

in the development of a criminological content in Canadian Law School curriculums.

Those members of the legal profession who find an outlet for their talents in the criminal courts will know that the sentencing function of those courts is of paramount concern on occasion, to their clients. This work will assist them immeasurably in whatever attempts they may make on behalf of those clients when discharging their role in regard to sentence. As the author has pointed out, the central problem in penology is the assessment of the effectiveness of penal measures. While he does not purport to make such an assessment, he does acquaint the reader with some of the efforts that have been made and the problems involved.

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AUSCHWITZ IN ENGLAND

By MARVIS M. HILL and L. NORMAN WILLIAMS.

London: MacGibbon & Kee, 1965, pp. 293, with a foreword by Lord Denning.

If one were seeking a text to introduce this book, these cynical words could hardly be improved upon: "And Satan answered the Lord, and said: 'Skin for skin, yea, all that a man hath will he give for his life'."¹

The book, by two members of the Bar of England, is a report on an eighteen-day trial—the libel action of *Dering v. Uris and Others*—which took place in the Royal Courts of Justice, in London, England, before Mr. Justice Lawton and a jury, in April and May, 1964. But the burden of its theme moves on a higher level than a purely factual one. It raises an important ethical question; which each man, if he should ever be unfortunate enough to find himself in circumstances demanding a direct answer, would have to answer for himself, and not by words alone: Is life so sweet that it should be purchased at the price of moral dishonor and mental degradation?

In his successful novel, "Exodus", a story of "the tribulations and triumphs of the Jews in Europe and the Middle East in the twentieth century," at page 155, Leon Uris wrote this sentence: "Here, in Block X, Dr. Wirth (sic) used women as guinea pigs, and Dr. Schumann sterilized by castration and X-ray, and Caluberg (sic) removed ovaries, and Dr. Dehring performed seventeen thousand 'experiments' in surgery without anaesthetic." He was none too careful in his spelling of

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1. *Book of Job*, 2:4.

proper names. "Wirthe" should be "Wirths", "Caluberg", "Clauberg", and "Dehring", "Dering".

His words have reference to the barbarous inhumanities (how can they be adequately characterized), which were practised upon Jewish prisoners, in the Nazi concentration camp, at Auschwitz, in Poland, during the Second World War.

In June, 1962, Dr. Wladislaw Alexander Dering, O.B.E., a London doctor, of Polish origin, who had been a prisoner in Auschwitz from August, 1940 to January, 1944, launched an action, claiming damages for injury "in his character, credit and reputation and in the way of his said profession," by reason of the single reference to him on page 155 of Mr. Uris' book. Though it had been published some three years earlier, this book had just come to his attention. He joined as defendants, Mr. Uris, William Kimber & Co. Ltd., the publishers, and Purnell & Sons Ltd., the printers of the novel. Purnell & Sons Ltd. offered Dr. Dering an apology and paid to him the sum of £500 by way of damages.

Refusing to yield a single inch, the author and publishers entered the defence of justification, undertaking to prove that the words, of which the plaintiff complained, were substantially true in substance and in fact.

In their Particulars of Justification, the defendants gave, among others of a similar unsavory flavor, these details of the facts which they hoped to prove at the trial:

Dr. Alina Brewda (a qualified woman doctor) was ordered to attend and was present throughout the operations for the purpose of attempting to calm the girls. During the first operation she asked Dr. Dering, "Do you realize these girls have had irradiation quite recently, what are you doing?", and he replied that he knew all about it and was doing an ovariectomy; she said, "The wound will never heal because of this irradiation", and he did not reply. Just before the incisions Dr. Brewda asked him, "what do you think you are doing? This is a young girl; she has already had a radiation on the ovary, so why do you operate?", and he did not reply. During the second operation she said, "You know you are really operating on these girls as if they were corpses," and he said nothing; during a later operation on a girl with previous irradiation burns Dr. Brewda said, "Leave them alone. They are suffering enough already from the burns", and he said, "Shut up. I have my orders. They will kill me. I have to do it . . ."

