THE MATRIX OF INSANITY IN MODERN CRIMINAL LAW

BY GABRIEL HALLEVY

Springer International Publishing, Switzerland, 2015. 204 pages, $69.99.

Reviewed by Christopher Faille

Gabriel Hallevy is a professor of criminal law at Ono Academic College, which boasts the largest law faculty in Israel. Hallevy has written *The Matrix of Insanity in Modern Criminal Law* largely to make the point that "insanity" is defined neither by law nor by medicine but by social norms. He instructs us to contemplate the Bible's story of Abraham and Isaac in order to grasp that point.

That story tells us that God spoke to Abraham, and that in accordance with God's instructions, Abraham took his son Isaac to a mountain, built an altar, bound Isaac, and laid him upon that altar prepared to kill him. He even "stretched forth his hand" for the knife that would finish the deed.

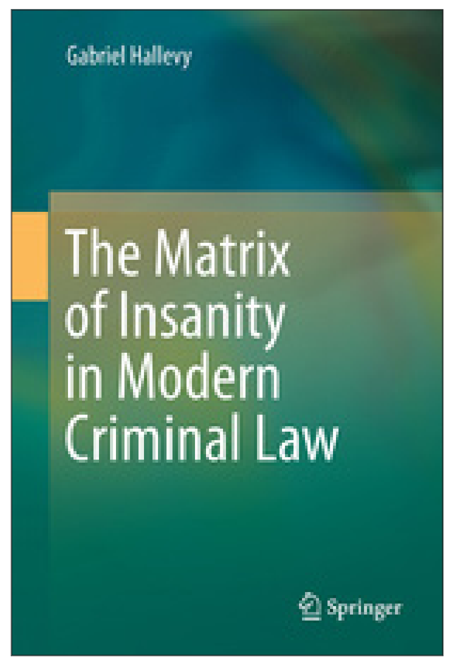
In the early 21st century, in most jurisdictions in the world, Abraham's action would likely be considered either criminal or insane. Because Abraham didn't go through with the sacrifice of Isaac, he didn't commit murder. But he would clearly be in danger of some criminal charge, and "it really was God's command" would not be an available defense.

Hallevy writes that "in most legal systems this is a case of attempted murder." I'm not sure of that. My understanding is that, in common law systems, attempted murder is the performance of an act that tends to, but in the case at hand failed to, produce the death of a human being. A stroke of a knife in Isaac's direction would have made the act an attempted murder, but Abraham didn't get that far before God countermanded the earlier order. Arguably, Abraham was only *preparing* to attempt murder (and committed child abuse or child endangerment in the process) rather than actually attempting murder.

Regardless, it seems clear that, under contemporary legal systems, there would be a clear presumption that he committed a crime, however defined, and it also seems that insanity would be a tempting defense for an attorney charged with serving this difficult client's interests. Yet, as Hallevy writes, "Abraham is considered a cultural hero." Abraham serves as evidence for the proposition that insanity is "dependent on time, place, and social environment rather than a medical diagnosis."

Personally, I can't help thinking in this connection of Immanuel Kant's analysis of the matter of Abraham and Isaac. (Really, I kan't.)

Kant wrote that no God worthy of worship would command anyone to do such a thing and that Abraham should have known this. If the event is to be understood in spiritual rather than in medical (or sociological) terms at all, it should be understood as an instance of demonology. A devil pretending to be God may have been tempting Abraham. In such a case, Abraham ought to have said, "that I ought not to kill my good son is quite certain. But that you, this apparition, are God—of that I am not certain, and never can be, even if this voice rings down to me from (visible) heaven."



The implication is that God doesn't even show up in this story until the very end—that the real God countermanded the orders of the phony one.

I'm not sure how that interpretation plays into Hallevy's argument, but if Abraham was the dupe of a demon pretending to be God, and was inadequately philosophic to see through the demon's disguise, that might help save the rationality of keeping Abraham, if not as a cultural hero, at least as a valuable moral touchstone, in the 21st century.

