Winter 1982

Book Reviews

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BOOK REVIEWS


One does not have to be a member of the criminal defense bar to recognize that Allan Dershowitz's book, The Best Defense, is an informative and interesting opportunity to share some of the exciting cases and professional assessments of an intelligent and zealous defense attorney.

The introduction and the last chapter (chapter eleven) set out the author's assessments of some of the major problems and dangers in the criminal justice system, together with his forcefully stated views of what is right and what is wrong with the system. The introduction focuses upon the system as a whole; while chapter eleven focuses on the defense counsel's function. Chapters one through ten are exciting case illustrations which support the author's assessments in the introduction and chapter eleven. The book is an account of Allan M. Dershowitz's "odyssey" through the manicured (and sometimes not manicured) forest of legal institutions with a number of exciting side trips and points of interest. Here, however, the points of interest are not monuments to virtue or breathtaking wonders of beauty, but rather living testimony of the hypocrisy of those in the administration of justice who are prepared to extol the virtues of honesty and integrity and who are not prepared to make these virtues a reality in their day-to-day professional activities.

One may legitimately call into question many of the author's assessments (or pronouncements). For example, I am very uncomfortable with the discussion in the introduction and the subsequent chapters of the factual guilt of the accused and "put[ting] the government on trial for its misconduct" without an adequate discussion of their relationship to our adversarial system of dispute resolution and our abhorrence of arbitrary, dishonest, and unlimited exercise of governmental authority. The absence of such a discussion will give the average reader the impression that the system is designed to let the guilty go unpunished and is unfair to the government. The public needs to know that the theory of our adversary system of justice is that if the three parts of the system (defense, prosecution, and judge-jury) conduct themselves in a manner that respects constitutional safeguards and is consistent with their func-
tions, the chances of convicting the innocent are minimized. Defense counsel’s vigorous advocacy of all matters favorable to the accused is required by the system not as a means of undermining justice or feeding counsel’s thirst for beating the system but rather to insure that the innocent is not convicted. Undoubtedly, some guilty people will escape punishment under this system. However, if the prosecutor performs his/her function in a vigorous and competent manner, this systematic error will be minimized. Moreover, society cannot be morally certain of the guilt of those convicted without a judicial system designed to give detached and unbiased consideration to all the relevant factors in a case. Our system, the adversary system, requires the prosecutor to advocate relevant factors that favor conviction; it requires the defense counsel to advocate relevant factors that favor acquittal; it requires the fact finder (judge or jury) to consider all relevant factors in a detached and unbiased manner.

Chapters one through ten are case illustrations of the assessments presented in the introduction, namely: (1) the lawyers’ and judges’ “conspiracy of silence”; (2) “nobody wants Justice”; (3) the alarming pervasiveness of judicial dishonesty; and (4) the system’s tolerance and encouragement of cheating, short of, or very close to, outright lying. One may quibble about whether the case illustrations are an adequate basis for the assessments in the introduction, especially “The Rules of the Justice Game.” Rule I (“Almost all criminal defendants are in fact guilty.”), Rule III (“It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.”) and Rule XIII (“Nobody really wants justice.”) are at best sweeping and inaccurate generalizations that will promote a general lack of confidence in our system of justice that far outdistances the flaws of the system. For example, without empirical data I do not see how it can be said that “Almost all criminal defendants are in fact guilty.” Guilty of what? Overindicting a defendant is not a rare occurrence in our courts. Rule III appears to be simple and correct; however, in some cases, conviction may be easier by respecting constitutional safeguards and thus increasing the fact finder’s confidence in the accused’s guilt. Rule XIII ignores the fact that many judges and prosecutors feel they have to “help the case along” in order to achieve justice. Where there are differing concepts of justice, one may want to define the concept before declaring that “Nobody really wants justice.” It is not clear whether all the rules are the author’s assessment of the practical realities of the system or whether they are his assessment of the real views of others in the system.

Potential readers should not be discouraged by my reservations.
The book should be enjoyed for what is is rather than what it is not. It is the assessments and courtroom experiences of a capable and zealous defense lawyer. It is not a presentation of statistically significant empirical data that establishes proof of the author’s assessments. Indeed, the cases are limited to problems encountered by a small segment of the middle class.

