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BOOK REVIEWS

FATAL REMEDIES. By *Sam D. Sieber*. New York: Plenum Press, 1981. Pp. ix, 234. $24.50.

Dr. Sieber attempts to explain why instances of collective or governmental intervention in social and economic problems frequently are "fatal remedies." They create what he calls "regressive effects" whereby the target group to be helped is actually hurt or the problem to be solved is aggravated. To develop his thesis, he presents a series of brief case studies describing interventions, their intended purpose, and the final counterproductive results. He cites for example, attempts to increase agricultural production in Egypt by longer term irrigation of farmlands after the building of the Aswan Dam. Snails carried a debilitating parasitic disease, schistosomiasis, that multiplied exponentially in the new irrigation channels. Half of the population, rather than the usual small portion, suffered from the energy draining disease, losing their strength and vitality, causing sufficient manpower loss to reduce agricultural production below former levels. Using a criminal justice related example, he describes the Federal Drug Enforcement Administration's practice of spraying the toxic herbicide paraquat on marijuana plants to impede the production and use of the drug. The practice posed a threat to public health as paraquat showed up in about twenty percent of the marijuana smoked in the United States. Since the preservation of public health was the purpose of the controlled substance act that banned marijuana, the use of paraquat was counterproductive, or had a regressive effect.

The regressive outcomes of intervention are, according to Dr. Sieber, caused by an array of social and psychological processes that he categorizes as functional disruption, exploitation, goal displacement, provocation, classification, overcommitment, and placation, with each category being subcategorized into component versions of each mechanism. Each category describes the mechanism by which the intervention became regressive. The functional disruption mechanism describes how interventions interfere with the requirements of systemic equilibrium. Exploitation suggests that the intervention resources are misused to the detriment of the target group. Goal displacement emphasises the

intervention process rather than the purpose of the intervention, causing negative outcomes to be ignored, as in the case of paraquat and marijuana. Provocation, the intended or inadvertent use of fear or threat, causes the target group to resist or develop counter-intervention efforts. Classification creates artificial entitlement, exclusion of groups, or labeling of groups in a pejorative sense, causing harm to groups such as the underprivileged, who are supposed to be helped. Overcommitment creates false promises followed by dissappointment and finally additional demands by target groups. Placation creates a lulling effect, causing vulnerability to the potentially harmful consequences of the problem being considered, i.e., "the Maginot Line effect." Dr. Seiber concludes with a discussion of the implications for policy development essentially a set of guidelines that include the regressive outcome-causing mechanisms he has described. By including the sources of regressive effects in the decision making process, the possibility of their occurrence can hopefully be minimized.

I found the case studies showing regressive effects fascinating. While Dr. Sieber himself recognizes that many of the regressive mechanisms are commonly known, such as the temptation of the "forbidden fruit," he provides additional insights into more subtle reversal effects such as the unintended creation of implicit threats in an intervention that can create a regressive reaction. For example, fear of the impact of busing, which was intended to promote school desegregation, caused enough white families to move to the suburbs to create school segregation. Intervention in the form of advice may create anxiety and force target groups, smokers for example, to increase their psychological denial of the hazards of smoking. Intervention aimed at creating helpful or often needed innovation in a system or organization can create a status threat to the target group, as innovation may suggest a change in the hierarchical order in an organization. The status threat would, in effect, create more rigidity in a system that appears to be in need of change.

The weakness throughout Dr. Sieber's work is the implicit assumption that the possibility of regressive outcomes are not considered or recognized by policy makers at political or organizational levels. In the open political system, there are individuals or groups that can predict counterproductive consequences of governmental intervention and technological innovation. In the development of policy at the executive or legislative level or in the decision making process in organizations, dissent and argument is the rule rather than the exception. Certainly individuals or groups have predicted the regressive outcomes of the interventions in the cases that Dr. Sieber uses in his work. An important question that he does not address is why those individuals or groups were not heard or taken seriously.

The answer may be buried somewhere in our highly technological culture, whose members perceive a history of technological advancements that have brought wealth and prosperity to a significant part of the world's population. Society's confidence in technology, appropriate or not, may have been improperly generalized to all social and political institutions, placing those institutions under pressures to solve problems and solve them quickly. While such a broad perspective is beyond what Dr. Sieber is presenting, he should have focused some of his analysis on areas pertinent to the compromises, resources sharing, and symbolic creations that are a normal part of our political process. Legislators and public administrators indulge in an effort to respond to the demands from a heterogeneous and often uninformed constituency.

Thus, political realities favor ignoring analysis and dissenters who may predict regressive effects. Could we have denied the Egyptian farmer water, knowing that the possibility of an increase in schistosomiosis may have existed? Probably not. Nor could a police administrator advise the public, or at least parents of teenage children, that drug enforcement policies are counterproductive and should be abandoned. The choice to intervene or not is often made by public pressure, and the intervention is altered through the political process in spite of sound technical advice.

Dr. Sieber's chapter on policy implications is thus technically informative but his recommended actions seem to do no more than gloss over the political framework in which policy decisions are made. Discussing the decisions of when and how to intervene in the political context from which they emanate would have added to his book. Nevertheless it is a solid piece of work and well worth reading. It can add to one's understanding of regressive effects—Fatal Remedies—and how they might occur.

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KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTEN. By *Richard Moran.* New York: The Free Press, 1981. Pp. xiii, 234. $14.95.

In January 1843, a Scotsman named Daniel McNaughten attempted to assassinate the Tory Prime Minister of England, Sir Robert Peel. Instead he mistakenly killed the Prime Minister's private secretary, Edward Drummond. On March 4, 1843, McNaughten was acquitted of the charge of murder by reason of insanity when the Solicitor General, following unanimous medical testimony as to McNaughten's insanity, declined to pursue the prosecution further and Chief Justice Tindal stopped the case. McNaughten was then sent to Bethlem Hospital (Bedlam) and later to the newly opened Broadmoor Hospital "to await the Crown's pleasure." He died, still a confined man, twenty-two years later, having refused consistently to comment on his attempt to assassinate Peel. He was seen by all as a lunatic.

The major impact of McNaughten's crime was the use by the House of Lords, two months after his trial, of a seldom used provision of English Law which allowed them to require judges to answer legal questions concerning controversial cases. The verdict in the McNaughten case outraged Queen Victoria and the Tories, and out of the inquiry in the House of Lords came what eventually were called the McNaughten Rules for the insanity defense.

Most commentaries on the McNaughten case have stopped at the point of the House of Lords inquiry, but in *Knowing Right from Wrong* Richard Moran has taken the McNaughten case and set it in the historical perspective of the economic depression and political turmoil of England at the time. In the first six chapters of the book he makes a strong although certainly not conclusive or compelling case for the proposition that McNaughten was sane, that his "political delusions" of persecution by the Tories were real, not imaginary, and that the crime was a political one, not one derived from the madness of an isolated man with deviant ideas. McNaughten is seen as a middle level leader of the workingmen's movements of the day. Moran presents evidence to at least make a prima facie case that McNaughten may have been a paid and dedicated political assassin for one of these groups. The government, on the other hand, is portrayed as handicapped in its prosecution of McNaughten, since it would have had to expose its network of spies among the working classes to rebut McNaughten's defense based on "delusions" of persecution. Yet the government is seen as also benefiting from the finding that McNaughten was insane because that verdict took away any credibility that the assassin's ideas might have had at the

time, although most of McNaughten's views were eventually accepted years later by the House of Commons.