As to the way legal systems deal with claims of divine intervention in human affairs: One needn't treat the matter as a hypothetical. Hallevy cites a decision by a court in the United Kingdom in 1952 in which a man had set fire to a brothel in the belief that he was acting in accord with God's command. When he was arrested he told a policeman, "I suppose they will hang me for this."

The *M'Naghten* rule is that an insanity defense succeeds only if it establishes that "the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." In terms of knowing what is "wrong," English law understands the term to mean wrong as *defined by English law*. Thus, the defendant in the brothel-arson case, whose remark shows that he was perfectly aware of the fact that his act constituted a crime, was refused the opportunity to argue insanity to the jury, and the trial court ruling to that effect held up on appeal.

Hallevy also observes that the answer to the question of what "wrong" under *M'Naghten* actually means is more ambiguous in the United States. Some jurisdictions understand it to mean legal wrong, others moral wrong, and others leave the matter to the jury. Some no longer employ the *M'Naghten* test.

The issue of religious delusion is only one of the themes of this insightful book, the one I have arbitrarily chosen to give a taste of the whole here. The book's other themes include the history of psychiatric treatment, with its ambivalent relationship to the legal concept of insanity. There is also an elaborate compare-and-contrast exercise involving insanity and automatism; automatism is a defendant's inability to control the actions of his body, as in the case of an alleged battery that consists of blows inflicted in the course of an epileptic seizure. *The Matrix of Insanity in Modern Criminal Law* is a thoughtful survey of a vast field, amazingly concise in its mere 204 pages. ⦿

Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

OVERRULED: THE LONG WAR FOR CONTROL OF THE U.S. SUPREME COURT

BY DAMON ROOT

Palgrave Macmillan, New York, NY, 2014. 274 pages, $28.

Reviewed by John C. Holmes

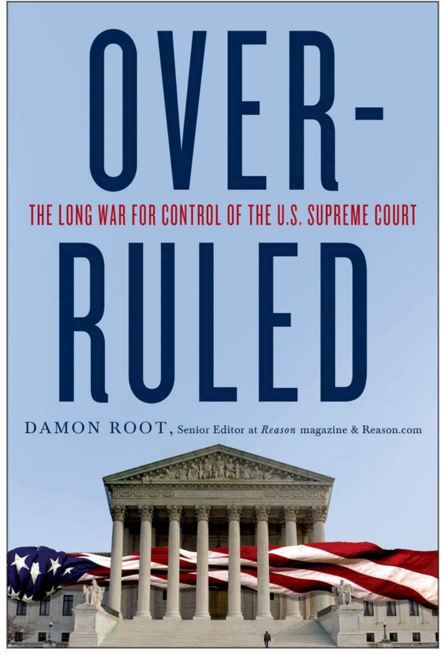
In *Overruled: The Long War For Control of the U.S. Supreme Court,* Damon Root, the managing editor of Reason.com and featured widely on numerous television and radio stations throughout the country, presents a comprehensive discussion of many debates over the interpretation of the U.S. Constitution. These debates include those between, among others, liberals and conservatives, living constitutionalists and originalists, and advocates of judicial activism and advocates of judicial restraint. Root's main focus, however, is on the ascendancy of libertarianism, the school of thought inspired by "the conservative and libertarian judges and lawyers who rejected judicial deference and worked instead to strike down many of the laws imposed during the Progressive and New Deal eras."

Root starts by discussing a justice who opposed the libertarians: Oliver Wendell Holmes, whom President Theodore Roosevelt appointed to the Court in 1902. Holmes became a hero of the left because he upheld the constitutionality of reform legislation, even though he disliked much of it, writing in a letter, "If my fellow citizens want to go to Hell I will help them. It's my job."

Root then shows how Chief Justice John Roberts followed Holmes' lead when, in *National Federation of Independent Business v. Sibelus* (2012), he upheld the constitutionality of the Patient Protection and Affordable Care Act. Roberts echoed Holmes' letter, writing, "It is not our job to protect the people from the consequences of their political choices." He also quoted Holmes' concurring opinion in *Blodgett v. Holden* (1927): "between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the Act."