Before the trial opened, the publishers paid into court the sum of forty shillings, being their estimate of an adequate compensation for any damage which may have been suffered by Dr. Dering. Mr. Uris did not follow the same procedure.

After all the preliminaries of the case had been settled, the trial opened on April 13. Mr. Peter Colin Duncan, Q.C., to whom the presiding judge referred as "the Homer of that section of the English Bar concerning itself with libel", and Mr. Brian Thomas Neill, appeared for the plaintiff. The defendants were represented by Lord Gerald Austin Gardiner, Q.C. (presently Lord Chancellor of England, long a

moving force for law reform), Mr. David Couzens-Hardy Hirst—and Mr. Louis Jacques Blom-Cooper.

During the nightmare of Hitler's regime, in Germany, the Nazis embarked upon a deliberate and systematic program to exterminate the Jewish race. "Genocide" is the polite word which had been coined³ to describe this twentieth century phenomenon. Jews of full blood were no problem—they were fodder for the gas chamber, or the firing squad. A more sensitive approach was called for in dealing with Jews of mixed blood. It would not do to offend their non-Jewish relatives. This was the purpose of the "experiments" which took place in Auschwitz. The Nazis were seeking an effective means of sterilizing human beings on a wholesale scale.

Dr. Schumann explored the possibilities of castrating males and sterilizing females by X-ray. Some of his victims were then turned over to Dr. Dering, whose responsibility it was to remove their testicles, or ovaries, so that the effectiveness of the "experiments" could be determined.

Under examination by Mr. Duncan, Dr. Dering explained why he had been willing to lend himself to this evil work. "The common opinion was," he said, "that there was no sense in refusing, for if we refused we would not save the people because it would be done, either by other doctors or by some unskilled person, or—as Schumann threatened—he could send victims to gas chambers and get surgical help to remove X-rayed testicles which he needed for his purpose."⁴

Lord Gardiner pressed Dr. Dering in cross-examination for more light on this point. "As a doctor you had taken the Hippocratic oath when you become a doctor," he questioned. "Yes", replied Dr. Dering.

And the cross-examination continued:

Question: "And you were here being asked to castrate a potent man against his will?"

Answer: "Yes."

Question: "That requires, does it not, some justification by a doctor?"

Answer: "Yes."

Question: "I am just asking you, is there any justification, in your view, except that you'd have been shot if you'd disobeyed the order?"

Answer: "I would like to answer exactly to your question. Since I entered Auschwitz all law, normal, human and God's law were finished. They were Germans' law. And this questions, Lord Gardiner, you put to me, they concern normal conditions. It is difficult to imagine the situation in life in the camp. So therefore it is difficult for me to give you short 'Yes' or 'No'⁵ to your questions."

3. By Dr. Raphael Lemkin in 1954.

4. Page 64.

5. Page 77.

Dr. Grabczynski, who had been associated with Dr. Dering in Auschwitz, travelled to England from Poland to give evidence on his behalf.

A revealing passage from his evidence, under cross-examination, follows:

Lord Gardiner: "Do you agree that before Hitler came to power in Germany, the center of civilization in the world was the Christian countries of the west?"

Dr. Grabczynski: "Maybe."

Lord Gardiner: "Do you agree that if at that time we had been told that within a short time one of those countries would murder two-and-a-half million people—mainly old people and children—by sending them naked into gas chambers we should all have refused to believe it?"

Dr. Grabczynski: "Yes, I agree."

Lord Gardiner: "Particularly if all that the murdered people had done was to be the children of their parents?"

Dr. Grabczynski: "Yes."

Lord Gardiner: "And if we had been told that experiments would be carried out to irradiate and then remove sexual organs of men and women when they were conscious of what was being done, in order to see whether the remainder could be sterilized en masse, we should equally have refused to believe it?"

Dr. Grabczynski: "Maybe."

