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BOOK REVIEWS

OF CRIMES AND RIGHTS: THE PENAL CODE VIEWED AS A BILL OF RIGHTS. By *Macklin Fleming*. New York: W.W. Norton & Co., Inc., 1978, Pp. 273, $11.95.

Efforts to reform the criminal justice system over the past half-century have produced a variety of highly visible phenomena in contemporary society: exact change meters on mass transit facilities; taxis and gas stations offering no more than five dollars in change; the stability of neighborhoods threatened by youth gangs; the elderly in fear of cashing social security checks; the need to lock and chain homes and automobiles in rural communities; the availability of drugs in suburban schools. Of course, unfortunate social conditions, unemployment, poverty, and inadequate education have influenced these developments, but similar circumstances confronting turn-of-the-century immigrants and those caught in the crush of the great depression did not produce a crime wave of epidemic proportions. However salient these factors may be, they certainly do not explain the wanton violence that we read about almost daily.[1]

Thus, we are left with the system itself—the blueprint on which criminal justice is administered—as the most elemental aspect of the crime problem. Because the current system exacts little, if any, price for crime, operates too slowly and irregularly, and remains beset with an overabundance of arbitrariness, it "has produced more cruelty and injustice than the benefits its supporters envisage."[2] For this reason, the Chief Justice of the United States recently has indicated that, "[a]t every stage the system cries out for change."[3]

A national reappraisal of the methods by which criminal justice is administered in this country, in light of the growing social consequences

[1] In March, 1981, both *Time* and *Newsweek* contained cover stories on the epidemic of violent crime. *See The Curse of Violent Crime*, TIME, Mar. 23, 1981, at 16 (". . . crimes are becoming more brutal, more irrational, more random—and therefore all the more frightening".); *The Plague of Violent Crime*, NEWSWEEK, Mar. 23, 1981, at 46 (". . . random mayhem has spilled out of bounds and . . . a sanctuary can become a killing ground almost at whim.").

[2] M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 88 (1973).

[3] Warren E. Burger, Annual Report to the American Bar Association 2 (Feb. 8, 1981).

of violent crime, is particularly appropriate at this point in our history. "[A]s the usages of society alter, the law must adapt itself to the various situations of mankind."[4] With that objective in mind, California Appellate Justice Macklin Fleming has proposed a variety of fundamental changes in the administration of criminal justice. In light of Fleming's status on the bench, as well as the breadth of his experience as a federal prosecutor and as counsel to the American Civil Liberties Union, the proposals merit serious consideration.

The essential problem with Judge Fleming's presentation is the road that must be traveled before reaching his substantive proposals. The volume is divided into two distinct parts: the first deals with the theoretical underpinnings of crime and its causes; the second relates the theory to practice within the framework of proposals for change. However, the theoretical thicket is difficult to traverse and, for one who has some basic familiarity with the criminal law, not particularly worth the effort.

It is impossible to dispute Holmes' observation that "[t]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."[5] But Judge Fleming's approach resembles a college entrance examination. The existing theoretical responses to a number of almost rhetorical questions are identified and properly annotated, and the author selects some of the theories, all of them, or none of the above.

For example, the philosophers have left us with a variety of theories on the causes of crime. Crime is (1) the product of members of a criminal class of society who engage in offenses as a profitable occupation;[6] (2) the inevitable result of a hereditary or genetical defect;[7] (3) the product of psychological or physiological disease;[8] (4) the result of social deprivation such as poverty;[9] (5) the consequences of bad associations;[10] or (6) the result of psychological disaffection.[11] From this sampling, Judge Fleming chooses "none of the above." He concludes, rather, that crime is normal and inevitable, and that, "in dealing with causes of

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4 Barwell v. Brooks, 3 Doug. 371, 373 (1784) (Lord Mansfield, C.J.); *see* People *ex rel* Durham Realty Corp. v. LaFetra, 230 N.Y. 429, 450, 130 N.E. 601, 608 (1921) (Pound, J.) ("The law of each age is ultimately what that age thinks should be the law"); F. MAITLAND, COLLECTED PAPERS 487 (1911) ("Every age should be the mistress of its own law").

5 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1896).

6 The archetypal example of this theory is the evil Fagin and his band of juvenile thiefs. C. DICKENS, OLIVER TWIST (1838).

7 *See* G. VOLD, THEORETICAL CRIMINOLOGY 78 (1958).

8 *See* 1 H. SILVING, CRIMINAL JUSTICE 10-12 (1971).

9 *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

10 *See* E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 71-91 (8th ed. 1970).

11 *See* L. RADZINOWICZ, IDEOLOGY AND CRIME 90-97 (1966).

crime we are dealing with an uncontrolled, unsegregated plurality of variables" (at 63).

There is nothing wrong with this conclusion; most would agree that crime "remains a part of all societies, whatever their racial, national, social, moral or economic conditions may be".[12] This pragmatic deduction could have been made, however, without resort to an extended analysis of the dry doctrines of theoretical sociologists and historians, and Judge Fleming's work would have been more fluid and readable without it.

