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### Book Review. Underhill, H. C., A Treatise on the Law of Criminal Evidence

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## BOOK REVIEWS

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THORSTEN SELLIN [Ed.]

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A TREATISE ON THE LAW OF CRIMINAL EVIDENCE. By *H. C. Underhill*, 4th ed. by *John L. Niblack*, xxviii+1691 pp. The Bobbs-Merrill Co., Indianapolis, 1935. \$15.00.

The editor of the new edition of this book tells us that "as a practical handbook for use in criminal courts, *Underhill on Criminal Evidence* is unexcelled. In bulk, the book may be unexcelled by a single volume on any subject. It is half again as large as the 1923 edition, despite omission of the table of cases—the increase being due to the addition of new cases, to amplification of the subject of Expert Testimony, and to inclusion of new chapters on Identifying Evidence, Visual Evidence, and Receiving Stolen Property. Although the range of topics touched upon somewhere in the book is very wide, a brief examination reveals the following important omissions, which may or may not be typical of the contents in general; blood analysis, and the tests to establish non-paternity; the recent requirements in some states regarding notice of alibi as a defense; the New York receiving stolen property rule regarding presumptions raised against dealers; rules in several states regarding comment on the defendant's failure to testify; and the very important developments in a number of states completely discarding the common law methods and tests of proving insanity and adopting quite modern procedures.

The entire book is characterized by disjointed generalization that is anything but analysis, by indiscriminate cumulation of case materials, and by most of the other confusion and superficiality that enter into the construction of many of the practical books for lawyers' use.

To observe specifically the sort of thing that one here encounters, consider the statement that "It is the general rule that the state has the burden of proving all the necessary ingredients of a crime, including the criminal intention, and this rule logically casts the burden of proving the sanity of an accused person upon the prosecution in the first instance" (p. 597). But immediately following that we are told that "The prevailing view seems to be that an allegation that the defendant is insane is a statement of an independent fact, and is, in its nature, a plea of confession and avoidance. Hence, if insanity is pleaded as a defense, the burden of proof is on the defendant, in conformity with the general rule that he who asserts any affirmative fact has the burden of proof, and if he fails to prove his insanity, he is presumed sane" (pp. 599-601). Such juxtaposition of contradictory rules produces a jumble of authority; and, in addition to confusing the burden of introducing evidence with the burden of proof, there is no indication and apparently no awareness that there are several conflicting theories. The best that can be said of the work is that it

may serve as an index to the case materials.

What has happened in the case of *Underhill on Criminal Evidence* may be surmised: published first in 1898 and having but little competition, it achieved an important niche in the lawyer's bookshelf. Then in 1904 Wigmore published his monumental treatise—one of the very great legal works in modern times. At least one other relatively helpful American book—this exclusively on Criminal Evidence—is available. Then why *Underhill*? The reason hardly reflects credit upon the training or the scholarship of the Bench and Bar. That a work like *Underhill* and countless others—pitchforked mountains of case materials—should be re-issued time after time despite the publication of scholarly treatises, is, unfortunately, rather conclusive in itself. And the stupendous number of reversals because of evidentiary errors further indicates the confusion in the field as well as the incompetence of courts and practitioners.

All of which becomes especially significant when one considers the relationship of the law of evidence to the problems of demonstration and persuasion. Certainly there is great and persistent need to continue to provide thorough critiques of evidence in the light of the best contemporary empirical (chiefly social) science. A mere handful of scholars has made valuable contributions, and most of these have been fragmentary. Others have essayed the task, and departed shortly for "purer" or more tender fields. Yet *Criminal Evidence*, to confine oneself to that branch, precedes and parallels, admits or rejects, weighs and conditions, the whole stream of fact and knowledge bearing upon crim-

inal litigation. The rules of evidence, like others, have had their origin in the past, and have been colored by the cultural milieu and molded by the knowledge existing in the past. They have been constantly modified as ideas have changed and knowledge has increased. But such improvement has lagged far behind scientific discovery. And all-too-frequently has it been haphazard.

What a world of interest and enlightenment could be turned up by painstaking researches: How do the rules stack up with the best current knowledge? That is the persistent problem. Doggedly and critically and skeptically it should be pursued. In some instances, e. g., ballistics and fingerprints, the rules have caught up with science. But consider, for example: what are the rules of evidence governing bastardy proceedings? And what is known in bio-chemistry regarding paternity and non-paternity? What are the various rules and legal theories regarding proof of "insanity"? And what of contemporary psychologic knowledge regarding mental disease? What are the rules regarding "consciousness of guilt"? And what does psychiatry provide that may cause one to pause frequently, if not to reject, the legal formulas generally? Confessions, use of drugs, of alcohol (*cf.* the Swedish and other provisions for laboratory tests and the consequent availability of precise data), the weighing of testimony in the light of what psychology offers as to seeing, remembering, exaggerating, suggestibility, the results of cross-examination as compared with those obtained by uninterrupted narrative—these are only a few links in an endless chain of evidentiary problems that await

courageous, critical, broadly equipped explorers.

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DER MODERNE TÄTERBEGRIFF UND DER DEUTSCHE STRAFGESETZENTWURF. [The Modern Concept of Criminal Participation and the German Draft Penal Code.] By *Richard Lange*. vi+79 pp. Walter de Gruyter & Co., Berlin, 1935.

KRIMINALISTISCHER BERICHT ÜBER EINE REISE NACH AMERIKA. [Criminological Report on a Journey to the United States.] By *Franz Exner*. 85 pp. Walter de Gruyter & Co., Berlin, 1935. RM2.50.

BEITRÄGE ZUR LEHRE VOM ADHÄSIONSPROZESS. [Contributions to the Doctrine of the "Adhesion" Procedure.] By *Adolf Schönke*. xii+179 pp. Walter de Gruyter & Co., Berlin, 1935.

All three of these studies reflect in various degrees the influence of the National Socialist revolution upon German jurisprudence. Every revolution necessarily leads to a reshaping of the existing legal system, and the most radical changes are usually made in the criminal code. But while on some occasions this process has been accomplished with a minimum of ideological fanfare, such empiricism is alien to the German temperament. There is probably no country in the world where the general doctrines and problems of the criminal law in all their ramifications have been subjected to such exhaustive examination as in Germany. It is therefore certainly not surprising that the pending Nazi

criminal code should lead to a thorough reexamination of all the old problems. If the American jurist who has read this type of literature before the revolution has sometimes felt that it was a little too theoretical and impractical, he will be led to even greater musing by the present flood of studies of which the three at present under review are fair samples. This feeling is not due so much to the fact that the theories which are propounded have no scientific validity as to the existence of a doubt that the principles can be applied under the conditions of dictatorship. The subtleties of the general doctrines of the criminal law necessarily presuppose for their successful application a degree of judicial objectivity which may be presumed to be non-existent in the present *Reich*. In current German criminal theory there is much that is admirable in the abstract. We are now often told, for instance, that criminal doctrines must not contravene the "popular consciousness" and that law and morals must be reconciled but how shall the *Volksgeist* (which has been in cold storage since Savigny) make itself felt? It might be supposed that the popular consciousness would be pretty inarticulate in the present German state. The new German code will in general be based upon positivist principles which are fine in themselves but somehow positivism and dictatorship have become inseparable companions.

These melancholy reflections are justified most by Doctor Lange's study of the doctrine of criminal participation in relation to the pending draft of a German penal code. To be sure the American jurist interested in the criminal law can learn something from Doctor Lange's review of the controversy