The presentation of the cases is well done. They are generally concise, with background facts that unfold like a series of short mystery stories. Accordingly, it is easy to read because readers are constantly gratified with fulfillment of their anticipations. Of course, the facts are presented through the eyes of the defense counsel-author, but this is not necessarily without value. In fact, readers of this type of book might want to know what facts the lawyer considers important and why. The author admirably performs this function with his description of the factual background of the Jewish Defense League bombing case, the Bergman nursing home case and the Tison mass murder case. One of the most positive characteristics of the book is that the author presents issues of law within the factual context of the cases. This enhances the reader’s ability to understand the principle of law involved. In addition, he often explains in non-legalistic language the relevant principles of law including, for example, the exclusionary rule (pp. 43-44), the general limitation of appellate review to issues of law (p. 69), joint enterprise (p. 92), plea bargaining agreements (p. 141), pre-trial discovery (p. 188), entrapment (p. 322), and attorney-client privilege (pp. 388-89).

The reader may be a little strained wading through heavy doses of the author’s ego and the ethnic tidbits. The institutional significance of most of the cases and the author’s role in these cases seems to be overplayed. The ethnic tidbits seem to be irrelevant sideline reminiscences. However, even these add to the book. They give the reader insights into the author’s frame of reference and they give the book a character which is distinctive from the typical legal technician’s writing.

The major contribution of the book is the case by case illustration of what I believe to be our greatest problem in the administration of criminal justice today—namely, the alarming level of dishonesty and lack of integrity in the performance of judicial functions. It is our greatest problem because it inspires and protects dishonesty on the prosecutorial level and the police level. And, worst of all, defense counsels tolerate and/or participate in this dishonesty. The reading public needs to know about the conduct of judges in cases such as the Jewish Defense League bombing, the Bergman nursing homes, the Deep Throat pornography, and the order of commitment to a mental institution because of the patient’s threat to sue. The author cracks the conspiracy of silence and exposes these problems to the public.
BOOK REVIEWS

While I do not consider The Best Defense to be as scholarly as Courts on Trial, by Jerome Frank, it is within a class of books including The Brethren, by Robert Woodward and Scott Armstrong, that are thoughtful and well documented reminders that “[t]hose who expect to reap the blessings of freedom must . . . undergo the fatigue of supporting it.” Knowledge of the system’s shortcomings is essential to any effective efforts in support of freedom. The Best Defense is a contribution to this knowledge.

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Subtitled “Police Discretion and the Dilemmas of Reform,” this book deals with reform as much as it does the police. Brown, an Assistant Professor of Political Science at the Virginia Polytechnic Institute and State University, examines the exercise and management of police discretion in light of the modern professionalism movement in law enforcement. Police professionalism, which has with its underpinnings in the progressive ideology of the past century, has sought to insulate law enforcement from the politics of local government. The primary thrust of police reform has been to secure autonomy and legitimacy through an emphasis on civil service, “scientism,” efficient administration and strict internal discipline. By internalizing this system of hierarchical controls, the reform movement was intended to have greater control over police discretion and a more effective, just process of law enforcement.

The author contends that professionalism has only served to mask the fact that police work is necessarily a moralistic and political endeavor. In their daily responses to class and group conflicts, the police must make political decisions regarding their arrest powers, and thus, they can apply laws indiscriminately. One tantamount consequence of the reform movement has been to isolate police policy-making from community and governmental influences. Having achieved this autonomy, the police have begun to take responsibility for clearly political functions, such as defining the nature and extent of the crime problem and determining enforcement practices.

Another dilemma of reform Brown discusses is that professionalism has allowed (even encouraged) the police to perpetuate the myopic role
definition of law enforcement as "crime fighting" to the exclusion of the many service and order maintenance functions performed by police. The preoccupation with crime control has heightened because fighting crime is presumably more amenable to the tenets of professionalism. Not suprisingly, crime control has also, of course, proved to be a very advantageous platform from which to generate public support.

The bulk of this book is devoted to understanding the contradiction between the uncertainties of police work and the administrative demands brought about by professionalism. Far from bringing discretion under control, the professional police department further shields and stimulates discretion by imposing even more ambiguous constraints on the police officer. The basic problem in bureaucratic control systems, that of subordinate non-compliance, is compounded in the police organization by the presence of a strong police subculture. One of Brown's basic contentions is that the subculture, as well as the very nature of police work itself, will continue to render ineffective the legal and bureaucratic attempts to control individual police discretion. Throughout the book, the author uses information from a study of three police departments in southern California. The research included empirical data from riding with patrolment, aggregate departmental statistics and survey data from members of the three departments. The author also makes good use of the major scholarly works in this area to clarify and support his points.