Thus, one must hack through the underbrush of the definition of crime, slash across the dense growth covering the cause of crime, and level the coppice surrounding the purposes and ends of the criminal law before observing a glimmer of light. The difficulty of the journey notwithstanding, the glimmer breaks into a gleam when the reader reaches Judge Fleming's substantive proposals for change in the criminal justice system.

As the lynchpin of his program, Judge Fleming calls for a separation of "true crime" from "public offenses." "True crime" encompasses intentional invasions of the primary rights of others—offenses that, for the most part, threaten physical harm to individuals. In addition, they include a small class of offenses affecting the institutional well-being of society such as perjury, bribery, and treason. "Public offenses," on the other hand, include regulatory infractions, property offenses, and victimless crimes.

Under existing law, felonies are separated from misdemeanors, and both classifications are further subdivided into different levels.[13] While there are some distinctions between felonies and misdemeanors, the principle purpose of the classification system is to establish a penalty structure reasonably related to society's perception of the crime.

Judge Fleming's proposal goes considerably further. He suggests that public offenses be removed from the criminal law in order to facilitate ease of definition and simplicity of prosecution. He claims that under appropriate circumstances, proof of intent can be eliminated, liability imposed without fault, and fault punished independent of mental competence. Depending on the severity of potential punishment, due process procedures can span in scope from plenary to summary, and tribunals can range from courts to government administrators.

Swift and certain punishment for public offenses, with concomitant public cost savings, would result from the adoption of Fleming's propo-

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[12] *Id.* at 74.

[13] *See, e.g.*, Ill. Rev. Stat. ch. 38, § 1005-8-1(b) (categories of felonies and sentencing limits); Ill. Rev. Stat. ch. 38, § 1005-8-3(a) (categories of misdemeanors and sentencing limits).

sal. A streamlined prosecutorial system for "minor" offenses, structured within constitutional limits, would reduce the backlog in the criminal courts and accelerate the disposition of cases. By separating public offenses from true crimes in the manner suggested, the attention and resources of the criminal justice system would be able to focus on the real problem of violent crime.

Although Fleming pays lip service to the question of whether a truncated form of due process would withstand constitutional scrutiny,[14] the validity of his proposal is contingent upon the answer to that question. The problem with the constitutional analysis is that the presentation is too general; the particular procedures appropriate to each form of public offense are not identified, and a precise catalogue of included crimes is missing. Thus, while the concept provides thought-provoking material, the proposal lacks the precision necessary to test its viability.

With the focus of his analysis narrowed by the elimination of public offenses from the criminal law, Judge Fleming concentrates on the need for reform in connection with the suppression of true crime. Linking the deterrent value of prosecution and punishment to the reliability of the fact-finding process, he offers a number of suggestions to assure that the criminal justice process better reflects reality.

The principal prong of Judge Fleming's plan to enhance the effectiveness of factual inquiry in the adjudication of criminal cases is the abolition of suppressionary rules of evidence. After two decades of experience with the exclusion of valid evidence as a result of search and seizure errors by police officers,[15] recent commentary supports abandonment of the exclusionary rule.[16] Buttressed by empirical studies demonstrating the rule's ineffectiveness,[17] current scholarship recognizes that

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[14] Judge Fleming relies upon the Supreme Court's pronouncement that "[r]ules of procedure may be shaped by consideration of the risks of error . . . and should also be shaped by the consequences which will follow their adoption." Wolff v. McDonnell, 418 U.S. 539, 567 (1974) (prison disciplinary hearing) (citations omitted). *See also* Goss v. Lopez, 419 U.S. 565, 575 (1975) (student suspension hearing); Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole revocation). While due process may be sufficiently flexible to justify a variety of different procedures, the constitutional question cannot be answered until a specific set of procedures is applied to a concrete situation.

[15] The judicially created exclusionary rule, originated in Weeks v. United States, 232 U.S. 383 (1914), was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

[16] *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J. dissenting); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978); Wingo, *Growing Disillusionment With The Exclusionary Rule*, 25 SW. L. J. 573 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972); Comment, *Contempt of Court As An Alternative To the Exclusionary Rule*, 72 J. CRIM. L. & C. 993 (1981).

[17] *See, e.g.*, S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES (1973); Spiotto, *The Search and Seizure Problem—Two*

the "disparity in particular cases between the error committed by the police officer and the windfall afforded the guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."[18]

Judge Fleming contends that exclusionary rules are grounded upon fear of a police state and the threat that excessive investigative efficiency poses to our basic social values. While those concerns may have some validity with respect to across-the-board law enforcement, he argues that they are specious when applied to the investigation of a limited class of true crimes. Thus, he concludes that "we should change our rules for suppression of illegally obtained evidence from compulsory suppression to the carefully limited discretionary suppression that applies in England" (at 156).[19]

Rapidly accelerating disillusionment with the exclusionary rule lends credence to the author's proposal. Although the rule's abolition may have to await the legislative creation of an alternative procedure to vindicate constitutional rights,[20] the limitation on its application in the investigation of an identifiable class of true crimes is an idea worth pursuing. The Judge is certainly correct in his contention that the exclusionary rule skews the truth-seeking process and, thereby, erodes the deterrent impact of the criminal law.

