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# Ehrlich: A Reasonable Doubt

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France under de Gaulle. There is an interesting discussion of the possibility that the Soviet elite may be able to utilize social science for manipulating its "masses." However, as Ralph K. White recently indicated in the *Public Opinion Quarterly*,<sup>11</sup> social science is for the totalitarian state a potentially disturbing as well as useful instrument.

Although it often embellishes the obvious, this study even more often forces the reader to re-examine familiar assumptions. In particular it should shake American complacency. It is to be hoped that it will be widely read, for it is a solid, a challenging, and in some ways a distinguished book. No conscientious reader will emerge from it without re-examining many of his conceptions and prejudices about the two major political systems. By raising the somewhat artificial issue of convergence *versus* evolution the book may promise more than it — or perhaps any other book — can deliver in the present state of our knowledge; still it is one of the most substantial contributions to the study of comparative politics to appear for some time. It will play a useful part in the current effort being made by some scholars to lift comparative politics above the level of a rather sterile taxonomy. Works such as this can do much to overcome the parochialism which still to some degree plagues the study of comparative and international politics. Also, continued efforts of this kind can function to focus attention upon important issues, thus contributing, if not necessarily to consensus, at least to improvement in the quality of debate and discussion of public policy.

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A REASONABLE DOUBT. By Jacob W. Ehrlich. Cleveland: World Publishing Co., 1964. Pp. 297. \$4.95.

J. W. EHRLICH is not only a famous trial lawyer<sup>1</sup> and the model for television's *Sam Benedict* series, he is also a prolific writer. *A Reasonable Doubt* is his tenth publication. Although earlier writings reflect an astonishing breadth of subject-matter — ranging from the jury system to the Bible to the rather possessively entitled *Ehrlich's Blackstone*, *Ehrlich's Criminal Law*, and *Ehr-*

11. White, *Social Science Research in the Soviet Bloc*, 28 PUB. OPIN. Q. 20 (1964).  
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1. As of April, 1955, Ehrlich had tried a total of fifty-five murder cases; of these, forty-one resulted in outright acquittals, twelve in manslaughter convictions only, and two in second-degree murder verdicts. Ehrlich's cases have involved such celebrities as Billie Holiday, Sallie Rand, Gene Krupa, and Howard Hughes. More recently, Ehrlich has defended "beat" publisher, Lawrence Ferlinghetti, who was indicted for selling the allegedly pornographic *Howl and Other Poems*, by Allen Ginsberg. An account of the trial is contained in Ehrlich, *Howl of the Censor* (1961).

Over nine years have passed since the publication of Ehrlich's biography: Noble & Averbuch, *Never Plead Guilty* (1955). The biography casts Ehrlich as a hero larger than life.

*lich's Criminal Evidence* — the latest contribution, *A Reasonable Doubt*, is perhaps the most ambitious of the lot.<sup>2</sup>

In form the book consists of a large number of disconnected discussions of legal rules and practices, coupled with some more or less lively and/or profound anecdotes. At times the author also roams the domains of psychology, sociology, philosophy, and political science. The subjects discussed include the Polygraph, Juvenile Delinquency, Organized Crime, Mr. Justice Holmes, States' Rights, Poverty, the Emancipation Proclamation, and Honesty. Lincoln, Tennyson, and the Bible are quoted at length. The book is precisely characterized in a rather glowing forward as "as much a statement of personal philosophy as it is a statement of law."<sup>3</sup> Only parts of this personal philosophy will be discussed here.

In one of the shorter sections of the book Ehrlich savagely attacks Mr. Justice Holmes. Of course, taking pot-shots at great jurists is a time-honored tradition of both lawyer and law student — and no judge is immune from criticism — but Ehrlich's comments on Justice Holmes go beyond the traditional targets of the sharpshooter. It is one thing to argue that Holmes wrote a bad opinion — which Ehrlich does rather persuasively; it is another to conclude from this solitary example that Holmes was a "lawyer only by sufferance," and a "man born to cut bait while the braver did all the fishing."<sup>4</sup> What especially seems to gripe Ehrlich is that Justice Holmes was not a "liberal." Ehrlich proclaims: "Mr. Justice Holmes has always been thought of as a kind of . . . liberal."<sup>5</sup> Which isn't true. It has become almost commonplace to observe that Holmes wasn't really very wedded to the tenets of liberal democracy. Most recently, Harold Lasswell has noted Holmes' "distaste for democracy" and his opposition "to a conception of morality and legality that would hamper the strong for the benefit of the weak."<sup>6</sup> But while Professor Lasswell and others<sup>7</sup> would agree that Holmes' philosophy cannot be packaged neatly to fit many conceptions of liberalism, certainly they would stop short of labeling him, as trial lawyer Ehrlich does, a "reactionary."<sup>8</sup>