Moran's book is the best detailed description of the assassination of Drummond, the strategies of the government and the defense during the trial, and the climate of the times. Thus, it should provide excellent background material for lawyers, political scientists, psychologists, and psychiatrists who want more than a superficial understanding of the insanity defense. But more important, Moran places the insanity defense within the framework of its potential for abuse by government, which, aided by psychologists and psychiatrists, can employ it to both control and deprecate the actions of "political criminals." In that sense, the book falls within the same tradition as the work of Thomas Szasz regarding the role of psychiatrists and psychologists in cases where insanity is raised as a defense, but Moran is even more radical in his proposed solution.

In the final chapter of his book Moran advances the provocative idea that our legal system is unable to deal with persons charged with crimes which raise concerns about political and social justice as did the violations of the Vietnam protesters a decade ago. Like the American legal system of today, the British system did not allow McNaughten to raise a defense of political or moral convictions. Moran argues strongly that such a stance forces defendants into arguments as to their criminal intent or into raising the insanity defense as a means of putting before a jury the question of criminal responsibility.

As an alternative, he argues for incorporation of a political defense into criminal law. Most lawyers, judges, political scientists, and mental health personnel are unlikely to accept Moran's arguments and will raise the same arguments against his position that Moran himself notes. Yet this opening up of the argument for a political defense which would be consistent with the values of a free society forces the reader to confront fundamental questions about dissent in a free society as well as the techniques available in both democracies and totalitarian societies for disparaging and minimizing dissent. In that sense, analysis of McNaughten's insanity defense by Moran serves the same purpose that analysis of the defense has long served in law schools: to analyze the issue of criminal responsibility and justification for acts in great detail. This book adds another dimension to that analysis. Few are likely to agree with Moran, but his argument has a long legal history that has been ignored for the past century. By adding this dimension to the discussion of criminal responsibility, and in particular by contrasting the political defense analysis of criminal responsibility with traditional theories, the author has broadened the dimensions of legal analysis. As Moran points out, Chief Judge Bazelon of the United States Court of

Appeals for the District of Columbia Circuit accepted a similar stance in dissenting in one of the Vietnam protest cases. Bazelon has consistently argued that a jury is essentially the means by which to assess a criminal defendant's "blameworthiness" or moral guilt and that without blameworthiness the imposition of criminal sanctions is invalid.

Bazelon does not explicitly go as far as Moran in his quest for wider acceptance of analysis of moral guilt in our legal system, but readers of this book will be forced to confront that issue. In particular, lawyers exposed to the arguments presented come away seeing the insanity defense as more than a tactical maneuver in hopeless criminal trials.

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THE POLICE AND PRETRIAL RELEASE. By *Floyd Feeney*. Lexington, Massachusetts: D.C. Heath and Company, 1982, Pp. xviii, 211, $22.95.

In many cases, the formal arrest of a defendant may not be a prerequisite to judicial proceedings, particularly if the offense involves traffic, local codes, or property violations or other nonserious charges. An individual can be served with an order directing and requiring appearance in court on a specified date and time to answer a specified charge.

Floyd Feeney presents a challenging and provocative integrated model for use in establishing and managing pretrial release procedures. He offers a detailed history of the movement toward the use of citations and makes a rational argument that the primary purpose of our arrest procedures is to bring the offender before a judicial officer but to do it in a way which will reduce expense to the taxpayer, free police manpower for other primary duties, safeguard the defendant's rights, and ultimately add to the dignity of the law enforcement process. Thus, society can reduce the unnecessary detention of misdemeanants at the risk of only minor increases in nonappearance rates. In addition, a major portion of the book resembles a how-to-do-it manual for the initiation, implementation, management, and evaluation of police-citation programs.

The book refers to a "summons" as a "citation," demonstrating that the terminology actually used around the country to describe the procedure is often confusing. Despite the name used by the various jurisdictions, however, the practice deserves serious consideration in en-

compassing a wide range of criminal offenses previously given little attention.

The bail reform movement in this country burgeoned during the 1960's, with the major focus on securing the release on their own recognizance of persons arrested for felonies. Misdemeanor cases received less attention in the bail reform movement. The Manhattan Bail Project was a leading national effort directed at reducing pretrial detention.

In 1964 the Manhattan Summons Project attempted to utilize more broadly the summons process in lieu of formal arrest and detention. During the same year at the National Conference on Bail and Criminal Justice, Michael J. Murphy, Police Commissioner of New York City, stated in an address that "the procedure of extended use of summons in lieu of arrest may help remove one of the most marked inequities of our judicial system—the deprivations of freedom because of inability to raise bail." Thus, he recommended that the summons be used in preference to arrest, if feasible, and that release on one's own recognizance be the norm in preference to bail, unless there is reason to believe that non-appearance is probable.

Gradually, police began to use citations and releases in the field for selected misdemeanor cases. Traffic cases, in which citations are used, still overshadow other uses for the procedure. Floyd Feeney presents a number of studies along with his own primary research to suggest the increased use of police citations. He also reports, however, that major attention has not been focused on this aspect of bail reform.

He discusses examples to provide some idea of how the citation procedure has been implemented in a number of different communities. Five different locales were scrutinized: Oakland, California, a city of 340,000 with a substantial minority population; New Haven, Connecticut, a city of 125,000 with a considerable minority population and a large university near its core area; the District of Columbia, the nation's capital, with a population of 600,000 and a major crime problem; Jacksonville, Florida, a unified city/county government, with a population of 540,000; and Minneapolis, Minnesota, which has a population of 370,000 and is the largest city in that state.

The author wisely selects his case examples and it is fair to say that the survey represents a cross section of law enforcement agencies and pretrial release procedures. He emphasizes that what works in one agency or community may be wholly inappropriate for another. The only criticism of an otherwise insightful survey is that the data generated in the case examples do not convey a relationship among the contrasting variables of each sample. A brief summary of the major trends of how citations are used by the different communities at the end of the

discussion would have clarified the overall rate of and the problems of citation use, and the police organizational procedures employed in pretrial release.

For practitioners and acamedicians who have labored to produce change from within, or have lobbied from without, for wider use of the citation in lieu of arrest to benefit the powerless and poor, as well as for others who support pretrial release as a means of reducing the expense to the taxpayer, the message seems to be clear. Floyd Feeney has created a viable and flexible prescription for establishing and managing police release procedures. In these times of fiscal constraints, a program that reduces both the human and the financial costs of our criminal justice system should generate momentum for a national effort toward expanding the use of police citations. If this effort is ultimately successful, society can anticipate considerable savings in detention and welfare costs. The present high cost of custodial care and the current overcrowding of jails indicate the urgent need for measures of this magnitude. There will also be savings in policeman hours. The probability of reducing the time and administrative work involved in an arrest means that the procedure will keep policemen on patrol, where they belong.

A procedure of pretrial release will, moreover, improve the relationship between the police and community. Consideration given to the accused with respect to human rights, comfort, welfare, and dignity, is a practical and true manifestation of the assumption that a person is innocent until proven guilty. Poor persons, who are unable to afford bail, are spared the shame of what may be an unnecessary arrest and incarceration. Thus, the defendant may be accorded the privilege of citation without regard to economic status.