*Working the Streets* is a highly informative and readable book. The logic of Brown's analysis is outlined in a coherent manner, and the descriptive accounts of police practices are interesting and relevant. This book is a very important addition to the literature on discretion and police administration because it goes beyond simplistic single-factor explanations of police behavior like the authoritarian personality, departmental management orientations, or community ethos. The author clearly recognizes the individual, organizational and political influences on police behavior, but his most important contribution is his novel account of these complex relationships based on the nature of the conflict between police work and professionalism. He understands the nature of police work well, although the law enforcement community will not take kindly to his discussions of whimsical and haphazard enforcement priorities and practices. Additionally, his examination of the practical impact of the professionalism movement on law enforcement is unsurpassed and should stimulate much discussion among those interested in improving the police.

If the author can be faulted on any major count, it is his failure to acknowledge the potential importance of the higher education component of police professionalism. Police officers educated in the social sci-
ences should be better able to handle the moral dilemmas of police work in a more reasoned and just matter. Every other occupation involving human problems and interactions has certainly proved this maxim to be true. The author should not be criticized for the book that he did not write, but higher education in law enforcement has been an attempt to address two of the major concerns raised in the book—the preoccupation with crime-fighting and the insulation from community politics and control. The author might have given a little more attention to this aspect of the professionalism movement. Higher education will not eliminate discretion nor perfect administrative control systems, but it can help to sensitize police personnel to expanded role definitions of policing and generate a greater understanding of the many "publics" to be served.

The author, however, has been most successful in furthering our understanding of police discretion. The book should be required reading for all of those interested in the study of policing. Scholars and police professionals will find a host of innovative and controversial formulations. Students and other readers will find an interesting and realistic description of basic practices and problems in modern law enforcement. This book contains many important propositions which will stimulate much-needed creativity in the theoretical and empirical analyses of policing. Of equal importance, the author has pointed out a number of pitfalls in the reform process that will allow future attempts at improvement to proceed in a less naive fashion.

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This is a useful book on an important subject for the student of the history of American criminal justice. Up until the past two decades, the history of American policing had been neglected by scholars. Fogelson, Greenberg, Lane, Miller, Reppetto, Richardson, Schneider and Walker have all contributed to our understanding of policing, but their works examined the public police, which is only a part of the story, albeit an important one. Frank Morn's book has made a significant contribution to examining another aspect of law enforcement, that of private policing
and more specifically, the history of the Pinkerton Agency from its inception in 1851 to the 1930s.

Morn points out that it was not uncommon during the nineteenth century for the private sector to take upon itself tasks that the government was unwilling or unable to perform. Morn’s particular allusion was to the failure of government to protect private property. This, of course, runs counter to one of Locke’s basic maxims, that “government has no other end but the preservation of property.” Nonetheless, during this time period Americans displayed an antipathy towards big government, and this antipathy was reflected in, among other things, the type and availability of public law enforcement. By and large, the nineteenth century police forces of America resembled the inefficient parish forces of eighteenth century England. Americans were fearful of establishing effective centralized police departments that had long been associated with France and had more recently emerged in England. If American government was unwilling or incapable of coming to grips with this responsibility, some enterprising individual was bound to fill this void. Hence, Allan Pinkerton directed his efforts towards the emergence of private policing. The story of the Pinkerton Agency’s origin, the conditions under which it flourished and the transformations that occurred within it are as much a story of the government’s changing attitude toward its responsibility to protect property as it is a history of the Pinkertons.

Morn, however, was not simply interested in chronicling the Agency’s successes and failures. Rather, he viewed the rise of the Pinkerton Agency as mirroring the social history of the period, and he offers a convincing argument. The Agency is described in the context of the creation of the express and railroad industries, the need for Union spies during the Civil War, the emergence of professional bank and jewelry thieves, and the rise of organized labor with the strikes that preceded the early successes of that movement. Each of these events is explained in the context of four themes that are intertwined throughout the book: the often uneasy relationship that existed between private and public police; the gradual shift in private law enforcement from that of detection in the form of spying to prevention in the name of security; the attempt to modify the mystique that surrounded detective work in order to raise private policing to a respectable profession; and the development of a management philosophy that was often strikingly similar to that of the Agency’s corporate clients.