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2. Of course, trial lawyers, particularly famous ones, have rarely qualified as shrinking violets. Professor Bishop, reviewing Louis Nizer's *My Life in Court*, observed that "hero-worship, amounting to uncritical adulation, is what Mr. Nizer plainly feels for the subject of his autobiography." Bishop, *Book Review*, 72 *YALE L.J.* 614 (1963). But if the self-inflated ego is a classic subject for wit, it is also, in the case of the trial lawyer, the source of daring innovation. And it is boldness and originality which seem to characterize the great defense attorneys.

3. White, "Forward," p. 11.

4. Pp. 63-64.

5. P. 60.

6. Lasswell, *Book Review*, 73 *YALE L.J.* 532, 535 (1964).

7. See, e.g., KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 11-20 (Collier ed, 1961); HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS* (1963); Touster, *Holmes: The Years of the Common Law*, 64 *COLUM. L. REV.* 230 (1964); Bickel, *The Battle Over Brandeis*, *New Republic*, Aug. 8, 1964, p. 25.

8. P. 60. And very few would agree with Ehrlich's accusation that "had Holmes had his way, we would be living in a police state more cruel and vicious than any of

But if Ehrlich is something less than a major contributor to the literature of judicial biography, he remains pre-eminently qualified to lecture on the guides to juror selection. Somewhat surprisingly, in this section titled "A Dozen Isn't Always Eggs," Ehrlich has little to offer that is novel or even controversial.<sup>9</sup> Most of the aging clichés are marched out — sometimes a bit more recklessly than is customary. For example, Ehrlich not only echoes the common belief among criminal lawyers that members of minority groups tend to favor the defense, he also characterizes Englishmen, Germans, and Scandinavians as tending to "believe in absolute law enforcement and severe punishment for anyone who runs afoul of the law." "Such persons," Ehrlich asserts, "are ultraconservative, bull-headed, and usually have their minds made up — in favor of the prosecution — at the outset of the trial."<sup>10</sup> More flexible, according to Ehrlich, is the "outdoor or athletic type." He can "take either side" but "if you can convince him, he will espouse your cause till hell freezes over."<sup>11</sup> Perhaps Ehrlich's most original contribution is the notion that "a Southerner is often a good juror if the client is a Negro, because the Southerner will often best understand the Negro's problems."<sup>12</sup>

Ehrlich cautions, however, that his rules (regarding members of minority groups, Englishmen, Scandinavians, Germans, outdoor types, and Southerners) are general guidelines only; there is always the fearful possibility of meeting up with an American of German descent, reared in Mississippi, who loves to play tennis and take long hikes.

"One hard-and-fast rule," however, is offered up: "Never accept a wealthy person if the client is poor, nor a poor person if the client is wealthy. The gap between client and juror cannot be bridged and if you choose a wealthy juror who reads liberal periodicals you will *still* be gambling heavily."<sup>13</sup> This "hard-and-fast rule," with its not very implicit premise of class conflict, is probably in accord with general thinking, and may well have accurately described the attitudes prevailing twenty years ago.<sup>14</sup> Now, however, there is evidence that the rule does not hold true for many lower income families. Professor Lane's depth interviews with fifteen "common men" suggest that

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us can imagine." P. 19. No more defensible is Ehrlich's statement that Holmes "did more to undermine and lay waste to our precious Bill of Rights than *any other judge in our history*." P. 61.

9. SHADOAN (ED.), *LAW AND TACTICS IN FEDERAL CRIMINAL CASES* 264-66 (1964), contains some provocative suggestions for juror selection in insanity cases. A sophisticated model *voir dire* examination, both for general purposes and insanity cases, is now available in the excellent BELLOW & SHADOAN: *CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL* §§ 1.01-1.02 (1964).