In general, this book is an impressive and thoughtful work that fits well into the ongoing bail reform movement in the United States. It raises meaningful questions and provides a provocative model for the implementation of a pretrial release procedure. Professor Feeney's efforts advance an area in bail reform that has been undervalued in present law enforcement practices.

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COMPARATIVE POSTCONVICTION REMEDIES. By *Ira P. Robbins*. Lexington, Massachusetts: D.C. Heath and Company, 1980. Pp. x, 105. $14.95.

As Ira P. Robbins states in the preface to *Comparative Postconviction Remedies*, the avenues for challenge open to a convicted person represent an indication of the value which society places on individual liberty. The subject of this book is, therefore, a highly significant one in a world in which concern for human rights is a volatile issue. Since the matter of remedies cannot be evaluated in isolation, Robbins has taken on a formidable project in making a comparative analysis of the systems of several nations.

With free legal assistance becoming more prevalent in American courts, enhancing the availability of appeal opportunities, it becomes ever more important to consider the balance between the need for providing individuals with fair appeal procedures and society's interest that there be finality in adjudication. In *Comparative Postconviction Remedies*, Robbins examines the conflict between these goals in several countries in order to yield "some comparative insights on the issue of the proper point of repose in the criminal process." In addition, he refers to other benefits to be derived from transnational studies. As foreign travel burgeons, it is pertinent for larger numbers of potential travellers to be able to comprehend the legal systems in which they find themselves, "to know of and understand the criminal charges and procedures to which they might be subjected."

Initially, Robbins sketches the history of postconviction relief in the United States, describing its expansion in the nineteenth and twentieth centuries. He then notes that some of the more recent Supreme Court decisions have restricted the right of appeal and collateral remedies and suggests that the Court "may be waxing in favor of even greater finality of criminal convictions." Against this background, the author proceeds to outline postconviction remedies in five specific countries: Mexico, Brazil, Yugoslavia, the Federal Republic of Germany, and the People's Republic of China. The list appears to be eclectic, not clearly chosen according to an evident logical criterion such as representative regions of the world or families of law. Robbins' explanation is that the nations were "selected with an eye to their diversity of ideas, perspectives, and interesting postconviction features."

Some of the chapters focus on procedures of a particular country. The organization of these chapters differs; comparison would have been easier for the reader if Robbins had utilized a uniform sequence of topics in reference to each of the countries. A similar organizational problem is evident in sections where Robbins describes the postconviction

remedy prior to explaining the jurisdictional categories and levels of courts in the polity under discussion, an approach which makes it difficult for the reader to comprehend the route of appeal.

It is, of course, a particularly difficult task to compare systems at the same time that one must explain them. At some points Robbins first explicates the foreign remedy and then correlates it to American practice; at others he compares the two as he goes along. Also, the amount of comparison varies greatly from chapter to chapter; for nations like Brazil and Yugoslavia there is very little, whereas his review of the court processes in the Federal Republic of Germany includes references to those of other countries as well.

One chapter takes a transnational approach regarding the position and function of federal constitutional courts. Robbins notes that Austria created a separate court for the function of judicial review in 1920 and then compares the character of current constitutional courts in Germany, Italy, and Austria. The existence of this type of court, which is "somewhat extrinsic to the ordinary judicial system," has the effect of undermining the finality of the judicial system. In his final chapter, Robbins turns to an examination of international efforts to protect human rights. Again he starts with an historical perspective and moves to a depiction of current attempts. An intriguing proposal which he mentions is that of Luis Kutner who contemplates a system of regional circuit courts of "world habeas corpus."

The comparativist must be constantly alert to the danger of assuming that principles and procedures expressed in constitutions and codes correspond to actual policy and practice. Robbins states that written protections "are no guarantee of human rights; there we are compelled to look behind the words of these guarantees to see how they actually function." Occasionally it is, paradoxically, the most liberal nations which are the quickest to suspend personal liberties or to violate other human rights.

Another caveat which one must bear in mind is that ethnocentrism may cloud perception of the conceptual context of particular legal procedures; what may appear repressive to American eyes may, in fact, be a principle which is indicative of a liberalizing trend in a hitherto statist policy. Robbins finds the Chinese system to be so different from that of the United States as almost to defy comparison, adding that in view of the Chinese tradition, their system may not appear as harsh to the Chinese as it does to Americans.

Perhaps it is unfair to criticize the book because of its brevity; it simply would be unrealistic to ask one author to write at length about

such diverse polities. Still, the scant number of pages serves more to whet curiosity than to satisfy it, and the brevity can cause confusion.

For example, in the chapter concerning postconviction remedies in Mexico, Robbins defines *amparo*, a suit which can challenge both the constitution or a law as well as the action of an official, without directly comparing it to the United States doctrine of due process or to section 1983 cases. More disturbing, the skeletal description of a country's process can be misleading. In the discussion of German courts, Robbins writes that "trials for all but the most serious crimes take place in a mixed tribunal which consists of two lay judges and a professional judge." He fails, however, to indicate that there is also a chamber presided over by a single professional judge which has jurisdiction over petty crimes and that the line of appeal differs for this court.

Readers may wish that Robbins had expanded his treatment of some doctrines and procedures which vary widely from those of the United States. In some countries the state may appeal an acquittal. Inasmuch as there are proposals now being made for this principle to be written into our federal criminal code, greater detail on the actual effect of this practice might be relevant. Another concept mentioned in passing is the *jurisprudentia* of Mexican law, under which five consecutive *amparo* decisions by the Supreme Court holding the same way on the same issue become binding on lower courts even though the law at issue does not thereby become invalid. The author could have analyzed *jurisprudentia* more fully in relation to our doctrine of stare decisis.

For professors who teach courses in comparative judicial systems, *Comparative Postconviction Remedies* will be a welcome volume, and the bibliographical notes should prove to be of immense value for researchers. Many of the notes refer to sources in English, an especially valuable aid in the field of comparative study. Unfortunately, however, there is not always an indication of an English translation for the constitutions or codes. Robbins seems to be addressing readers who have at least some legal understanding. He uses terms which might be unfamiliar without defining them, a problem which might be solved by inclusion of a glossary. There is a possibility that this book may prove to be either too esoteric for the general reader or too lacking in detail for the specialist. Robbins considers *Comparative Postconviction Remedies* to be an exploratory study, and it should effectively serve to foster more extensive investigation along the lines which he has sketched. In the interim, the

book surely represents a substantial contribution to comparative literature.

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COPING WITH CRIME: INDIVIDUAL AND NEIGHBORHOOD REACTIONS. By *Wesley G. Skogan* and *Michael G. Maxfield*. Beverly Hills: Sage Publications, 1981. Pp. 280. $25.00 cloth, $12.50 paper.

Since the mid 1970's there has been growing research interest in fear of crime and behavioral reactions. Most of this research has focused on individuals using sample survey data. Although it relies heavily on survey data, *Coping With Crime* is noteworthy for its integration of field research, content analysis of newspapers, and a secondary analysis of the national victimization surveys to present a wealth of fresh insights on neighborhood as well as individual responses to crime. This book is one of a number of studies derived from Northwestern's Reactions to Crime Project, which examined individual and collective responses to crime in three cities, Philadelphia, Chicago, and San Francisco, and ten neighborhoods spread across these cities. Researchers conducted city-wide and neighborhood random digit dialed telephone surveys and year-long neighborhood field investigation.