The book is a skillfully crafted and balanced history of the Pinkerton Agency. Moreover, the book also insights into the character and personalities of the elder Pinkerton and his two sons, William and Rob-
ert. Morn’s extensive use of the sources, and his judicious interpretation of the period makes the work a well reasoned and objective book.

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Imprisonment in America is a timely book, whose policy proposals are rendered more worthy of consideration by the recent release of 1981 figures showing a record high prison population growth rate. Tightly argued, well-reasoned and sophisticated, Imprisonment in America is an eminently readable book that offers valuable insights and lessons for academicians, practitioners, policy makers and interested laypersons. It is, moreover, a modest book, making no unwarranted claims for its policies or for the historical analysis on which they are based. Finally, it is a cautiously optimistic book, for it develops the argument that, now more than ever, policy makers can indeed fundamentally change penal practices.

Sherman and Hawkins begin by reviewing and critiquing the contemporary debate on imprisonment, correctly describing the situation as involving an unenviable choice between two one-idea positions: construct additional prisons to relieve overcrowding or declare a moratorium on building and use alternative punishments. By showing that overcrowding and capacity figures neither speak for themselves nor provide specific policy guidelines, Sherman and Hawkins emphasize the importance of broadening the debate beyond a consideration of quantitative dimensions to the more fundamental qualitative issue, namely, the very purposes of punishment itself. To address the normative issue of who should be punished and how, requires, however, a brief backward look into American history where the strong symbolic link between “real punishment” and imprisonment was forged.

This link lies at the center of contemporary difficulties, and the policy Sherman and Hawkins propose is designed to weaken, if not dissolve, that link. Put simply, they recommend that we use prison for what it can do and find other penal measures to do what it cannot. They advocate the use of incapacitation as the defining principle of punishment, that is, to tell us what punishment should be imposed; and the use of social service or rehabilitation as a limiting principle, that is, to tell us
what punishment may be imposed to ensure that punishment is just and humane; and finally, the use of legalism or retribution as a supplementary principle to deal with extremely serious offenses or to justify exemplary punishment. Concretely, Sherman and Hawkins recommend that we (1) reserve incarceration for serious violent and professional property and drug offenders; (2) use punitive non-incarcerative alternatives for other offenders; (3) impose determinate sentences of five years imprisonment, with stipulated exceptions so as not to depreciate the seriousness of offenses; (4) do not increase current capacity, but rather use any new space to bring conditions up to constitutional standards; and (5) maintain or begin truly voluntary social service programs.

While these proposals and the shift in the purposes of punishment they reflect will not please everyone, they have the virtue of unifying sentencing, construction and social service policies. Moreover, they define a policy that is flexible without being indeterminate. But regardless of whether one accepts these policy proposals, Sherman and Hawkins offer a number of insights that while not necessarily novel are particularly timely and merit reiteration. The following discussion does not exhaust their observations, but summarizes those I found most compelling.

Sherman and Hawkins convincingly demonstrate the dangers of the current "crisis mentality" in corrections, a mentality that because it focuses only on easily apprehended quantitative dimensions of the problem (e.g., overcrowding) has the capability to generate only short term, general and quick solutions. In contrast, Sherman and Hawkins argue that since current problems are deeply rooted, policy must be based on a solid understanding of qualitative normative issues. Moreover, it must be tailored to specific situations and cognizant of long term consequences.

Equally convincing is their argument that "overcrowding" and "institutional capacity" are terms whose meanings cannot be taken for granted as inherently unambiguous. Rather, people define these terms and use quantitative indicators on the basis of their own values and agendas. The current reliance on overcrowding figures, aggregated to the national level, concretizes this argument. As presently used, national-level statistics obscure variation and so inadequately define the problem at the level where it most tangibly exists (or does not exist), namely, state and local. Such figures cannot and should not provide the basis for federal or regional policies, which typically are presumed to apply equally to all constituent states.