Lord Gardiner: "And we should have said, 'They could never find a doctor who had taken the Hippocratic oath to take part in such experiments?'"

At this stage of the cross-examination Dr. Grabczynski requested that he be asked shorter questions.

The judge commented that the phrase "take part in" should be qualified. Did "take part in" mean as a voluntary or as an involuntary act?

Lord Gardiner: "By 'taking part in' I mean a surgeon actually removing the sexual organ?"

Dr. Grabczynski admitted that he knew "that men and women had had their sexual organs 'irradiated', and that there were doctors who had actually removed the sexual organs. He knew, too, that it was being done for Dr. Schumann's experiments, though he did not then know the nature of the experiments."

Lord Gardiner: "Were the two doctors who actually removed most of the sexual organs of both men and women two Polish doctors, Dr. Dering and yourself, Dr. Grabczynski?"

Dr. Grabczynski: "Yes.⁶"

The incredulous events to which Lord Gardiner referred in his cross-examination must never be forgotten, however distasteful to any normal healthy mind their remembrance may be. They must serve as a beacon light to warn us that we must never let the veneer of civilization wear thin. We have been moving upward, slowly, working out the beast; but, let the controls be relaxed, and the descent to barbarism can be sudden and swift. It happened in Nazi Germany. It could happen elsewhere. The safeguards and guarantees of the common law make it less likely to happen here, or in any country where that law prevails.

A word about these safeguards may be appropriate, and here I follow closely Dr. Arthur L. Goodheart.⁷ First, there is the jury system. "The most effective guard against governmental tyranny ever devised if—and this is an essential 'if'—the ordinary citizen is prepared to show courage and independence."

Second is the writ of habeas corpus, "the key that unlocks the door to freedom."

Third is the principle of the independence of the judiciary: of all the judges, with no single exception, from the smallest pygmy to the mightiest giant. No power under heaven can dictate to a common law judge how he must decide a case. His judgment must be his own, free and untrammelled, according to the best of his skill and understanding; and, alas, if he is weak in skill and understanding, he has the right to be as nature made him, or as nurture has kept him. He has the right to be wrong. This is the price we must pay to maintain the sacred principle. A judge cannot be treated like a schoolboy who gets his sums wrong: which is not to say, of course, that he cannot be criticized. (Per Lord Atkin, Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.)⁸

Fourth, is the principle "summed up in the phrase 'an Englishman's home is his castle.' . . . This is the hallmark of government under the law."

In an uncertain world, our debt to the common law is a fact for which we should be daily thankful. But it is a fact which we should never, for one single unguarded moment, take for granted. In all seasons, the outposts must be patrolled, and the barricades manned, by men and women of the true faith.

Dr. Dering called seven witnesses in support of his case. For the defence, twenty witnesses were called; six men and eight women, all victims of Nazi brutality; four doctors, one man and three women, who had been prisoners in Auschwitz; and two expert witnesses.

7. *The Migration of the Common Law* (1960), page 8 *et seq.*

8. *Attorney-General for Trinidad and Tobago v. Ambaré*, 1936 to W.W.R., 252.

But the most eloquent witness was a witness which could not speak—a register from the operating room at Auschwitz, part of which was in Dr. Dering's handwriting. Speaking of this witness, the authors said: "The relevance of this mute witness can hardly be overestimated. As Lord Gardiner, Q.C., for the defence, told the jury in his opening speech, if it had not been for the register and the searches which it made possible, the trial of Dr. Dering's action might have been little more than his evidence against that of Dr. Brewda."⁹ (Dr. Brewda claimed that she had seen Dr. Dering perform "experimental" operations. This fact, Dr. Dering denied categorically.)