Skogan and Maxfield cover ground which others have been over—how individuals fear crime and how they take behavioral measures to cope with it—but their analysis on many points is more detailed and more insightful than that of those who have preceded them. They are most concerned with fear of crime, its nature, its causes, and its impact.

Their overriding message is that there is much more fear than actual victimization; that fear cannot simply be explained by crime rates or individual victimization experiences; and that fear is related to some, but not all, types of behaviors people undertake to deal with crime. Fear is linked to vicarious experiences and neighborhood contexts.

They limit their discussion of fear to feelings of being unsafe in neighborhood streets. This is by no means the only form of crime fear, but, the authors argue, it is the most pervasive and the one most related to neighborhood conditions.

It is often reported that the media distort the picture of crime by giving greater emphasis to personal crimes, particularly those of an unusual or gruesome kind. The authors find that interpersonal communica-

tion about crime has a similar tendency to report disproportionately personal crimes. Indeed, the content of interpersonal communications appears to be more consequential than the mass media. The media provides crime information which is more abstract and less directly relevant to the receivers and has no systematic effect on crime perceptions. By contrast, when people learn about crime, especially crime in their own neighborhoods, from their personal communication networks, it is much more likely to affect their perceptions and behavioral precautions.

Victimization does have some effect on fear, but most fearful people were not recent victims. As expected, personal crimes have more of an impact on the individual than property crime. Skogan and Maxfield point out, however, that since many more people are victims of burglary than of personal crime, property crime may contribute more to people's fears and perceptions of neighborhood crime problems than personal victimization.

Ever since victim surveys began providing estimates of victimization rates for different demographic categories, researchers have wrestled with the counterintuitive finding that less victimized categories—females and older adults—are more fearful. Skogan and Maxfield argue that a sense of physical vulnerability shared by women and older persons explains their greater fear of crime. Physical vulnerability includes feelings of an inability to resist victimization and of a greater likelihood of suffering consequences. By contrast, the idea of social vulnerability—the degree to which people are exposed to more crime because they live in high crime areas—is used to explain the higher levels of fear among blacks and poor people. These two types of vulnerability are additive, with sex and race being more powerful predictors of fear than age and income.

This study also explores crime perceptions at neighborhood and citywide levels. The size of a city is substantially correlated with the fear levels of its residents. Larger cities, regardless of their crime rates, tend to have higher levels of fear than smaller cities. There is, however, more variation among a city's neighborhoods than among cities in levels of crime and fear.

The study makes more of a contribution to the study of fear and other crime perceptions than to behavioral reactions. The general pattern of findings, that personal precautions are linked to perceived individual vulnerability while household protective measures beyond the most simple or routine ones are more associated with higher incomes and higher social integration, confirms earlier studies. What is less often included in other studies of behavioral reactions to crime is an analysis of those who move out of urban neighborhoods. Using survey data from the Chicago metropolitan area, the authors examine the reasons given

by those who have left the city for the suburbs. White flight is found to have much less to do with problems such as crime in the neighborhood of origin than with the opportunities and attractions of the neighborhood of destination. While crime may be a factor in some moves from the city, it is not a major one.

Although the authors demonstrate a high degree of sensitivity to the general quality and limits of their data, there are a few occasions on which their conceptualization of the data may be misleading. Perhaps the most important has to do with the relationship between victimization, fear, and behavioral responses. Like almost all other victimization surveys, the one used here asked respondents about victimization experiences which occurred in a limited recall period. When these data are analyzed, any respondent who did not report a victimization is considered a "non-victim." It is obvious, however, that some respondents who were not victims in the past year or two could have been previously victimized. If the crimes were salient, then it is probable that they affected the respondent's perceptions and behaviors at the time of the interview. When such persons are labeled "non-victim" one is not surprised that this study and others using similar data find small or no differences between victims and "non-victims." Skogan and Maxfield take some account of this problem by speaking of "recent" victims, but at other times they draw conclusions about the small effects of victimization experiences in general.

It has only been possible to highlight a few of the great number of important findings in this study, which is probably the most complete research report on these topics to be found in the social science literature. One of its important policy implications is its support for focusing "on the dynamics of fear as a distinct object of policy analysis." Fear may prove more tractable than crime rates. Its reduction can make a contribution to neighborhood improvement through individual and collective crime protection and prevention activities.

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CRIME CONTROL STRATEGIES: AN INTRODUCTION TO THE STUDY OF CRIME. By *Harold E. Pepinsky.* New York: Oxford University Press, 1980. Pp. 352. $10.95.

Many introductory texts exist in criminology; few, however, are organized to promote critical thought. In criminology, we too often fail to ask the appropriate questions. Simple questions often lead to superficial answers in our attempts in devising strategies to reduce crime. Students entering the field of criminology and criminal justice are often assigned texts that simply present a cross section of the field with descriptive chapters that are top heavy with definitions, concepts, and perspectives, leaving the reader with the task of memorizing (ad nauseum) for exams that often simply require regurgitation (ad infinitum).

Pepinsky's approach is an admirable one which provides both the neophyte and the scholar with intellectual tools for analyzing complex problems in crime control strategies. At the outset, he rejects a "value neutral" position (at vii) which promotes the study of the causes of crime for its intrinsic value. Rather, *Crime Control Strategies* organizes ideas in terms of their "usefulness" in developing more adequate crime control strategies. Pepinsky points out that authors should "push [students] to develop their own opinions" (at 65), that "the reader is qualified to create and evaluate strategies of crime control" (at 68), that the reader is invited to "disagree [with him] . . . as an exercise in independence from the 'expert' criminologist" (at 190), that those beginning the study of crime have, as their greatest weapon, their imagination ("we need approaches to crime control that have not yet been tried and evaluated," at 279), and, finally, that criminology is an open field that gives many a chance to do pioneering work of social importance (at 309).

Throughout the book, Pepinsky deliberately minimizes the use of esoteric language, something we all fall victims to in our attempts to understand and communicate. Yet, to Pepinsky's credit, he is able to present complex issues and questions which challenge the reader to test assumptions, premises, as well as his or her imagination in developing creative crime control strategies. The neophyte in criminology will receive sophisticated tools for critical thought, while the sophisticated student certainly will feel the need to rethink the crime problem and existing crime control strategies.

The organization of the book focuses on two important themes: (1) the question of what it is we wish to control, i.e., measures of crime, measures of criminality, or costs and benefits; and (2) the question of by what criteria can control strategies be evaluated. Addressing these questions in parts two and three of his book, Pepinsky discusses the dilem-

mas, contradictions, and pitfalls in our attempts to control rates of crime and criminality.