Since this is explicitly a policy book, it comes as no surprise that Sherman and Hawkins caution against conceptualizing penal practices as determined principally if not exclusively by forces external to the
Of equal significance, they argue, are forces internal to the criminal justice system in the form of penal doctrines and conscious policies. While I found their dismissal of structural theories somewhat cavalier, this is a minor quibble and simply underscores the need to develop a causal model that links structural forces, conscious policy and doctrine and penal practices. Their general discussion draws a more compelling and valid lesson: policy makers may shape penal practices, but they cannot make and implement policy as they please. Rather, if policies are to solve problems, policy makers must use the past as a guide to present and future policies. Of central importance to Sherman and Hawkins is the legalist tradition, which equates real punishment with imprisonment and, in so doing, makes the prison a symbol, whose power stems from the solid balance of justifications (i.e., crime control, social service and retribution) it has provided since post-colonial times. Because some policy makers question the very legitimacy of prison as an exercise of state power, recent attacks on the legalist tradition provide these policy makers with the opportunity for a change in penal practice that is equally fundamental. But restricting the symbolic role of imprisonment and curtailing its actual use imply a corresponding expansion of the symbolic role and actual use of non-incarcerative alternatives. Sherman and Hawkins give us little guidance as to the form these alternatives would take. Perhaps alternatives to prison are of little concern because they consider the symbolic link between imprisonment and punishment sufficiently weakened by recent criticisms as to minimize concerns with the legitimacy of alternatives. But I suspect Sherman and Hawkins have overestimated the strength of recent criticisms of imprisonment and underestimated the strength of the bond between “real punishment” and the prison. If this is indeed the case, then policy makers will have to devote greater thought and effort than Sherman and Hawkins anticipate to the development of non-incarcerative alternatives that, in the minds of practitioners and public alike, symbolize “real punishment.”

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In some late nineteenth century penitentiaries they put prisoners in iron masks. In others they suspended convicts from hooks and pulleys engineered to inflict excruciating pain. At Sing-Sing they hung recalcitrants by the thumbs, sometimes so long that they bled from the mouth. And in an otherwise unremarkable institution in Kansas, they forced inmates face-down into a “water-crib,” hands cuffed behind their backs, and slowly filled the coffin-like contraption with water. “You take a man and put him in there,” a guard asserted with some pride, and it “wilts him at once” (p. 20).

Other penal implements of that era were less likely to leave a man’s “system ... all deranged,” but even the ordinary punishments of the time were cruel enough: thirty, forty, fifty lashes at a stand, straitjackets, starvation, and solitary confinement (p. 20). And the same measures also prevailed in the mental institutions of the era. Beatings were so common that attendants testified they saw inmates “struck most every day” (p. 20). At the Utica asylum, patients were routinely “bleached out”—left to soak in cold water—to lighten the discolorations of their skin from the buffetings they endured (p. 22).

Such unblinking brutality sets the stage for Conscience and Convenience, David Rothman’s long-awaited account of twentieth century treatment of the deviant and dependent, just as it provided the impulse for Progressive efforts to return to the “reform” tradition of ante-bellum Jacksonian America, which Rothman traced so brilliantly a decade ago in The Discovery of the Asylum. In both books Rothman illuminates an age in which self-styled reformers mobilized to supplant the callous practices of the past with modes that might rehabilitate. In his previous book, Rothman described the emergence of the institutional regime of the penitentiary, the reformatory and the insane asylum. In Conscience and Convenience, he details the reclamation of that regime from the abuse to which it showed itself so lavishly liable.

Nonetheless, though humanitarian horror at the treatment of the nation’s derelicts impelled Jacksonian initiative and Progressive reform alike, Rothman did not begin his previous book as he begins this one. He did not set forth from the nineteenth century’s grisly discoveries of lunatics confined in rat-infested cellars, nor from its dawning abhorrence of public floggings and executions. He started instead from a past we had very nearly forgotten, in which criminals, paupers, orphans, and madmen were encompassed within the community rather than being excluded from it in vast congregate institutions. He reminded us vividly
and vivifyingly that there were once other ways to deal with deviants and delinquents. His narrative itself declared those alternatives and, indeed, breathed them. The nineteenth century inventors of the asylum founded their new institutional order on a deep fearfulness for the coherence of the democratic society that they saw developing around them and a profound fidelity to the communal system of social control which was the only one that they had ever known.