Yet Root notes that, despite many conservatives' outrage at Roberts' opinion, "Roberts had not actually betrayed legal conservatism; he had simply followed one of two conservative paths in the case. Judicial restraint, as Roberts well understood, was not only a touchstone of the Progressive left; it was also a philosophy adopted by many members of the modern right." Root cites Robert Bork as an example.

Returning to libertarianism, Root traces its appearance on the Supreme Court to the unheralded Justice Stephen J. Field, whom President Abraham Lincoln appointed to the Court in 1863 and who served there until 1897. In the *Slaughterhouse Cases* (1873), decided just five years after the 14th Amendment went into effect, the Supreme Court



majority deferred to a Louisiana statute that granted a private corporation the authority to operate an exclusive central slaughterhouse for the city of New Orleans. The plaintiffs, representing other butchers, suspected with good reason that, rather than health and safety being the purpose for the legislation, creating a monopoly for a powerful constituent was. The issue, Root states, was: "Should the courts defer to legislative majorities …[o]r does the Constitution require judicial action in defense of individual liberty, forcing the courts to overrule democratically enacted laws?" Fields took the latter approach and dissented.

The current justice most often labeled libertarian is Anthony Kennedy, who said in 2005, "I don't really know what that means." The current justice who is the least restrained in demeanor is Antonin Scalia, whose opinions Root finds judicially restrained, while the current justice who is the most quiet and restrained personally, Clarence Thomas, often embraces judicial activism in defense of individual liberty.

Root examines conservative-leaning libertarian organizations such as the Institute for Justice, the Federalist Society, and the Cato Institute, noting that justices Scalia, Thomas, Roberts, and Samuel Alito have spoken before the Federalist Society. In 1988, proposing the founding of the Cato Institute's Center for Constitutional Studies, Roger Pilon challenged the reigning legal orthodoxies on both the left and the right by calling "upon judges to interpret the broad language of the Constitution neither by deferring to legislative majorities nor by consulting contemporary social values, but rather by repairing to the moral, political, and legal theory of natural rights and individual liberty that has stood behind and informed the Constitution from its inception."

Root contends that *Lawrence v. Texas* (2003) "was the libertarian-conservative debate in a nutshell." The issue was whether Texas could ban homosexual conduct. The Cato Institute filed a brief contending that the Texas statute was unconstitutional. Justice Kennedy's majority opinion agreed. Root thoroughly analyzes the case and concludes that Justice Scalia, dissenting, "was fighting a rearguard action to keep the libertarian insurgency at bay. Nor would it be the last time that Scalia and his fellow justices found themselves under fire from the libertarians. Over the coming decade, on issues ranging from property rights to gun control to medical marijuana, the libertarian legal movement would push the Supreme Court repeatedly to endorse its broad constitutional vision of personal and economic freedom. The battle for control of American law was about to heat up."

United States v. Lopez arose when a high-school student was charged with violating the federal Gun-Free School Zones Act for bringing a gun to school. The Cato Institute contended that the case was "not about gun control or even about federal-state relations but about whether the Court is ready to hold Congress to its constitutional limits." Advocating a return to limiting Congress to powers enumerated in the Constitution, Cato's brief argued that the statute was not within Congress' power under the

Commerce Clause. Root notes that Chief Justice William Rehnquist's opinion quoted extensively from Cato's brief when it struck down the act.

Root devotes a full chapter to the *Sibelius* decision upholding the Patient Protection and Affordable Care Act. During heated and extended oral arguments, which seemed not to be going well for the government, Solicitor General Donald Verrilli, almost in desperation, contended that the act's use of a mandate could be considered a tax. Justice Scalia interrupted, asking, "The President said it wasn't a tax, didn't he?" Verrilli replied, "The President said it wasn't a tax increase. ... I don't think it fair to infer from that anything about whether that is an exercise of the tax power or not." Chief Justice Roberts, of course, embraced judicial restraint and, finding that the mandate was a tax, upheld the act.