He discusses conviction rates, police-produced crime rates, victimization rates, incarceration rates, self-report rates, and recidivism rates. Each, he points out, can be evaluated along seven dimensions: (1) measuring rate numerators, i.e., the number of crimes reported; (2) measuring rate denominators, i.e., the population at risk; (3) current trends of crime and crime control in the United States, controlling for different types of rates; (4) evaluating chances of controlling the respectively derived rates, focusing particularly on the possibilities of type 1 (false positive) and type 2 (false negative) errors, the former being those errors attributed to overprediction, the latter to underprediction; (5) side effects, particularly unintended consequences; (6) political considerations, i.e., forces that promote or hinder specific crime control strategies; and (7) ethical issues, focusing particularly on "value neutrality," just deserts, "objectivity," hidden assumptions and premises that guide planners' strategies, and questions such as whether it is worse to convict people unnecessarily (type one treatment error) or to let guilty people go free.

In part four, Pepinsky addresses the issue of cost-benefit analysis, a field recently opened wide by economists. He discusses some important recent research that attempts to operationalize costs and benefits in specific strategies of crime control. Again, he points out limitations as well as hidden assumptions that exist in these models. Finally, in the last section of part four, Pepinsky spells out the necessity of a "systems approach." "In criminology, the traditionalist seeks to find out what causes crime; the systems analyst looks at how probabilities of crime, or responses to crime, might be changed in a society by intervening at various points in the crime production process" (at 301).

At the end of each chapter a section is devoted to "food for thought" wherein several think-questions are posed that encourage the reader to examine his or her assumptions and to think through alternative, imaginative crime control strategies. In sum, Pepinsky's *Crime Control Strategies* is a challenging book that encourages creative thinking and encourages neophytes as well as the well-read to enjoy the process of creative, imaginative thought in developing crime control strategies. This is something few if any texts do.

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THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE. By *Francis A. Allen*. New Haven: Yale University Press, 1981 Pp. 160. $15.00.

Doubt and even despair over the prospects of reforming offenders are now familiar themes in the literature. Nobody, however, has analyzed the slide away from rehabilitation as fully and sensitively as Francis Allen in his new book, which constitutes a more complete version of the Storrs Lectures given at Yale Law School in 1979.

The first great prisons of the nineteenth century—Auburn and Sing Sing in New York, the Eastern State Penitentiary in Philadelphia, and Millbank in London—were based on the belief in regeneration through a regime of solitude, work, and what was expected to be a cleansing introspection. After the Civil War, Elmira in New York was built and became another great monument to all that is conjured up in those sombre yet hopeful titles "penitentiary" and "reformatory." It seems that those on the firing line, the wardens and warders engaged in the day to day management of prisoners, were from the start less confident of the success of reformation.[1] Yet the ideology of rehabilitation persisted with astonishing strength into the mid-twentieth century, even in the face of little evidence of practical success.

Rehabilitiation theory was in large part responsible for the American invention of the indeterminate sentence and for the colossal power conferred upon parole boards. Since the time required to rehabilitate an offender was unpredictable, rather than make this decision irrationally at the time of disposition the logical alternative was to entrust the question for continuing review by those who might release the prisoner when they saw signs of reform in his record and demeanor. In the face of little confirmatory evidence, the academic community retained an almost touching fidelity to this model of rehabilitative justification for indeterminate imprisonment right into the 1970s. But when the defections came, they were sudden and massive.

Three factors contributed to these defections. First, it became less and less possible to ignore the fact that rehabilitation did not work very well. Crime, especially violent crime, increased at a disturbing rate after 1960[2] and recidivism among violent offenders remained high. In addition, many "rehabilitative" practices came under careful scrutiny and were judged to be unconvincing euphemisms for vengeful punishment or simple restraint. Finally, the moral roots of rehabilitation theory

[1] M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA 89-90 (1981).

[2] *See* Gurr, *Historical Trends in Violent Crimes: A Critical Review of the Evidence* in 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 295 (M. Tonry & N. Morris eds. 1981).

were themselves challenged. Penal philosophers argued that society may have warrant to lock someone up for reasons of retribution or even simply to protect others, but that there is no justification for locking people up until they become better people.[3] The advocates of rehabilitation reeled under this triple assault of meager success, critical analysis, and philosophical doubt.

Allen elegantly advances the larger underlying social and cultural explanations for the flight from rehabilitation. He argues convincingly that confidence in the possibility of rehabilitation depends on a high degree of general confidence in society about established values. It was for this reason that a philosophy of incarceration in rehabilitative terms naturally arose and flourished in the Victorian era. Twentieth century doubt has eroded this confidence; human nature now seems less susceptible to improvement and we are more likely to think that we are sliding down the road to perdition than marching along the road to perfection. The very ideal of progress is viewed with suspicion as we see the unexpected destruction worked by many of the technological developments hailed by the Victorians.

Rehabilitation also rests on a positive feeling about fundamental social institutions and their capacity to do good. Education and the home environment were until recently the cornerstones of Anglo-American society. Society viewed these institutions as beneficent and as capable of strengthening the good and working miracles with the weak, slow, or evilly inclined. But the family is now devalued as an institution, even deprecated by some, while schools are regarded by many with contempt if not outright condemnation. They may be perceived as not only inefficient and incompetent but even in some respects as playing a sinister role as the props of an unjust and intolerable system.

A general scepticism about middle class morality parallels this cynicism about institutional arrangements. Radicals, minorities, and the poor may perceive Establishment morals as a hypocritical facade that cloaks the dominance of one class in America. Furthermore, the radicalization of a section of the middle class and its experimentation with a diversity of life styles increasingly dilutes the consensus of an earlier time, leaving traditional values securely held only in the shrinking fortresses of middle-America.

Allen points out that along with a confidently held set of values there is a further condition for adherence to the ideal of rehabilitation. This is a belief in the malleability of people— a belief which has hardly

[3] Two especially influential publications urging these positions were AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971) and A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

deserted us. Indeed, popular belief in the possibility of brainwashing and the widespread allegiance to the desirability of psychotherapy to alleviate many of the problems of life have probably led to a widely diffused conviction that the application of medical or other conditioning techniques can significantly change most people.

As Allen demonstrates, however, there are important shifts in our present posture towards such therapy compared with the attitudes of an earlier time. The aspect of therapy that seems to account for its present mass appeal is its promise of relief from guilt and anxiety. How different from the Victorian aims of inculcating guilt, of reminding us of our obligations, of instilling an awful sense of duty and the need to do right and refrain from wrong! Modern therapy in its attractive guise is seen as liberating and fulfilling, as affording an escape from irrational constraints and strictures. Present perceptions do not fit the ideal of a therapy that rehabilitates from crime and restores one to dutiful living. Many are likely to see the rehabilitative approach as at best a manipulative and paternalistic effort by the Establishment to perpetuate its power by guiding errant citizens back to fulfill their approved roles.

In a darker view, therefore, therapy has become identified with savage, mind-changing intervention or with hypocritical euphemisms for punishment. Allen cites instances, for example, where a solitary confinement cell (mockingly or half seriously) is referred to as the "quiet room" and the use of cattle prods is called "aversion therapy." In these perversions, "therapy" is connected with the use of psychiatry as an arm of the state police in such countries as the Soviet Union, and rehabilitation becomes tainted with the image of the desperate recantations and confessions pursued throughout history by such terrible institutions as the Holy Office of the Spanish Inquisition and the Gestapo.