Rothman saw in those apprehensions and ideals of the original promoters much more than Jacksonian devices for dealing with the outcasts of an emergent capitalistic economy. The asylum allowed access to the ambitions and anxieties of the early republic itself. The founders of the asylums intended to reorder their entire society rather than just redress a few isolated imbalances or resolve a few sequestered social problems. These individuals refocused the thinking of their era by reconceiving the subjects of crime, madness, poverty and orphanhood which, prior to the Jacksonian reformers, had been viewed as congeries of several subjects. The Jacksonian reformers viewed them as an amalgamated subject which was then seen as central rather than peripheral to the thought of an era. Just as the partisans of the new penitentiaries and mental hospitals engaged the fullness of the American moral order, so did Rothman. In following their remarkable endeavor, he wrought a remarkable book.

In following the less remarkable endeavor of the Progressives, Rothman has written a less remarkable book. It was symptomatic that The Discovery of the Asylum began with a war of two worlds, the traditional cosmos of face-to-face community of the eighteenth century and the impersonal institutional complex of the nineteenth century. And it is equally symptomatic that Conscience and Convenience begins with some severities inherent in that impersonal institutional order but does not challenge the underlying foundation of that order. The would-be reformers of the Progressive period entertained no evident apprehensions about the American experiment itself; they scarcely thought in such terms. Theirs was a merely managerial perspective, and Rothman embraces it.

Where The Discovery of the Asylum opened vistas on vast ranges of American thought and action, Conscience and Convenience affords a view of a single specialized sector. Where The Discovery of the Asylum expanded the conventional history of prisons and madhouses until it became indistinguishable from the moral and political history of the nation, Conscience and Convenience embodies the limited vision and specialized concerns of the professional personnel in criminal justice and mental health. Far from addressing the problems and prospects of social control in a democratic culture, Rothman confines himself to an oppressively constricted canvass of tactical differences between competing interests within the
altruistic establishment. Where The Discovery of the Asylum was a landmark in American social history, Conscience and Convenience represents a retreat to a more traditional institutional history.

Yet, in its own right, Conscience and Convenience is an extraordinary institutional history. Though it offers a narrower notion of the world and its possibilities than its predecessor, it displays a far sharper sense of the workings of that world. Though it never quite comes to a moral judgment or a policy prescription, its very indecision approach allows its story to emerge more directly.

And its story is a significant one. The reformers of the Progressive era developed the concepts of probation, parole and indeterminate sentencing. Their reforms have thus been the principal means by which we have disposed of adult and juvenile offenders alike for the last three generations. Indeed, Conscience and Convenience is very nearly the first comprehensive history we have had of twentieth century prisons, mental hospitals, juvenile courts, training schools and outpatient clinics. If Rothman merely provided an account of each of these institutions, that would be no mean achievement. But he does much more. He shows that, across disparate domains, a shared Progressive purpose informed a common Progressive program.

When professional altruists of the Progressive period looked upon the asylums that altruism had invented in the age of Andrew Jackson, they were appalled. They were appalled by the blatant brutality which engulfed those institutions, by the corruption which pervaded them and by the concern for custody which crushed all thought of curing in them. Furthermore, they were appalled by a regimentation which went back to the beginnings of incarceration.

The Jacksonians, distressed at a disorder that seemed to be advancing apace, had deliberately designed their prisons as fortresses and their asylums as monasteries for the mad, in order to impose a discipline that appeared to be ebbing in their society as a whole. They meant their institutions to provide the martial order that the faltering family and the decaying community no longer could. Prisoners would shuffle along in lock step. Orphans would parade in military formation. Lunatics would wear uniforms. And all would observe rules of silence and submit to the regulation of the clock.

Progressives recoiled from such routines. They saw in them neither a diagnosis of an undue disorder nor an antidote to an unmanageable melee. On the contrary, they saw in them only "a style of operation that was rigid, inflexible, and machine-like" (p. 43). Hence, they rejected the uniformity that their intellectual precursors had sought so strenuously to instill.
While the Jacksonian reformers feared a decay of discipline, the Progressives feared its excess. Where the Jacksonians wanted to corset the day by the clock in order to counter an incipient democracy that they dreaded, the Progressives wished to relax the institutional environment in order to prepare inmates for an established democracy that they admired. They sought policies that "substituted discretionary authority for uniform rules" (p. 44).