In *Overruled*, Root has packed an immense amount of material into a relatively short book. In an enjoyable journalistic style, he effectively covers many Supreme Court decisions and legal issues. He probably gives too much credit to libertarian advocates in directly influencing Supreme Court decisions, but this is a minor flaw. ⊙

John C. Holmes was an administrative law judge with the U.S. Department of Labor for more than 25 years, and he retired as chief ALJ at the Department of Interior in 2004. He currently works part time as an arbitrator and consultant; enjoys golf, travel, and bridge; and can be reached at jholmesalj@aol.com*.*

UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE

BY ADAM BENFORADO

Crown Publishing Group, New York, NY, 2015.

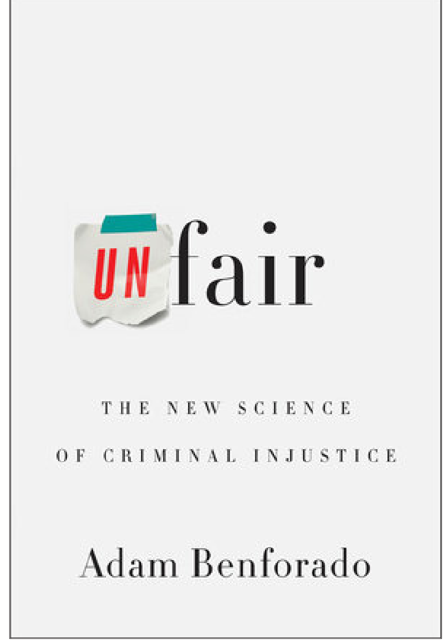
379 pages, $26.

Reviewed by Elizabeth Kelley

Unfair: The New Science of Criminal Injustice begins with the story of a trial by ordeal in 12th-century France. How could this grisly tale possibly be relevant in a book about criminal justice in 21st-century America? Adam Benforado, an associate professor of law at Drexel University, uses it to illustrate both our criminal justice system's inexorable progress and how misguided future generations will believe our current system to be.

Benforado uses advances made in psychology and neuroscience to explain how our system—despite its good intentions—is fundamentally flawed. Our criminal justice system as envisioned by our Founding Fathers (about whom he warns us against fetishizing) was created in a spirit of fairness and justice. But, having been designed by and presided over by human beings, it necessarily contains all the frailties and prejudices of human beings.

Unfair explores all the stages in the criminal justice system where mistakes are made: police investigations that focus on the wrong perpetrator, faulty eyewitness identifications, false confessions, forensic



evidence whose interpretation is subject to human biases, prosecutorial misconduct, jury deliberations that place too much emphasis on nonverbal communication, expert testimony that is not truly expert, plea bargains that force the innocent into pleading guilty, and prisons that do little more than warehouse people in barbaric conditions.

Although our criminal justice system started with good intentions, flaws have arisen. Take, for example, Eastern State Penitentiary in Pennsylvania. When the Quakers came to this continent, they were determined to develop a system that was more civilized and effective than the one they had fled in England. Over the years, however, the penitentiary became squalid, and prominent citizens, including Benjamin Franklin and Dr. Benjamin Rush, sought to reform it. Their forward-thinking innovation was solitary confinement, where a prisoner could reflect upon his crime in solitude. Fast forward to 1842. When Charles Dickens was touring this country, he visited Eastern State and noted:

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers. ... I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.

Still, today, as Benforado notes, the practice of solitary confinement is widespread and inappropriate. In particular, people with mental illness are often kept in solitary confinement. And, even when those with no diagnosable mental illness are put in solitary, they acquire one as a result.

By no means is *Unfair* a dry, scholarly work. It is interdisciplinary and wide-ranging, citing stories ranging from the execution of a pig in 14th-century France to the trial of the police officers charged in the beating of Rodney King. It quotes persons as diverse as G.K. Chesterton, David Mamet, and Nelson Mandela.

A substantial segment at the end of the book is devoted to reforming the system. Some of Benforado's ideas are straightforward and can be easily implemented, such as improved training for judges regarding scientific evidence and placing an app on smartphones to ensure that police follow proper procedures when investigating a crime scene. Some are expansions of initiatives that many jurisdictions have implemented, such as problem-solving courts and sequential police lineups. Other proposals are more complicated, such as eliminating peremptory challenges. Here, Benforado quotes Justice Thurgood Marshall's statement that "any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." But Benforado also criticizes other players for stacking the deck. He writes:

> Causing an innocent man to be convicted is clearly wrong and shameful, yes, but so is helping a guilty man go free. Avoiding these outcomes should be a primary concern for lawyers on both sides.