As if rehabilitation theory were not sufficiently assailed by radical thought, which has detected these elements of tyranny in rehabilitative practice, it has also reeled under a furious onslaught from law-and-order advocates. Desperate to locate plausible culprits for the increase in violent crime, conservative critics have accused judges, criminal justice officials, and criminologists of being too concerned with nurturing the reformation of the criminal and too insensitive to the wrong done to the victim.

Thus, a curious philosophical alliance sprang up in the 1970s between liberal theorists and populist law-and-order advocates. Disgusted with rehabilitation for very different reasons, they combined in an attack on the indeterminate sentence and the discretion of the parole board. According to the liberals, indeterminate sentences were wrong because they resulted in gross inequality, in chilling uncertainty for prisoners, and in arbitrary power often unintelligently exercised by parole

boards. According to conservatives, indeterminate sentences were wrong because they resulted in early releases by soft-hearted parole officials, deceived by devious prisoners who had learned well the lessons taught in prison "acting schools." As a substitute theory, the concept of retribution was hauled out of the back room to which it had so long been consigned, and after a quick paint job was presented to the public under its new title, "desert."

In place of indeterminate sentences, both factions agreed that we must have punishments that fit the crime. Price tags of a certain precision should be annexed to crimes or to particular ways of committing crimes and the court should have only a narrow band of discretion in sentencing. In this way criminals will be spared the uncertainty of not knowing how long they will have to spend in jail, and the public will be reassured that offenders cannot escape the punishment that they deserve.[4]

This reemergence of the desert principle has hardly provided any answers for the practical problems of penologists. One problem is that desert, while it highlights the need for equality and fairness in sentencing, reveals little or nothing about the general scale on which sentences should be fixed. One desert adherent might judge that a certain kind of assault merits two years in prison, while another would rate the identical offense as a twenty-year crime. This ambiguity was of course what made possible the alliance of the crime fighters and the justice seekers. Liberal opponents of the vagueness and indeterminancy of earlier sentencing practices for the most part contemplated determinate sentences of a moderate or light range with perhaps no imprisonment at all for many offenses. Their conservative allies, on the other hand, envisaged desert sentences on a much more severe level. After all, some people still think of the cat-o'-nine-tails as a prisoner's desert and, as Allen points out, it was also once considered to be powerfully rehabilitative.

An awareness that desert, for all its philosophical interest, hardly provides a very practical guide for the details of a sentencing practice, as well as an understandable wish to offer some solace to an uneasy public, have recently led some criminologists to emphasize the importance of incapacitation as a justification for imprisonment.[5] Whatever else is in doubt, we are told, we do at least know that offenders cannot hurt the

[4] On the recent trend in some jurisdictions to introduce schemes of determinate sentencing, see Zimring, *Making the Punishment Fit the Crime*, HASTINGS CENTER REP. (1976); PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING, DETERMINATE SENTENCING: REFORM OR REGRESSION? (1978); von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289 (1981).

[5] *See* M. SHERMAN & G. HAWKINS, *supra* note 1; Floud & Young, *Dangerousness and Criminal Justice*, in CAMBRIDGE STUDIES IN CRIMINOLOGY XLVII (1981).

public when they are locked up. And if prisons are overcrowded and are a scarce resource, then prudence dictates that we concentrate on identifying and locking up offenders who have demonstrated that they pose a substantial risk of committing future violent acts.[6]

Incapacitation in its "strong" form of long sentences based chiefly on estimates of future danger is a morally unsound thesis, since psychiatrists and criminologists concur in proclaiming their inability to identify long-term dangerousness. False positive predictions of future dangerousness are likely to be very high, and sensitive advocates of long-term preventive or protective detention are driven to subtle, if not tortured ethical defenses of their position. One such argument contends that although we have no right to lock up those who have not committed any crime just because we think they are dangerous, once we acquire the right to punish a person because he *has* committed a crime, we also acquire a supplementary right to confine that person for a longer period based on a concededly unreliable estimate of future dangerousness. Floud and Young justified this position in a recent work by drawing an analogy to the self-defense privilege: the violent offender has revealed himself as an assailant and we may protect ourselves out of a right of preservation independent of the practice of punishment.[7]

The weakness of this argument is that self-defense theory applies to a situation in which there is a reasonable response in an emergency to an individual who either is or reasonably appears to be immediately threatening the victim with deadly force. With long-term confinement, however, we make a judgment about an individual with due deliberation and not under the presssure of an immediate crisis. It is a judgment which, in terms of our knowledge of the inaccuracy of prediction, is not only likely to be wrong, but also becomes progressively more likely to be wrong the longer it extends in the future.

The weaker form of incapacitation theory, which merely emphasizes the need to treat those who have committed violent crimes in a moderately severe way and also to treat them in a consistent and uniform fashion, is a much more acceptable argument.[8] But it seems fairly clear that whether in the strong or the weak form, incapacitation will be in the forefront of criminological discussion for some time to come. It is therefore crucial to consider its relation to the apparently displaced justification of rehabilitation.

Incapacitation and rehabilitation have one important feature in

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[6] The most penetrating recent study of the calculus of interests and policies contained in the problem of overcrowding is M. SHERMAN & G. HAWKINS, *supra* note 1.

[7] Floud & Young, *supra* note 5, at 38-49.

[8] This is the form of the theory presented by M. SHERMAN AND G. HAWKINS, *supra* note 1.

common: neither can be regarded as a philosophy of punishment. If the concept of punishment essentially entails the notion of an unpleasant consequence ensuing upon the breaking of a rule, so that the consequence is perceived as being deserved for this reason, then rehabilitation as a paramount ideal would sometimes be incompatible with punishment, for it may often be the case that rehabilitation can only be effected by an absence of sanctions. Similarly, if incapacitation is the paramount goal it would have to override the model of punishment in some cases, for the master ideal of punishment could not condone incarceration for any period longer than that which is a just response to the act done by the defendant. If, on the other hand, punishment is the paramount aim, rehabilitation would have to be a subordinate goal that could be pursued only in so far as the aims of punishment allowed.

Thus, as many scholars have pointed out, punishment simply cannot be fully elucidated in terms of either rehabilitation or incapacitation.[9] Incapacitation could of course be proffered as the chief justification for incarceration, but to accept it as such would be an abandonment of the core concept of punishment, which demands that the response be limited by the notion of just desert. Like rehabilitation, incapacitation can be reconciled with the concept of punishment only if it is assigned a subordinate status and perceived as no more than a useful by-product or bonus that cannot be allowed to overrun the limits of a desert-defined response. Recent attempts to present incapacitation as a prime justification of imprisonment are potentially dangerous if they fail to clarify this reservation.

As Allen acknowledges, the academic ferment in recent years over the justification for imprisonment clearly stems from anxiety about rising crime and prison overcrowding and from an understandable desire to be seen to be making a practical response to popular clamor. The greatest merit of his book is its insistence in the last section that, even if it is true that we were long deceived in our hopes for rehabilitation, there are independent reasons why we must continue to offer voluntary facilities and programs that may hold out hope for rehabilitation. There is no empirical evidence to support the proposition that rehabilitation never works, and it would defy common sense to so imagine. It is virtually impossible to conduct any studies that would quantify the success or failure of rehabilitative efforts; to do so would require the ascription of definite reasons to cases where the offender does not commit further crimes or does not commit crimes of a like kind or gravity. Such non-recidivism may sometimes be due to the passage of time; sometimes it may be because the grim impact of prison has been an effective spe-

[9] *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

cific deterrent for the individual; sometimes it may be because some educative or otherwise rehabilitative program has changed the offender and better fitted him for social life. Although we can never know why a particular individual does not commit more crimes, we do know that many offenders do not commit further crimes after release. It is a reasonable hypothesis that in some cases rehabilitative programs have played some useful part. This hypothesis presents a utilitarian justification for continuing such programs and trying to expand and improve them.

