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Review of “The Law of Homicide,” By Roy Moreland

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The text of this book is thoroughly documented, and all footnotes are placed at the end to avoid interruption of continuity. There is an excellent bibliography and table of cases in addition to the usual index. While the approach is that of the sociologist (the author is assistant professor of sociology at Princeton University), the concept of law as a promoter or eradicator of social discrimination is most effectively handled. Any one interested in a concise analysis of the effect of law in dealing with social problems will find this study exceptionally rewarding.

MALCOLM W. MARTIN†

THE LAW OF HOMICIDE. By Roy Moreland. Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. viii, 338. \$7.50.

It is the style in law books to make studies of this and that, studies which purport to be and usually are scholarly expositions of a chosen field. Some of these books laboriously trace the development of the common law rule through a labyrinth of legal minutiae until everything from Bracton's casual footnote to Holmes' felicitous epigram has been expounded in lush detail. Some of the books touch history lightly and rush on to a statement of the "existing law" in which everything is distinguished from everything else. Now and then a book appears which goes beyond mere exposition to what the law should be. Unfortunately many of these rare books are phrased in a terminology so esoteric that none but the chosen can comprehend. Rarely there is a book, however, which traces the delicate thread from history to the present, explains the contemporary law and indicates the way without slipping into a special argot proposed by the author. Such a remarkable book is Moreland's *Law of Homicide*.

Professor Moreland has taken the entire field of homicide and subjected it to a remarkably clear and penetrating analysis. His objective is the drafting of a suggested homicide statute which he hopes may "serve as a working guide to legislators and lawmakers generally." The author's method is historical and comparative. He traces the law of homicide from its obscure common law beginnings to the present time. As a part of the modern treatment the statutes of all forty-eight states are examined and classified. The book contains a very interesting chapter on statutes relating to homicides arising out of the operation of motor vehicles. The treatment of the current law is so meticulous that even the most pragmatic practicing lawyer should be pleased. Ponderous as this may sound in review, Professor Moreland has managed it with a lightness of touch which makes his book as delightful reading as one finds in the law.

Fundamentally (as the preface points out) the presentation follows traditional lines. Although the subject headings are orthodox, the traditional terms of art like *mala in se* are given tough-minded analysis. Professor Moreland does not shy off from obscure phrases and retreat into a new vocabulary as esoteric as the old; rather he comes to grips with the stock phrases and explains what sins each subtends. One departure from

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strict orthodoxy is that the abandonment of the term "malice aforethought" is recommended. As the book points out, the term has been a part of the criminal law since the thirteenth century but analysis of the cases shows that the term no longer has a realistic meaning, but is used in at least eight different senses. Professor Moreland recommends that in each instance language be used which frankly and clearly states the principle upon which liability rests.

Another important thesis of the author is that the so-called "unlawful act" doctrine that liability for a homicide may be determined by whether it occurred in the course of a lawful or unlawful act is unsound. Professor Moreland points out that seven hundred years ago Bracton based much of his analysis of homicide upon the lawfulness or unlawfulness of the act in which the defendant was engaged when the killing occurred. This classification has lingered in the law ever since and is responsible for the felony murder doctrine, the misdemeanor manslaughter rule and much of the confusion in the law of criminal negligence. Professor Moreland demonstrates that the true test in such cases is the amount of danger in the act causing the death rather than its lawfulness or unlawfulness. Thus, he would assimilate much of the unlawful act doctrine into negligent homicide. As Professor Moreland shows, the better modern cases have recognized this test but many are still engaged spinning out technicalities about the difference between acts *mala in se* and those *mala prohibita* in order to reach a palatable result.

As an example of how a draftsman of a statute should approach his task, this book is without a peer. When Professor Moreland has completed his historical survey and explored the meanings of the traditional terms used to express the modern law, he then faces the problem of putting the rather refined concepts such as "malice aforethought" and the "unlawful act doctrine" into meaningful language. On the one hand, there is little to be gained by substituting one phrase of art for another. On the other hand, much of the existing terminology, although sanctioned by centuries of usage, is hopelessly ambiguous. While realizing the unreliability of words, the author recognizes that the statute must still be phrased in words, and he concludes that expressing the concepts in familiar legal terms which also have a similar dictionary meaning is a desired end. The resulting statute, while a little ponderous in spots, deserves consideration by legislatures everywhere.

If the book has a weakness, it is that too little attention is paid to the objectives of the law of homicide, but undoubtedly this is a point on which there would be much disagreement. The common explanation of the "unlawful act" doctrine that it discourages criminals is dismissed with Holmes' retort that a more discouraging thing would be to hang one thief in every thousand. This lack, if lack it be, does not impair the value of the work.

In short, to snatch a phrase from Justice Holmes to whom the book is dedicated, Professor Moreland has indeed made "cosmos out of chaos" and his book deserves to be studied by all students of the criminal law.

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