As a second consideration in his effort to promote the integrity of the fact-finding function, Fleming cautions against the evils of plea-bargaining when true crimes are involved. Although plea-bargaining alters reality by allowing an offender to waive trial and accept less punishment than he probably deserves for a lesser offense than he actually committed, plea-bargaining is firmly entrenched in our criminal process.[21] Moreover, separation of powers principles prevent legislative or judicial controls over the exercise of prosecutorial discretion.[22]

The author believes that pernicious plea-bargains would be discouraged if crime victims were provided with an opportunity for input

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Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule, 1 J. POLICE SCI. & AD. 36 (1973); Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROB. 87 (1968).

18 Stone v. Powell, 428 U.S. 465, 490 (1976).

19 This is consistent with the theme of a prior work by Judge Fleming. M. FLEMING, THE PRICE OF PERFECT JUSTICE (1974).

20 *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

21 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971).

22 *See, e.g.*, Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (absolute discretion of prosecutor to engage in different plea bargains with codefendants is an incident of the constitutional separation of powers). *See also* United States v. Cowan, 524 F.2d 504 (5th Cir. 1975); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

into the system. He suggests that victims be permitted to appear in person or through counsel at the initiation of the charges, entry of plea, dismissal of charges, and sentencing. There are obvious problems with this proposal in terms of scheduling, access to counsel, and the risk that a victim's opinion would be automatically discounted due to self-interest. When the victim testifies at trial, however, the court has a much better understanding of the impact of the crime on a real life situation. If similar factual testimony were received prior to the acceptance of a plea, the court would be in a better position to decide whether the plea is appropriate and whether the agreed upon sentence is adequate.

Beyond victim representation, Judge Fleming offers no concrete limitations on the plea-bargaining process. Instead, he suggests that where serious crime is involved, expanded judicial capacity and increased output are worth the cost when the alternative is compromised integrity in the judicial process. The suggestion is well taken. Prosecutors who adopt plea-bargaining policies that do not fit within budgetary limits can generate the kind of pressure that will lead to an expanded capacity. Because less plea-bargaining generally leads to more just results, reasonable prosecutorial policies can be employed to attain the objective sought.[23]

The third aspect of Fleming's concern for factual accuracy as a deterrent force is a call for finality in criminal litigation. Because our dual sovereignty system permits federal court review of the constitutional decisions of state courts, criminal cases tend to drone on endlessly. There is a significant body of opinion that condemns the seemingly endless repetition of inquiry into the propriety of criminal convictions.[24] Specific proposals designed to limit collateral attacks on convictions are difficult to develop in light of our constitutional structure, however, and Judge Fleming provides no assistance in that regard.

Once factual accuracy is assured, the deterrent function of the criminal law operates to teach serious offenders that crime "carries consequences that are neither negotiable nor accidental" (at 165). At this point, the question of punishment becomes critical. Judge Fleming believes that the key to criminal sentencing is proportion—mandatory minimums and reduced maximums, resulting in limited periods of certain confinement.

The proposed reduction in statutory maximum sentences is predicated on the theory that "[c]onfinement reaches a point at which its cost

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[23] *See generally* White, *A Proposal For Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

[24] *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Burger, *supra* note 3, at 8.

exceeds its value as protection, and a further point at which it protects only against dangers that no longer exist" (at 177).[25] Accordingly, he suggests an across the board reduction of maximum sentences because they are largely unimposed paper sanctions which deceive the public but are lightly regarded by criminals.

Any proposal to reduce maximum sentences would be rapidly rejected in most legislative chambers across the nation. The political reality is such that most legislators believe that increased penalties represent the proper response to crime. Moreover, they feel that the general public, despite its anti-tax fervor in recent years, is willing to pay more to keep dangerous criminals incarcerated.

Political considerations aside, there are deficiencies in Judge Fleming's theory. Whether the cost of confinement exceeds its value as protection is in the eye of the beholder. The subsequent victim of the inmate released after a shortened sentence would disagree with the Judge. Nor does the "burn out" theory—suggesting that those over forty do not present a violent crime problem—justify shortened maximums. An eighteen-year-old armed robber will have several opportunities to victimize the public if the maximum sentence is ten years. Whatever deterrent value harsh sentences may have could conceivably be diminished by reducing maximum lengths of confinement.