Even defense lawyers, Benforado argues, should seek fair and impartial jurors. Benforado also criticizes trial consultants who enable stacking of the deck for a high cost while often skewing witnesses' testimony during pre-trial preparation.

Some reforms are longer term and must overcome obstacles to be instituted. For example, Benforado proposes moving trials to a "virtual" environment, because, "[i]n most trials, there is no compelling reason for jurors to inspect the defendant, witness, or attorney in the flesh." Bias would be reduced if jurors cannot focus on a person's demeanor, mannerisms, race, physical attractiveness, accent, and so forth. Benforado also notes that such trials would speed up court dockets and result in the accused spending less time in custody pending trial. Nevertheless the accused's constitutional right of confrontation would have to be preserved. We can and should be using technology more, and as Benforado notes, we are limited only by our imaginations.

Benforado is part of a rising chorus of academics, politicians, and those of us who work in the criminal justice system who are appalled by the fact that this country spends $60 billion a year on prisons and boasts the dubious honor of incarcerating more persons per capita than any other nation. In *Unfair*, Benforado does a wonderful job of describing the scope of the problem and of thinking creatively about how we can improve our criminal justice system. ⦿

Elizabeth Kelley is a criminal defense lawyer based in Spokane, Washington, and she has a nationwide practice representing persons with mental disabilities. She is serving her third term on the board of the National Association of Criminal Defense Lawyers. She has been appointed to the National Advisory Committee of The ARC's National Center on Criminal Justice and Disability. She hosts two Internet radio shows, "Celebrity Court" and "Author Chats," and interviewed Adam Benforado on the latter: http://tobtr.com/s/7786813. She can be reached at ZealousAdvocacy@aol.com.

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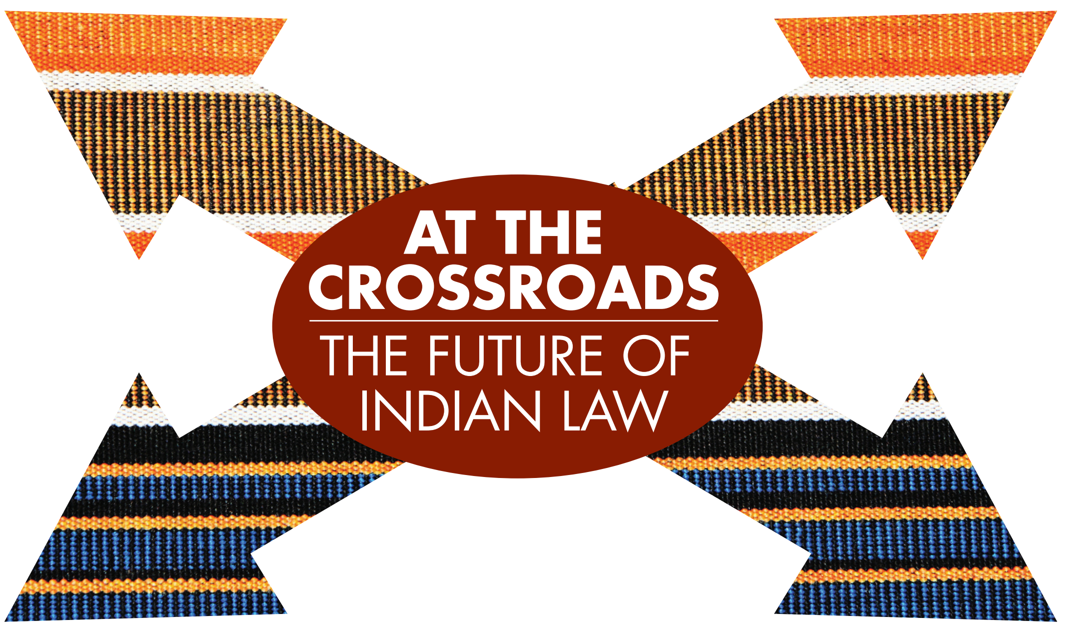

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