The utilitarian argument is reinforced by a most important moral contention. The moral demand that prisoners be treated as persons requires that, whether imprisonment be justified in terms of desert, general deterrence, or incapacitation, we should make every reasonable effort to make it a humane and helpful experience. This is an obvious conclusion if we rely on incapacitation or deterrence as our chief justification for imprisonment, since these validations frankly admit that the prisoner is being confined for the benefit of others. Initially, the desert principle might seem to lead us away from this obligation since its advocates could deploy it to argue that the prisoner deserves to suffer. If punishment means an unpleasant consequence, then it is a waste of resources to leaven prisons with rehabilitative efforts. Under a retributive regime, punishment should be nasty and brutish so as to hurt as much as possible. One response to this argument is the utilitarian point that we can better protect society by using prison time to make it likely that some prisoners on release will become useful (or at least harmless) members of the community.

There is a more specific moral reason why we have a duty to make rehabilitative programs available. If offenders deserve to be punished, then people generally deserve to be given the best opportunities to choose not to become offenders. One need not adopt a determinist view of crime causation to acknowledge that many people who commit serious crimes have more difficulty than others in choosing not to commit crimes because of social conditions that are not their fault. This does not mean that offenders ought not to be punished, but under general principles of fairness it does point to an obligation to work to change social conditions. Generally, this need for change involves the whole range of social conditions that contribute to criminality. This is a daunting task and Allen properly observes that a general exhortation to social improvement does not constitute a penal policy. But within the penal system itself, we have a particular chance to make some small discharge of this obligation through the provision of rehabilitative programs. Persistent efforts in this direction are required by general principles of justice and fairness.

Professor Allen has written a fine book, bringing a wealth of social and cultural knowledge and sensibility to the questions of penology. If his book is in some measure an elegy for the imperial era of rehabilitation, at the same time it bravely insists upon the need to remain committed to the noble aims of the tradition of rehabilitative thought in criminology.

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CONVICTION. By *Doreen J. McBarnet*. Atlantic Highlands, New Jersey: Humanities Press, 1981. Pp. 182. $30.00.

Doreen McBarnet is a keen observer of the courtroom and the role of law in structuring courtroom interaction. She is a lively and important writer and a critical legal theorist who, even when she provokes disagreement, also provokes thinking in new directions. Her new book sets itself the task of trying to explain "how it is legally possible for the prosecution to win so routinely despite the rhetoric of the criminal justice system bending over backwards to constrain the prosecution and safeguard the accused." McBarnet's answer in a nutshell is that the due process safeguards provided by law are merely rhetorical, rather than realistic. Moreover, the rhetoric serves the powerful by affirming an ideology of individual freedom, while masking the considerable procedural advantages accruing to police and prosecutor.

McBarnet's argument is methodological as well as substantive. Instead of focusing on interactions between police and citizen, lawyer and client, magistrate and defendant, she tries to understand how the formal rules of law themselves permit what occurs in the system to happen. By turning "the law" from a background assumption into a primary focus, she tries to show how both substantive and procedural law is constructed and deconstructed.

Agreement with McBarnet's substantive answer to her main question depends on the assumptions one makes. McBarnet summarizes her critique of the "gap between the rhetoric of justice and the substance and structure of law" by declaring that there is a false distinction between Packer's[1] due process and crime control models. She writes:

> The law on criminal procedure in its current form does not so much set a standard of legality from which the police deviate as provide a license to ignore it. If we bring due process down from the dizzy heights of ab-

[1] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

> straction and subject it to empirical scrutiny, the conclusion must be that due process is *for* crime control.[2]

McBarnet is a forceful writer. Yet her analysis satisfies only if one takes due process rhetoric not only seriously but also *literally.* That is, to agree with her one seems to have to believe either that because every defendant is presumed innocent, the vast majority are factually innocent, or that, even if a vast majority are factually guilty, the presumption of innocence and other due process rights should exonerate a substantial percentage of them.

After reading McBarnet, I went back to Packer and reviewed his discussion of the due process and crime control models. His introductory discussion cautions against believing that the "presumption of innocence" is intended to create a presumption of factual innocence. Packer offers the example of a murderer who chooses to shoot his victim in plain view of a number of people. There are eyewitnesses to the shooting and there is no doubt that the accused is factually guilty. He is, however, legally still *presumed* to be innocent. It would, as Packer says,

> be plainly absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what presumption of innocense means. It means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.[3]

The most sustaining idea behind the due process ideal is the doctrine of *legal guilt*. Legal guilt implies that a defendant should not be held guilty of a crime merely because the state can show that in all probability, based upon reliable evidence, the accused actually did what he is said to have done. Due process—legal guilt—requires that certain *forms* be observed. For example, did the statute of limitations run, has the accused been previously convicted or acquitted of the same or a substantially similar offense or can the state bear the burden of proof beyond a reasonable doubt? All of these issues obviously invite interpretation in any given case. Sometimes an accused can successfully assert defenses that have nothing to do with factual guilt.

McBarnet's interpretation of due process as rhetoric makes sense insofar as a literal interpretation of legalese misleads the average citizen and even the better than average sociologist. But when due process is understood as a set of directions to officials on how they must proceed in order to sustain a finding of legal guilt, it is not puzzling that most of those accused of crimes should be found guilty. Most persons who show up in court accused of crimes are factually guilty.

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[2] D. MCBARNET, CONVICTION 156 (1981).

[3] H. PACKER, *supra* note 1, at 161.

McBarnet is in any case not writing her book about defendants accused of *serious* crimes. Hers is a study of 105 cases in Scotland, where police are offered by law a degree of discretionary authority they do not enjoy in the United States. For example, a defendant in Scotland may be arrested as "a known thief in suspicious circumstances." Such low-level defendants really depend for their fate upon the good- or ill- will of the police as do those arrested for loitering or breach of the peace. McBarnet urges the reader not to observe the interaction between the police and the accused, but to set sights upon the law itself which permits the police such wide discretion as the focus of problem. Of course, any number of previous writers have observed that procedural injustices are often traceable to inadequacies of substantive law. Indeed, that concept might properly be considered the main theme of the Packer work of which McBarnet is so critical. It is, after all, titled *The Limits of the Criminal Sanction.* Even Sir Robert Peel was profoundly aware of the relation between the substance of criminal prohibitions and how police actually conduct themselves. Indeed, he undertook to reform the criminal law before reforming the police. In short, the idea that substantive law influences procedure is no doubt true, but it is scarcely newsworthy.

McBarnet is also right but unsurprising when she alleges that due process *is* for crime control, as Packer's illustration of the factually guilty murderer suggests. Packer would not find that noteworthy, nor do I since one of the goals of substantive criminal law is to control crime. I have never thought that due process requirements really posed very serious impediments to the process of conviction. Most defendants that are factually guilty are convicted, provided the authorities adhere to elementary procedural rules. The authorities are rarely, as some of them claim, hamstrung. But they are directed and overseen much more than they would be, I suspect, if a presumption of guilt as a form of crime control was *legally* permissible.