Any suggestion that harsh sentences deter crime is unprovable at best. Judge Fleming correctly points out that judges are reluctant to impose severe sentences, parole boards make them meaningless, and offenders scoff at the prospect of extended incarceration. If we assume that a small number of individuals commit most violent crimes and will continue to commit them when they are free until the point at which their energy levels burn out, the answer is not to reduce maximum penalties. In order to protect the public, harsher sentences should be imposed, parole abolished, and victim, witness, and offender made aware of the exact length of confinement on the day that sentence is imposed. Society must be willing to bear the cost of incarcerating violent criminals. Only then will we be in a position to assess the deterrent effect of a rigorous sentencing structure.

Judge Fleming comes closer to this point of view with his proposal for fixed minimum terms of imprisonment. As a general matter, judges adamantly oppose limitations on the exercise of their discretion, and it is

[25] The death penalty is exempt from this analysis. Judge Fleming believes that capital punishment should remain available for offenses, such as murder through terrorism, assassination of a chief-of-state, or murder by one serving a life sentence, which cannot be adequately punished or deterred by imprisonment. This is fairly consistent with the public policy that has led most states to reenact death penalty statutes following Furman v. Georgia, 408 U.S. 238 (1972).

significant that this suggestion comes from the bench. The potential impact of mandatory minimums, which already exist in some states for violent crimes,[26] cannot be better articulated than the author has stated it: "A system of fixed minimum sanction, designed to protect through deterrence, would contrast sharply with our present practices of probation, suspended sentence, and suspended imposition of sentence, under which only a small minority of criminals, even those who repeat their crimes, experience serious sanction" (at 183-84).

To implement this sentencing structure, Fleming proposes a quasi-determinate system under which the judge would select a minimum and maximum within a narrow range. The court would select the type and place of confinement which could be modified by court order on an administrative recommendation. Release after the minimum would be determined by a judicial tribunal based on the inmate's good behavior.

In many respects this proposal is consistent with the shift to determinate sentencing that has been sweeping the nation.[27] Under a determinate sentencing system (which may have as many permutations as there are experts to suggest them[28]), the judge determines how long the offender will serve in prison; parole is abolished; and the term can be reduced only through the accumulation of credit for good behavior. Victim and offender alike are informed of the precise length of confinement, and the public at large is made aware of the price that must be paid for crime. Inmate tensions are reduced by the knowledge of when they will be released and the certainty that release will not be contingent on the whim of a parole board. Correctional programs are enhanced by the fact that only those who desire to participate need do so. The unrealistic promise of rehabilitation is replaced by a system that is upfront and honest.

To the extent that it implicates judicial involvement beyond the imposition of sentence, Judge Fleming's proposal is different from any system currently in place. He suggests the creation of a court of sanction which would be responsible for judicial supervision of the execution of sentence in the manner that courts now oversee the implementation of civil decrees. The court of sanction would supervise release, impose appropriate conditions and preside over revocation proceeding. In addi-

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26 *See, e.g.*, Ill. Rev. Stat. ch. 38, § 1005-5-3(c)(2).

27 *See, e.g.*, Cal. Penal Code § 264 (West 1977); Ill. Rev. Stat. ch. 38, § 1005-8-1; Ind. Code Ann. § 35-50-2-3, 4, 5, 6, 7, 8 (Burns Supp. 1977); Me. Rev. Stat. tit. 17-A, § 1252(5) (Supp. 1977).

28 *See, e.g.*, D. FOGEL, WE ARE THE LIVING PROOF (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); J. WILSON, THINKING ABOUT CRIME (1975).

tion, the court would hear confinement related civil suits, challenges to prison regulations, and breaches of prison discipline.

The notion of a courthouse in a penal institution would probably drive prison wardens into hysterics. It would allow prison lawyers to polish their skills as advocates. It would send judges pleading to their supervising judge for reassignment. Yet, the novel proposal could reduce tensions in the institution, provide inmates with immediate access to the outside world, and overlay the confinement setting with a sense of justice.

As with many of Judge Fleming's proposals, the concept of a court of sanction requires deep thought and penetrating analyses before it can reach the adoption stage. If any serious criticism can be leveled at the proposals, it is the fact that they are too underdeveloped—painted with too broad a brush to ascertain how the requisite detail would look in the form of proposed legislation. This is more a request for a sequel containing further development than a criticism.

The significance of Judge Fleming's work is the fact that it provides fertile material for debate on the directions that the criminal justice system should take. Judges, lawyers, criminologists, and penologists can, and inevitably do, disagree on those directions. If the states are to be experimental laboratories to test various solutions to the crime problem, the directions must be focused by thought-provoking proposals from a credible source. In this respect, Judge Fleming has made a worthwhile contribution.

There is no reason to turn away in desperation as street crime increases to intolerable levels. The system that society has created for protection and security is the criminal justice system. If problems appear in that system, the answer is not to barricade ourselves in our homes, purchase handguns for protection, or form vigilante groups. The answer is to improve the system. "The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have the principle of growth."[29]

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[29] B. CARDOZO, THE GROWTH OF THE LAW 20 (1924).