Dr. Adelaide Hautval, a Frenchwoman, was the most eloquent of the witnesses who spoke from the witness box. For protesting to members of the Gestapo about their treatment of Jews, she was told: "Because you defend them you can share their lot." In prison, she was made to wear a yellow star on her clothes and a band bearing the words, "Friend of Jews". In his summing up Mr. Justice Lawton, as reported by the learned authors, made this reference to her:

Then there was Dr. Hautval—perhaps one of the most impressive and courageous women who had ever given evidence in the courts of this country, a most outstanding and distinguished person—and they knew what had happened to her. She had stood up to the Nazis four times, and made it quite clear at an early stage what she was prepared to do and what she was not prepared to do. As a result of the stand she made, she found herself summoned by Dr. Wirths and she gave a reply to Dr. Wirths which his Lordship expected would live in the jury's memories for many years—a devastating reply . . .¹⁰

(When Dr. Wirths, in referring to the Jews, asked her: "Cannot you see that these people are different from you?" Dr. Hautval replied, as she stated in her evidence: "I answered him that there were several other people different from me, starting with him.")¹¹

Dr. Lorka, one of the defence witnesses, gave a moving testimony to the fact that, though man, during a moral blackout, can descend to the depths of brutality; he can also, under the most difficult and dangerous circumstances, rise to the highest dignity of human life.

"In the first days of my stay in Block 10 (in Auschwitz) one evening I spoke with Dr. Hautval," she related, in the witness stand.

This conversation took place in the operating theatre. She explained to me as a doctor what was happening in Block 10. At the end of that conversation she told me that it was impossible that we should ever get out of the camp alive. "The Germans will not allow people who know what is happening here to get in touch with the outside world," Dr. Hautval said, "so the only thing left to us is to behave, for the rest of the short time that remains to us, as human beings." I have never forgotten that conversation, and in all the difficult moments of my life I have remembered what she said to me.¹²

9. Page 28.

10. Page 255.

11. Page 221.

12. Page 190.

Professor William Charles Wallace Nixon, M.D., F.R.C.S., F.R.C.O.G., a professor at the University of London, was one of the two expert witnesses called by the defence. Dr. Dering had maintained that it was dangerous to leave an irradiated ovary in a woman's body, and offered this a further reason why he had been willing to operate.

Lord Gardiner asked Professor Nixon this question: "If an ovary is irradiated, is there any medical benefit to be obtained by its surgical removal?" Professor Nixon: "None at all."

Lord Gardiner: "Can its continued existence in the body cause any harm to the patient?"

Professor Nixon: "None at all. It ceases to function physiologically as an ovary."¹³

Professor Nixon had examined the eight women witnesses who had been operated on in Auschwitz. He reported his findings to the court. They do not make pleasant reading. In substance, his evidence was that the eight women had been permanently affected in their health, "by just crude, bad surgery."¹⁴

In opening his charge to the jury, the presiding judge said that it was important to remember the nature of the case. "We are not here acting as a war crimes tribunal, nor are we conducting an inquiry about what went on in Auschwitz. We are here to try a civil case according to the law of England."¹⁵

On the moral aspect, he said that he was glad that the jury had to decide, not himself. They would have to decide how the average man could be expected to act in the circumstances.

His review of the evidence was in the best traditions of the English Bench. He spoke for nearly five hours, putting to the jury the points which told both for, and against, the parties.

The jury retired at 11:55 a.m. on the eighteenth day of the trial. At 2:28 p.m., they were ready with their verdict. The foreman announced the verdict to a hushed courtroom. They found for the plaintiff—and awarded him one ha'penny, the smallest coin of the realm, as damages.

