidence obtained by improper police methods on the ground that this is the only practical way to force police compliance with the maxims of fairness we like to think we live by. (He also thinks [ch. 13] that the states should be constitutionally required to adhere to such a rule.) He goes so far as to advocate the British preferred practice of not interrogating an accused person at all after arrest, except perhaps in the presence of his own counsel (pp. 96-97). He thinks that counsel should be provided for the indigent accused whenever conviction carries a danger of imprisonment (p. 228). Before arrest, incidentally, he would follow the strict rule of the common law in allowing no general police right of detention for questioning, even for the compromise two hour period suggested in the Uniform Arrest Act (p. 55). He is unfriendly to the police officer who uses fatal force necessary to effect an arrest, at least when the crime for which the arrest is made is something less than an atrocious felony (pp. 28-41).

However, it would be unfair to characterize Professor Moreland as the felon's friend. He favors, although he is somewhat doubtful, the view that the law should not always require a search warrant when a police officer receives immediate sense impressions of the commission of a crime (p. 114). He is critical of the lax bail provisions existing in many places (ch. 13), and is doubtful of the wisdom of the Supreme Court's whittling away of the trial judge's contempt powers (pp. 258-259). He would allow conviction by a less than unanimous jury in some cases (p. 243), would favor the right of the state to appeal in a criminal case (pp. 280-282), and would give increased recognition to the danger to society in undiscriminating release of convicts on parole (pp. 314-317).

Any opinions on criminal procedure invite argument. The questions are almost all troublesome ones, involving possibilities of conflicts among such important goals as privacy, tranquillity, economy, efficiency, safety, fairness, and absence of brutality. The author recognizes this, but he does not hesitate to make decisions on the specific problems before him and to argue forcefully for his point of view. Indeed, a principal virtue of Professor Moreland's book is that it manages to combine a candid and outspoken statement of the author's not always middle-of-the-road position with a fair and detailed presentation of the policy arguments on all sides of the difficult problems involved.

The reader need not fear that important considerations which do not happen to support the author's thesis are being suppressed. The author's method of argument is, in general, admirable. He marshals his sources, presents his arguments, and states his conclusions carefully. Usually his presentation is concise. Almost always it is clear.

Occasionally, however, there is a tendency to present the things to be said on both sides of the question and then state a conclusion without any very clear explanation of the detailed reasoning which led to the conclusion. For example, in the chapter on wire tapping (ch. 9), he takes the position that the dangers in the practice to personal liberty are so great that the Fourth and Fifth Amendments ought to be construed to prohibit it. This conclusion is grounded on careful consideration of the extent to which public and private wiretapping is actually being used, unresolved problems of construction of the Communications Act of 1934, 47 U.S.C.A. § 605, and the sorts of dangers which wiretapping is invoked to meet, as well as a historical and analytical treatment of the constitutional background. The author believes that police diligence and ingenuity should prove sufficient to meet the problem without using a device which seems to endanger civil liberties. Up to this point the argument and the grounds upon which the conclusion of the author rests are clear — whether the reader agrees with the conclusion or not.

But the author then dismisses without explanation[4] a proposal that wire tapping be permitted under a prior specific court order based on probable cause. His conclusion that the proposal is unsatisfactory may be correct, but, if it is, it cannot be demonstrated without estimating and evaluating the probable amount of interference with individual privacy which would occur, the benefits likely to be obtained, and the problems of administration involved. These themes can be picked up in the earlier parts of the chapter, but the merits of "licensed" wire tapping are never considered with specific reference to them — and it is much easier to argue that unrestricted wire tapping is bad than it is to argue against a tap authorized by specific court order.

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[4] There is a somewhat question-begging Senate speech, characterized as brilliant by the author, which takes the position that there can be no compromise with the guarantees of the Bill of Rights, and that there can be no effective safeguards in wire tapping. There is no attempt by the author to define essential terms or to demonstrate the truth of the latter proposition.

Sometimes, an argumentative technique may ruffle the reader. Compare, for example, his attitude toward judicial law making when he likes the result, and when he does not:

> "The chief value of the decision lies in the obvious attempt of the judge to make a manslaughter verdict possible. While the second part of the instruction may be interpreted to give effect to the rule under discussion, the third part gives an opportunity to the jury to evade it. It is clear that the facts of the case call for a conviction of murder, if the rule were applied as ordinarily stated. It is by such a judge, with such instructions, with such a jury, that obsolete law is sloughed off" (pp. 42-43).

> "As Justice Frankfurter puts it, what was a mere *hint* in the *Weeks* Case became a *suggestion* in the *Carroll* decision, was loosely turned into *dictum* in the *Agnello* Case, and finally was elevated into *decision* in the *Marron, Harris* and *Rabinowitz* Cases. It is from such fragile and unstable sources that poor law often comes" (p. 122).

But trivial flaws, so dear to the heart of the reviewer,[5] should not obscure the solid merits of the work. It is clearly written, convenient in length, and thought-provoking in content. Perhaps its greatest merit is that Professor Moreland has managed to present facts and arguments so fairly that the reader is encouraged to think for himself and to test his own conclusions against those of the author.

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[5] There is also, at pp. 241-242, a depressing and lengthy allegory taken from WIGMORE, in which, in the course of examining the arguments on the question of abolition *versus* reform of the jury system, the otherwise great man, in a flight of lead-winged whimsy, compares the jury system to a watch. (It begins: "A Man came to a Jeweler's Shop with a Watch, and said: 'I want one of those new Swiss Watches that I saw advertised. This is my old Watch, a Walginson Perfecto; I bought it for $500 in New York in 1914. But lately it has been going to Pieces. It runs down every Week or so. I cannot make it Go. It is a Failure . . . .'") The passage is reminiscent of something of George Ade's with the humor removed. A valid point is bludgeoned to death.

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