TAKING THE FIFTH. By *Mark Berger*. Lexington, Mass.: D.C. Heath and Company, 1980. Pp. x, 286. $23.95.

There is very little to praise in this book. The prose is poor, the grammar worse. There is needless repetition. Neither its policy insight nor its policy critique is new. Writing well about the privilege against self-incrimination is not easy. Improved answers to hard questions may be too much to require, but a book ought improve at least our understanding of the questions. Here too the text fails. The competent analysis of Supreme Court opinions and the adequate survey of the history and contours of the privilege are not enough to justify this book.

There are defenses to the charge that a book ought to be written gracefully. A philosopher like Kant may be difficult to read because he seeks to express a new thought for which existing language has no word. These defenses are not available here. Instead there is a curtain of bad English which at worst obscures thought and at best merely annoys the reader. No one splits infinitives better than the author.[1] No one gives life to the inanimate better than the author.[2] In several instances, two jarring notes appear in the same sentence.[3]

The problems of style here not only interfere with, but sometimes destroy entirely, the communication of ideas. Three examples suffice:

(1) "In response, however, analytical consistency is not without value; The law is obligated to be doctrinally honest in its resolution of disputes and should not permit separable areas of the law to merge without reason" (at 100). Apart from the fact that the law has been personified and the infinitive has been split faithfully, the sentence is nonsense. I can think of some things it *might* mean, but rereading the sentence and its context does not tell a reader what it *does* mean. It would be better to buy a book of puzzles, at least it would be clearly labeled.

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[1] *E.g.*, "compulsion to orally testify" (at 82), obligating the "suspect to affirmatively assist the state" (at 82), a court's will "to actively intervene" (at 214), or "to meaningfully consider and evaluate" (at 216).

[2] *E.g.*, "the modern view of the privilege appears prepared to accept the right to silence. . ." (at 31); "It is important that the Fifth Amendment accept as a supporting rationale the principle that. . ." (at 43); "The question of the relationship of pretrial discovery to the Fifth Amendment has had to confront this dilemma." (at 95)

I always believed that people accepted or were prepared to accept or even confront this or that. It was not until I read this book that I learned that "modern views," "Fifth Amendments" and "questions" also did these things. Perhaps this is not so difficult to understand in an author who resurrects that jurisprudential ghost, the "spirit of the law" (at 131).

[3] *E.g.*, "Although the theory initially sought to prevent the use of any sanction that made assertion of the privilege costly and as such would have had the potential to closely supervise state interference with the Fifth Amendment. . ." (at 215) or "Encompassed within the standard was an urging to trial judges to broadly consider the position of the witness" (at 92).

(2) "Nonetheless, it is also true that unlike England in 1641, modern society depends heavily upon institutions, both formal and informal. Contemporary America has grown too large for individuals, acting alone, to successfully influence it, and thus they must associate in groups." (at 57) The idea expressed by this sentence is absolutely crucial to the position taken by the author. It is awkwardly stated and entirely unsupported. I am sure that England in 1641 was different from the United States in 1981, but surely it is not only because an individual acting alone could do something then that he could not do now. Neither Cromwell nor the King acted alone. Group action has always been essential—it is only from a perspective of centuries that we say Alexander conquered the world. Moreover, it could be argued that today a single individual with access to television, to electronic data bases or to nuclear or biological weapons may have more influence than a single individual at any other time in history. Perhaps what the author meant is that the groups of today keep more and better records of their membership and activities than they did in the past and that these records require some form of protection so that the groups may retain their effectiveness. This may be the point, since the author later suggests that the privilege be extended to corporations and associations, but the reader can only guess.

(3) "A thumb is on the Fifth Amendment side of the scale and overcoming its weight will take more than a brief run-through of the countervailing policies." (at 219) This is the principal thesis of the book—that there ought to be a presumption in favor of the privilege in judicial doctrine. This sentence is easily understood, though it is not a model of clear expression. I doubt if the author would be satisifed by an opinion that narrowly construed the fifth amendment after a *lengthy* run-through of countervailing policies. I assume the author means to erect a presumption in favor of the fifth amendment overcome only by the clear weight of countervailing policy shown by careful analysis. This is not much of a rule—i.e., the fifth amendment applies unless we really think it should not. A writer objects most to the image of the thumb on the scale. The image that comes to my mind is the dishonest butcher giving short weight to his customer; the image of the dishonest judge giving short weight to the countervailing policies. This may be the proper theory, but its expression surely lacks persuasiveness.

The book's chapters appear to have been written as separate articles and placed, unedited, into a single volume. General rules are restated several times throughout the book. One striking example of this is the fairly detailed analysis of Chief Justice Marshall's ruling on a privilege question in Aaron Burr's case which appears in Chapter 3 (at 68-

69). Much of it is repeated after less than twenty pages in Chapter 4 (at 84).