10. P. 112.

11. P. 112.

12. P. 113.

13. P. 112.

14. Cf. MERTON, *MASS PERSUASION: THE SOCIAL PSYCHOLOGY OF A WAR BOND DRIVE* (1946). Merton suggests that the wealthy are perceived as leading immoral lives and as having achieved their money illegitimately.

today there is very little hostility toward the "rich;" rather the view is "that this is a land of opportunity in which merit will find a way," a view which leads to acceptance of the status differences in society.<sup>15</sup> Rich or poor, "people deserve their status."<sup>16</sup> Not only are Lane's subjects not hostile toward the upper classes, but they tend to identify with and to admire them. And equally important to the trial lawyer, they tend to denigrate those lower in the socio-economic scale, to consider them lazy, and to hold them somehow responsible for their impoverished position.<sup>17</sup> Lane's data thus suggest at least two rules-of-thumb, both of which run counter to Ehrlich's imperative. First, if the defendant is well-to-do, a low status juror is likely to be more lenient than somebody from the upper strata. And secondly, if the defendant is of a lower class, a juror with high socio-economic status will be more sympathetic, and a juror of only slightly higher status than the defendant will be harsher than somebody from the defendant's own stratum.

Of course, these propositions need further refining, and Lane's study is exploratory, not conclusive. The real demand is for empirical studies focusing specifically on the jury process.<sup>18</sup> In their absence, it is unfair to criticize Ehrlich for not being more sophisticated and systematic. The method of all in the business of selecting jurors is more intuitive than empirical. Ehrlich's intuition seems no worse than most; it may be better.

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15. Lane, *Political Ideology* 68 (1962).

The greater the strain on a person's self-esteem implied by a relatively low status in an open society, the greater the necessity to explain this status as "natural" and "proper" in the social order. Lower-status people generally find it less punishing to think of themselves as correctly placed by a just society than to think of themselves as exploited or victimized by an unjust society.

*Id.* at 79.

16. *Id.* at 68.

17. *Id.* at 79. Cf. Greenblum & Pearlin, *Vertical Mobility and Prejudice: A Socio-Psychological Analysis*, in *CLASS, STATUS AND POWER* 480 (Bendix & Lipset ed. 1953); HAVIGHURST & NEUGARTEN, *SOCIETY AND EDUCATION* 371-72 (1957); Kaplan, *Segregation Litigation and the Schools — Part III: The Gary Litigation*, 59 *Nw. U.L. REV.* 121, 153-54 (1964).

18. When the full findings of the University of Chicago Jury Project are published, a long step toward satisfying this demand will have been taken. See TOCH (ED.), *LEGAL AND CRIMINAL PSYCHOLOGY* 100-05 (1961), for a succinct survey of the studies on experimental and actual juries.

Using psychoanalytic concepts, it is possible to make accurate predictions about the orientation of a prospective juror in a criminal case. For example, it is now well known that individuals have highly differentiated needs to punish and to be punished, and that the failure of the state to punish an offender will threaten one individual far more than another. See ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 214-15 (rev. ed. 1956). See also, Ehrenzweig, *A Psychoanalysis of the Insanity Plea — Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 *YALE L.J.* 425 (1964). However, it is plainly impractical at this time to employ psychoanalytic concepts to the process of juror selection. The need is for more sophisticated application of broader, sociological categories such as class, occupation, religion, party, age, sex. The use of these variables is economical; only the knowledge of their relationships to jury behavior is lacking.

In summary, the best sections of the book are those in which Ehrlich frankly assumes the role of the trial lawyer. His advocacy of legalized abortion and his defense of some poems by Allen Ginsberg (an actual excerpt from oral argument) reveal him as a skilled debater, who, if not always original or systematic in presentation, does provide a passionate, sharply-sketched appeal for justice as he defines it. The weakest sections are those featuring Ehrlich as a social engineer. Like the losing gambler who frantically keeps switching the game, the reader skims these sections — on poverty, narcotics, delinquency — hoping vainly for a change in luck.

It was said of Hemingway that the act of writing performed two functions for him: "It was his weapon against an alien universe — the means by which he kept himself alive; and it was the battlefield in which he struggled for a small piece of immortality."<sup>19</sup> Ehrlich's universe is not so much an alien as an apathetic one, in which he assumes the role of an impatient schoolmaster. And, as for that "small piece of immortality," it must be concluded that *A Reasonable Doubt* reveals Ehrlich rather fully as much the mortal.

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19. ROVIT, ERNEST HEMINGWAY 30 (1963).

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