In everything that affected the institutionalization of the deviant, Progressives advanced "an individual, case-by-case strategy for rehabilitation" (p. 43). Against the mechanical routines of conventional penology, which put every prisoner through the same paces in the same striped uniforms, Progressives urged a recognition of differences among inmates and a responsiveness to their needs. Against the "compelled conformity" of nineteenth century juvenile institutions, which subjected every delinquent to the "cold, hard discipline of a military unit," Progressives counselled a redesign of the reformatories to enable youngsters to realize their own particular potentials (p. 266). Against the monopoly of the asylum, which put every madman under a common custodial management, Progressives proposed a diversified array of in- and out-patient facilities that could cure the mentally ill by attending to their specific "individual histories."

A decade ago, at the conclusion of The Discovery of the Asylum, Rothman looked ahead to Progressive criticisms of institutional rigidity and saw in them intimations of a more modern appeal to de-institutionalize the deviant. But in the years between these books, he came to see that his anticipation of the significance of the early twentieth century was mistaken. The Progressives were not devotees of decarceration and were certainly not skeptics of the state. Their dismay at prevailing penal practice never led them even to consider dismantling the penal operation itself. If they were appalled with institutions as they existed, they were enthralled with institutions they imagined might be. If they were keen to keep a few individuals from confinement, they were keener still to keep a great many behind less obtrusive bars and walls, in what they believed would be "non-institutional institutions" (p. 262).

Far from seeking to enervate the asylum, Progressives attempted to animate it. They decried its regimentation and repressiveness, but they never doubted that those qualities were its eliminable excesses rather than its essence. They remained sublimely certain that suitably altered institutions would enhance individual growth rather than stunt it.

As they secured such alterations—probation, parole, the indeterminate sentence, juvenile courts, training schools, psychiatric outpatient clinics and "temporary" commitment statutes—Progressives rearranged the landscape of deviance and dependence in ways which have survived
to our own time. The instruments they devised have "dominated every aspect of criminal justice, juvenile justice, and mental health" ever since (p. 3).

But by now it has become apparent that their domination has been disastrous. It has neither humanized institutions nor improved their inhabitants. On the contrary, it has augmented the sway of the state, increased the incidence of incarceration, and enlarged the room for arbitrary maneuver of prosecutors and custodians alike.

Rothman is at his brilliant best in illuminating these consequences. He helps us to see that the Progressives' very commitment to flexibility fostered the expansion of governmental prerogative. He shows us that their attachment to probation, parole, and outpatient services actually increased recourse to confinement. And he enables us to understand that their espousal of reform ultimately offered more to the keepers of the asylums than to the kept.

Progressives promoted flexibility but seemed scarcely to notice that it led inexorably to labyrinthine regularities all its own. The case-by-case approach resulted in new cadres of case-workers and new definitions of appropriate procedures. Close consideration of individual cases demanded development of measures that had never been necessary in the era of uniformity. Hence, the Progressives ended by establishing more cumbersome and unresponsive bureaucracies than the nineteenth century had ever known.

Two centuries ago, Edmund Burke pronounced judicial discretion a perilous thing at best. Progressives scorned such scruples. Sublimely certain that attainment of the promise of American life required the public sector "to guide, even dominate, the private sector," they were prepared not merely to install more agents of the state, but also to allow them more leeway (pp. 49-50).

Undisturbed by the extension of the scope of state surveillance implicit in probation, they urged that probation officers be allowed unlimited latitude in their investigations. Unmoved by misgivings about severing the connection between a crime and its punishment, they recommended an indeterminate sentence, running routinely from one day to life, for every felony. Undaunted by their own leading legal theorist's admonition that "the powers of the court of star chamber were a bagatelle" compared with those of the juvenile court, they cheered every amplification of that court's jurisdiction (p. 231). Undeterred by nineteenth century impediments to involuntary commitment, they passed laws permitting "temporary commitment" without medical or judicial determination of insanity and allowed the mass of eventual in-
mates of the mental institutions to enter through that vestibule (pp. 326-27).

Far from being anti-institutional, Progressives were quicker than their predecessors to lock deviants up, and more inclined to throw away the key. Progressive innovations were promulgated as increments to the custodial and therapeutic repertoires, not as substitutes for them and certainly not as decrements of the range of differentiated response to deviance. As Rothman points out, reform actually increased the proportion of people subject to the surveillance of the asylum.