The author's use of history presents other problems. His summary of the origin of the privilege follows familiar lines. Perhaps too much credit is given to John Lilburne, who was a kind of seventeenth century self-incrimination kamikaze. William Walwyn and Richard Overton, who deserve some praise, are not mentioned, but there is nothing incorrect in the summary. The chapter on the history of the privilege opens with the idea that "[i]n light of the absence of formal standards governing the role of history in the interpretation of the privilege . . . the risk of overvaluing the available historical evidence is significant" (at 1). The requirement of formal standards for the use of history is, I think, rather novel. I would have appreciated some justification for the proposition, but none appears. Perhaps some formal standards could have been suggested, but this is not done. Two hundred pages further on, the author ignores the very risk he cites at the beginning when he writes "[t]he historical focus upon the criminal trial in the privilege's evolutionary development amply supports such a position. Consequently, the adverse use of silence . . . should not be allowed to enter the areas in which guilt is to be determined" (at 200). How these two sentences appear in a single book by a single author is a mystery to me.

The author suggests the privilege should rest on three grounds: the protection of privacy; the elimination of the cruelty and indignity of self-accusation; and the limitation of the enforcement power of the state. The three justifications for the privilege are significantly intertwined. Privacy is to be protected when the state seeks to invade it. Self-accusation is to be avoided when the state compels it. In one passage, the author recognizes that in any society, people are frequently asked questions calling for truthful, self-damaging replies. Parents, spouses, employers, and others all do this. Such questions cross the line when "the inquiring party is the state and it seeks to use the force of law to compel a response" (at 34), or, said somewhat differently, "[o]ne must recognize that the issue arises in the context of state efforts to acquire information from an individual to be used to secure a criminal conviction against him. This is possibly the most serious and grave action the state can take with respect to its citizens and, therefore, the most appropriate place to impose limits on state power" (at 34).

None of this seems convincing to me. Neither premise nor conclusion is well stated. I suppose lawyers may regard a criminal conviction to be the "most serious and grave action" the state may impose upon an individual, but there are some other candidates—military draft, currency devaluations, revocation of professional licenses, prohibition of one's profession, condemnation of the old family estate. A conviction for

a petty offense carrying a one hundred dollar fine seems not quite to dominate such a field. In fact, the author does not really advocate his premise—he simply states it. The statement of his premise is itself weak, he says "conviction . . . is possibly the most serious . . ." and I may logically infer that it is possibly not. It is difficult to rest a firm conclusion on a maybe, maybe not premise. Were the premise properly stated, the conclusion would fit poorly if it is meant to refer to the privilege. The privilege has too wide a scope for the justification offered. It applies to witnesses in civil cases between private citizens and has even precluded defendants in criminal cases from securing evidence for the defense.[4] The only way one can tie these examples of privilege to the notion that the state seeks evidence is to maintain that the use of subpoena is state action. The author seems, correctly in my view, to eschew this position by distinguishing between the "state" on one hand and the use of the "force of law" on the other (at 34).

Moreover, the concepts of the state, its power and its purpose really need some examination before conclusions about limits can be reached. In criminal cases the role of the state is not always of one sort. Where the state enforces laws prohibiting gambling, the state acts presumably for the good of society as a whole. This is a traditional view leading to an image of a large society poised against a small individual, but this image does not hold so true in a prosecution for murder. There, the state action is, in addition, a substitute for the right of private vengeance. The state may act to help us all but it also may act on behalf of a single individual. If the privilege is to be defended in terms of the relation of individuals to the state which is, after all, a creation of man, the defender ought to have a clear understanding or at minimum a clear view of this relation. The author also should let the reader in on it. I suspect that he realized this, at least in part. Toward the end of the book he says "[t]he choice between a strict reading of the language of the self-incrimination clause and a broad construction of its policy foundations is, however, ultimately a problem of philosophy as much as it is a question of law." (at 163) It is really much more a question of philosophy, social philosophy, than of law. There are competing views of the role of the state. Reading Hobbes, Locke, Rousseau and Hume gives more insight into the place of the privilege than reading the opinions of courts. Indeed, such reading gives better insight into the intentions of our founding fathers than do some of the traditional sources.

I cannot demand that everyone who writes about the privilege arrive at and defend his own social philosophy but I think the author here

[4] See Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

who seeks to offer a fairly comprehensive treatment of the privilege,[5] should, for the sake of clarity, set down what he perceives to be the proper relation of state to individual. As this book is written, the reader has to backtrack from conclusions to basic premises which are neither stated nor defended. It is not worth the effort.