Although McBarnet never considers what life would be like without due process, she implies that nothing or little would change. She calls due process law a "facade of civil rights ideology," as "elusive and adaptable as a chameleon," and "simply withered away by exceptions, provisos, qualifications." But then McBarnet backtracks by saying that due process erosion occurs principally in "petty offenses, particularly offenses against public order." She argues that these "dominate" the work of the police and the courts, an impression one might have if one studied only a lower court, as she did. The word "dominate" is in any case ambiguous. Public drunkenness is our most "dominant" crime from a narrow statistical viewpoint, but surely one would not argue that it is our most serious crime.

Some of McBarnet's arguments might be more applicable to Eng-

land and Scotland than to the United States. She complains, for example, that the rhetoric of justice requires incriminating evidence as the basis for arrest and search, while the law allows arrest and search in order to develop incriminating evidence. Legally this is not the case in the United States, although it does happen. Before *Mapp v. Ohio*,[4] New York police used to testify on a routine basis that the narcotics they seized had been "hidden on the person." Under New York law, such illegally seized evidence was admissible, since New York state did not subscribe to the exclusionary rule. After *Mapp*, the law changed and the exclusionary rule was extended to the states. New York police then routinely testified that the seized narcotics had been dropped or thrown to the ground. The perjured police testimony came to be known in the system as "dropsy" testimony. This, of course, is an instance where the "law" offered protections that were undermined by the process of "the law in action." McBarnet argues that sociologists have been misled by observing the law in action. The reality is, of course, that it is useful to study law in action as well as law construction. They are after all inseparable.

McBarnet's position is perhaps best exemplified in the United States law regarding police interogation. We are all familiar with the holding in *Miranda v. Arizona*,[5] that an arrested person must be informed of the right to remain silent, the right to an attorney, and the right to be provided with an attorney if he or she cannot afford one. If an accused confesses, the government has a "heavy burden" to prove beyond a reasonable doubt that the waiver was made voluntarily, intelligently, and knowingly. Following *Miranda*, studies showed that when the warnings were conveyed by police so as to minimize their significance defendants frequently waived their rights and confessed.[6] One might argue that the courts permitted the police to confuse legally incompetent defendants, that knowledgeable and intelligent defendants did not waive their rights. Logically, *Miranda* and later cases should have held that a voluntary, intelligent, and knowing waiver cannot be made without the advice of an attorney.

McBarnet thus is partially right. The courts can erode due process rights while they appear to be giving them. Even if a sizeable proportion of defendants waive their rights, it would be an overstatement to assert that due process protections are *entirely* eroded in the confessions area. When a defendant does request an attorney, the police can no

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[4] 367 U.S. 643 (1961).

[5] 384 U.S. 436 (1966).

[6] Ayres, *Confessions and the Court*, YALE ALUMNI MAG., Dec. 1968, at 18-20; Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Project, *Interrogations in New Haven; The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

longer engage the defendant in conversation. In sum, there is something to McBarnet's position, but her sweeping generalizations about the erosion of due process do not seem to be justified.

I analyze the problem of due process and conviction rather differently than McBarnet does. Given that both English and American societies, however arguably class structured, racist, and unfair they may be, engender serious crime by a minority of criminals against a majority of citizens, the question we need to ask is: how is it possible to sustain ideals of legality and due process so that citizens can continue to make civil libertarian claims? The idea of due process is fundamentally counter-intuitive. Why, after all, should a defendant, arrested by a policeman with probable cause, even be presumed to be innocent? The presumption of innocence *is* mystifying in two senses: first, that such a presumption should exist in the face of all probability; and second, that it does indeed confuse those who interpret it literally.

In a contemporary society with increasing fear of crime, due process is thus continually under attack. It is difficult to sustain public confidence in a criminal justice system that openly suppresses illegally obtained factual evidence—for example, confessions to rape or kidnapping. (Recall that Miranda confessed to having kidnapped and forcibly raped a nineteen-year-old.) Courts suppress that evidence in the name of protecting the innocent. But when we convict innocent defendants, as we sometimes do, we do not know and therefore we do not *announce* that they are innocent. If due process protections freed substantially more factually *known* guilty persons than they already do, such protections would surely engender even greater criticism.

Nor is the law as elusive (at least in the United States) as McBarnet perceives it to be. To the extent that the privilege against self-incrimination does not operate in practice, it is not because the *law* is particularly unclear, but because police practices may undermine it. The privilege against self-incrimination may be undermined, while the defendant is in custody, by the policeman's demeanor in advising the suspect of his constitutional rights, or, in the courtroom, by the policeman's perjured testimony regarding voluntary waiver. But in these instances the *law* is perfectly clear.

Even in the search and seizure area, where the law is truly muddled and confusing at the edges, police frequently encounter situations where the law is reasonably clear. Indeed, as indicated earlier, police may be motivated to perjure themselves so that the *factually* guilty will lose the protection of clear procedural rights.

McBarnet argues further that it is unfair that guilty pleas account for something more than ninety percent of convictions. There are many

criticisms to be made of plea bargaining, but it is unlikely that if plea bargaining were eliminated there would be fewer convictions. Jury trials are no more likely to exculpate the factually guilty than are negotiated settlements. Plea bargaining has been banned in Alaska since 1975.[7] The Alaska experience has shown that overall conviction rates do not change significantly, although prosecutors win a larger proportion of those cases that actually go to trial. Futhermore, sentences are more severe for those who are charged with relatively less serious offenses, precisely the sort of defendant whom McBarnet studied, and for whom McBarnet advocates more jury trials. In fact, at present, plea bargaining is more likely to be criticized by hard liners who think it permits serious criminals to negotiate light sentences, than by due process advocates who argue that defendants are undermined by it.

But McBarnet is actually making a more comprehensive argument. The law is ultimately interpreted by her as an ideological tool for protecting the interests of the powerful. Citing Marx and Engels, she argues that the study of forms of law

> may help us understand not only how the legal system can simultaneously maintain both due process and crime control, the prime concern of this study, but more broadly, how it can reproduce the ideology of justice while denying it, and how the state through law can give class-based ideas "the form of universality."[8]

The law is for her an unfair, class-based instrument of social control, made even more mystifying and devious by its references to ideals of legality. These ideals, she argues, are routinely subverted in practice by high court judges and, finally even she acknowledges, by its practitioners as well. I certainly agree that procedural rights are fragile and counter-intuitive enough to be subverted by legal practitioners whether they be called police, judges, or lawyers.

I also acknowledge that the law is complex, but it surely is not what she asserts it to be: "a will-o'-the-wisp, pausing but a moment before the next decision, and then only 'clear' for the particular circumstances of that particular case." McBarnet is a powerful writer, a forceful rhetori-

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[7] A. Gross, Alaska Attorney General's Office, Memorandum on Plea Bargaining to All District Attorneys (1975).

[8] D. MCBARNET, *supra* note 1, at 166-67.

cian. Unfortunately, she is writing about a complex process which may be more obscured than illuminated by colorful rhetoric.

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