"Dr. Dering won a Pyrrhic victory," is the authors' comment on this verdict. "The judge ordered him to pay the costs incurred by the author and publishers after the date when the publishers paid the forty shillings into court, leaving the parties to bear the costs each had incurred before that date."¹⁶

One issue, as the authors' point out, was not settled. Was Dr. Dering justified in performing the operations, because he was in fear of

13. Page 211.

14. Page 217.

15. Page 248.

16. Page 25.

his own life? In its wider implications, which should be particularly relevant to lawyers, this question might be expressed: Is a man under a moral duty to disobey a bad law; or, what might more properly be called a perversion of the law, regardless of the consequences to himself? Was Emerson on sound moral ground when he wrote in his diary, after the Fugitive Slave Law went on the statute books: "I will not obey it, by God?"¹⁷

But though this issue was not decided, the instinct of the English jury was sound. They held that the defendants had drawn too long a bow, that the offending words were too strong. As the presiding judge said in summing up, "The defendants had sought to establish by the evidence three propositions of fact":

One, that Dr. Dering performed 130 "experimental" operations.

Two, that he performed these operations willingly, because he was an anti-semite, and because he wanted to put himself on good terms with the Nazis to secure his release from Auschwitz.

Three, that he performed the operations in a callous and brutal manner.¹⁸

In the jury's view, the evidence fell short of establishing these propositions; and, therefore, the plaintiff must have a verdict. But they showed then, contempt for him by their award of an ha'penny damages. This, surely, is justice putting its best foot forward.

Long ago, Burke pointed out the impossibility of drawing up an indictment against a whole race. Not all Germans were tarred with the Nazi brush. Not all were prepared to accept life on any terms. Some preferred death to dishonor, giving the direct lie to Satan. As a farm boy from the Sudetenland wrote on the eve of his execution:

Dear parents: I must give you bad news. I have been condemned to death, I and Gustave G. We did not sign up for the S.S. and so they condemned us to death. You wrote me, indeed, that I should not join the S.S.; my comrade, Gustave G. did not sign up either. Both of us would rather die than stain our consciences with such deeds of horror. I know what the S.S. has to do.¹⁹

Had there been more Germans of this spirit, Hitler could never have risen to power. But, alas, there were too few—far too few. This spirit shows man at his highest, a height to which not all men and women can be expected to reach.

In his recent novel, *The Betrayal*, Dr. Henry Kreisel, head of the English department at the University of Alberta, deals with the classic theme, upon what terms may a man, in conscience, cling to his own life. He puts these words into the mouth of one of his characters, a man who had betrayed others to save himself: "No man knows who he is until

17. Quoted by F. Lyman Windolph in *Reflections of the Law in Literature* (1956), p. 72.

18. Page 249.

19. This letter is quoted by Lord Radcliffe in *The Law and its Compass* (1961), p. 86.

the moment comes. No man knows what he will do and what he will not do until the finger points to him."²⁰ By what standards is a man to be judged whose courage fails when the finger points to him? With compassion, surely! Not in the light of a strict black-and-white morality! In the knowledge that we, too, are human flesh and blood; and that we, too, may fail an extreme test of courage and virtue.

When his counsellors preached contentment to him, cautioning him to look with a patient eye, upon his sea of troubles, Cardinal Richelieu, his life in momentary danger, his soul in tumult, cried from the depths of his agony:

O! Ye whose hourglass shifts its tranquil sands
In the unvexed silence of a student's cell;
Ye, whose unttempted hearts have never toss'd
Upon the dark and stormy tides, where life
Gives battle to the elements . . .
Ye safe and formal men,
Who write the deeds, and with unfeverish hand
Weigh in nice scales the struggles of the trapped
And the cries of the stricken,
Ye cannot know what ye have never tried!²¹

We, safe and formal men, from the safety of our studies, or the sweet security of our homes, must not be too severe on Dr. Dering. But, because he showed no sign of repentance, gave no indication that he carried an accuser within his own breast, he cannot claim an unqualified forgiveness for the evil which he has done. As Lord Gardiner said in his closing speech: "Yet, even in the witness box, there had been no real word of regret, and his general attitude was indistinguishable from that of any anti-Semitic officer of the German officer class."²² What stronger words of condemnation, than these, could be spoken of any human being?

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20. (1964) p. 177.

21. These lines are from Act III of the play, *Richelieu* by E. Bulwer-Lytton (1839).

22. Page 236.

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