Finally, if one assumes, as both the author and I do, that criminal cases are at least an "appropriate place to impose limits on state power," the assumption does not lead to any inevitable conclusions about what sorts of limits are to be imposed. If one is concerned about the use of the criminal law as a tool of social control, perhaps the answer is to limit the scope of the criminal law and not the power of the state to enforce it, i.e., no more victimless crimes; or to limit enforcement powers only in certain classes of crimes; or to allow adverse inference from the silence of the accused after the state has satisifed another form of limitation such as proof of guilt by clear and convincing evidence. The author recognizes this, and admits that there are other limits, such as the due process clause, on state enforcement tactics. Here his response is that the heart of the matter is the "immorality inherent in compelled self-incrimination" (at 34), not that to which it may lead, i.e., torture and abuse, or, put another way, "forcing an individual to be the instrument of his own undoing degrades the dignity of man" (at 32).

This is his best argument but its statement is seriously flawed. We are told that compelled self-incrimination is inherently immoral because it requires the degradation of dignity, but we are not told how this degrades our dignity. It seems to me the author has once again stumbled into philosophy. I have no objection to this, as I enjoy reading philosophy, but it is usually written quite carefully. There are theories of ethics that would support the author's judgments; he does not cite them. G. E. Moore, one of the great philosophers of our century, believed that good was an indefinable predicate, perceived much as the color yellow or red but not subject to scientific definition. If this is so, then the author could even defend his didactic statement that compelled self-incrimination is immoral as a simple statement of perception. One problem is that others may not so perceive it. Perhaps his perception of the immorality of self-incrimination was aided by some new way of looking at the issue, just as perception of color may be influenced by intensity, light, or eyesight, but there is no such claim. In the alternative, the author may be reciting a simple consensus, the way we tell a color blind individual that

[5] "Surely there is room for a book on the Fifth Amendment that seeks both an overview of its history, policy and contemporary application as well as a more detailed treatment of its evolutionary development in the courts. That is the task I set for myself . . ." (at ix).

the sofa is green. If this is so, there should be some evidence of this consensus and I find none.

Even if degrading one's dignity is inherent in compelled self-incrimination, we are not told why preserving dignity is so transcendent a value that it carries presumptive weight in value conflict situations. The concept of dignity is too elastic—it means too many different things to too many different people. If we eliminate what many of us will agree are trivial claims to dignity, we still confront the problems of significant deprivation of dignity inflicted by the state which we readily permit, e.g., military conscription, etc. The denial of dignity argument goes too far.

What the author is left with is the simple assertion that compelled self-incrimination is immoral.[6] Apart from the fact that this is neither proved nor argued for, it does not serve as a satisfactory basis for a theory of the privilege. If something is immoral, we should not do it—ever. Individuals should not do it and the state should not do it, and yet the author concedes there are situations at least in theory, in which self-incrimination may be compelled. If it is immoral to compel self-incrimination, why is it moral to compel self-defamation, to compel sons to testify against mothers, to compel witnesses to testify despite justified fears of homicidal retaliation?[7] It is not that I believe moral judgments are inapplicable here—I simply do not perceive morality as a helpful guide to determining the scope of the privilege unless, of course, one is willing to revise rather drastically the general rules governing compulsion of any witness to testify.

The protection of privacy is, the author believes, an important reason for a broad privilege. The intrusive character of modern society is cited repeatedly to justify a belief that today, privacy is particularly fragile. Here again, assertion is offered in place of proof. A good case can be made that one had less personal privacy in the smaller cities and towns and the less mobile society of yesterday than one has today. Perhaps the author again means that our lives today are better recorded than they were, i.e., insurance records, union records, corporate records, utility records, credit records and government records. Even if these records are not generally available to members of one's own circle, they are available to the state and the privilege construed as the author proposes will protect us from state intrusion. Yet, the privilege has rarely been thought of as a general privacy protection, and it is not difficult to see why this is so. What is private is not synonymous with what is in-

[6] The author does not appear to use this argument, he seems to rely on immorality deriving from degrading of dignity (at 32).

[7] People v. Carradine, 52 Ill. 2d 231, 287 N.E.2d, 670 (1972).

criminating. Much, if not most, of what the common man believes is private has no relation to the criminal law, i.e., prejudices, opinions, emotions, finances, family problems. Where this privacy does involve incrimination, it is protected only in the courtroom, not in the media, and only to the extent that the details may be learned only from the statements of the individual whose privacy we seek to protect. The author recognizes that there are problems with the privacy argument. Much of what he seeks to protect with the privilege would be better protected by a first amendment privilege and he believes a case can be made for a broad construction of the first amendment along with a narrow construction of the fifth. However, he says the first has been narrowly construed so we need the fifth (at 36). He could just as easily have said that we should broaden the first. He recognizes that the fifth is not really suitable as a privacy protection but he says the "intrinsic value of privacy is such as to demand support from those sources of authority that are relevant" (at 43) or, he might have said, "any port in a storm." I do not think he makes the case for the privilege as a real safeguard for privacy. What I find most disconcerting is that these arguments can persuade him.

Here the author fails to use history where it might help his case. I have always thought that there is a good privacy argument in the history of the privilege if one views the history in its political rather than its legal context.

Some of the momentum for the acceptance of the fifth amendment may have come from the equivocal political position held by nearly every Englishman in 1660. In the 1640's, as Charles I began to fall, the privilege was loudly claimed and rarely, if ever honored. It was not honored under Cromwell either, yet by 1660 when monarchy had been restored, the situation had changed. In the *Trial of Adrian Scroop*[8], for the regicide of Charles I, the court did not merely honor the claim but actually advised Scroop of his rights.[9] By 1660, nearly every Englishman had lived in obedience to the Cromwell governments, paying taxes, duties, fees, seeking permits and licenses, conveying real estate, using courts or simply refusing to engage in armed revolt to restore the Stuarts to the throne. It is not improbable that most Englishmen would have wanted to close the door to inquiry about their conduct in Cromwell years and that the privilege was perceived as a means to accomplish this.

The philosophical shortcomings of this book are quite serious. The

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8 5 How. St. Tr. 1034 (1660).

9 "Court: Did you sit upon the Sentence Day that is the evidence which was the 27th of January? You are not bound to answer me, but if you will not, we must prove it." *Id.* at 1039.

traditional legal arguments are somewhat better but again crucial theses are stated, but not proved or justified.

The author believes that witnesses who appear before a grand jury ought to receive warnings about the privilege. He believes such warnings are supported generally by the need to limit state power, protect dignity and preserve privacy. The key to his reasoning is this: "Witnesses without counsel and without training in the law face the risk of self-incrimination through ignorance or error. A warning about the privilege might help to eliminate some of that risk" (at 91).

There is no argument advanced to support the thesis that we must structure the enforcement of criminal law to protect against self-incrimination through ignorance or error—there is merely the assumption that we must. There are competing points of view:

> There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional state. . . . As to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed or more gifted criminal would not have left. . . . It is consonant with good morals and the Constitution to exploit a criminal's ignorance or stupidity in the detectional process.[10]

It is true that Chief Justice Weintraub was not speaking of grand jury procedure in *McKnight* but the principles he expresses are not without force and they run counter to the rather facile policy statement in this book. There are passages in which the author does weigh competing arguments but there are too many important ones where he does not. It is a significant flaw. I do not think that one can speak usefully of protection against the consequences of ignorance or error without trying to answer Chief Justice Weintraub.

The author believes that a defendant in a criminal case should not, by taking the stand, effect a complete withdrawal of his privilege. "The normal rules of evidence in cross-examination were adequate [to protect the prosecution] without holding the defendant to a wholesale waiver of his Fifth Amendment rights" (at 94). It would have been helpful if the author told us why this is so—he does not. At least one rule would not be adequate to protect the legitimate concerns of the prosecution. Some jurisdictions restrict cross-examination to the scope of direct examination—on the assumption that, if the cross-examiner needs the answer

[10] State v. McKnight, 52 N.J. 35, 52-53, 243 A.2d 240, 250 (1968).

and the answer is relevant, he may call the witness to the stand on his own. This cannot be done with a criminal defendant.

The author believes that the privilege should prohibit pretrial discovery against the defendant. "When defendant presents his evidence at trial, the prosecution's only course of action is to rebut it. If this task is undertaken before trial, however, it may lead to additional evidence that the prosecution may use to prove . . . guilt [i.e.] an alibi witness revealing a characteristic of the defendant which when conveyed to the victim assists him in making the identification" (at 96). Does the privilege therefore preclude the court from granting a recess after the defense presents its evidence? Does the privilege prevent the prosecution from conducting a midtrial investigation? I think the answer to both questions is no. The author's argument fails because it is based on a clearly erroneous assumption, i.e., that all the prosecution can do with a defense at trial is to rebut it. Sometimes this is true, often, in my experience, it is not. The only way the argument can be saved is to turn the assumption into a rule that the prosecution may do no more than rebut. The author does not adopt this position.

In this review, I have selected examples to show what is wrong with this book. I conclude with one more. The price of the privilege, the author tells us, is inefficiency in crime control. "Whether the price is worth it is a judgment question . . ." but the "cost is one that society, if it is to retain a minimum of control on state authority, must bear" (at 41). Surely there is more to this issue than appears here. Inefficiency in crime control is too brief an abbreviation for the effect of crime and the fear of crime on our daily lives, the disrespect for a government unable to protect its citizens, the false sense of invulnerability which contributes to a decision to commit crime. On the other hand, perhaps too much has been conceded. The operation of police and courts as a crime control device may well be exaggerated and the significance of the privilege within that operation may be overstated. So too with the degree to which the privilege is in fact a control on state authority. As he does at nearly every significant point of his work, the author assumes and dictates, he seeks neither to prove nor to persuade. The fact that many of the questions he deals with are "judgmental" does not excuse this failure.

In Bruce Jay Friedman's play, "Steambath," a failed writer spoke to God about his writing: "I see what you mean—you get more prestige from a truly observed book about . . . cheeseburgers than you can from a schlock Charlemagne book."

I would rather have read the cheeseburger book than this one.

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