Probation placed more rather than fewer people under the authority of the criminal justice system. Eased commitment procedures and augmented outreach promoted a steady increase in mental hospital populations. Indeterminate sentences resulted in longer rather than shorter prison terms, and the juvenile courts held youngsters in reform schools for more extended periods than nineteenth century norms ever countenanced. Parole left its intended beneficiaries liable to the correction of the state even beyond the completion of their confinement.

Progressive efforts to individualize the treatment of the deviant and dependent provided an immense panoply of manipulative and managerial opportunities for the functionaries of the asylum systems, and few failed to take advantage of them. Prosecutors, judges, and criminal lawyers all found that “probation, as it actually functioned, facilitated their work in critical ways” (p. 98). For probation did not serve to secure “individualized” verdicts sensitive to the rehabilitative potential of offenders; it served to clear crowded court dockets for judges, win convictions for prosecutors, and gain suspended sentences for criminals and their attorneys (p. 99). It served, in short, to promote plea-bargaining. It was granted, in the great majority of cases, to those who pleaded guilty to a lesser offense than the one on which they were originally indicted. And it was granted, in more than a few courts, to none but those who “copped a plea” (p. 100).

Prosecutors found that parole also enhanced their power to plea-bargain. They favored it for that reason as others did for other motives. All its supporters served their own interests in espousing it, and all those interests were vital to its persistence in the face of widespread public opposition. State legislators preferred to perpetuate parole and brave a few caustic newspaper editorials rather than appropriate funds for new prison construction and arouse a mass of angry taxpayers. Wardens resorted to parole at first to maintain discipline among their men, depended upon it later to placate convicts who came to consider it their right, and never wavered at any time in their belief that it was “an essential element in protective penology” (p. 184).
Still more disparate coalitions sustained, and found sustenance in, the juvenile court and the psychopathic hospital. For their own selfish reasons, child welfare leaders, private child care agency operators, prosecutors, reformatory superintendents, police officials, judges and workhouse managers supported the court, and general medical practitioners, psychiatrists and medical school professors embraced the hospital.

In each of these areas, Rothman reveals a tension between the innovations which he identifies with conscience and the narrow satisfaction of needs and interests which he attributes to convenience. In each he connects conscience to a band of men and women he calls reformers and convenience to the people, mostly male, who managed the dominant institutions of the day. And in each he traces the ways in which reformers proposed while bureaucrats disposed.

But for all his shrewd sensitivity to the conflict between functionaries and reformers, Rothman fails finally to capture either camp. His categories and conclusions are richly illuminating yet ultimately uncompelling. His data disclose more than he means them to, and demonstrate less.

On Rothman's account, ideas alone had causal efficacy in the alteration of the asylum and reformers alone had ideas. Politicians and administrators might muffle or even mutilate innovative impulses, but they did not originate them. Professional altruists were the sole source of social energy.

On Rothman's own evidence, however, the reformers never truly implemented their ideas or even forced any significant fusion of their own aspirations and the ambitions of others. Conflicts between reform and custody were “always resolved” in favor of custody (p. 144). Reformers could not get legislators to pay asylum personnel as much as the lowliest laborer; wardens, on the other hand, got the same legislators to appropriate funds for “incredible” walls without a murmur of protest. Reformers could not secure a single qualified probation officer in most jurisdictions; judges sinecured whole crews of their own cronies, even when presented with lists of superior candidates by the reformers (pp. 157-58).

The monotonous ineffectuality of the reformers renders Rothman's assumption of the centrality of philanthropic theory palpably implausible. Rothman cannot conceive that other elements which promoted the Progressive enterprise had plans and purposes of their own. He is, therefore, powerless to account for the invariable failure of these idealists to attain their ends. Because he assumes that philanthropic ideation was the only origin of social innovation, he has to fall back again and again on fictions of good designs “deteriorating” over time, when he might
have done better to wonder why "the gap was [so] enormous" from the beginning between promise and practice (pp. 60, 82-83).

In mental health, for example, the most exemplary outpatient programs established themselves as diagnostic way stations on the road to the state hospital. They made no sustained effort to cure the patient in their own right. They simply labelled him and passed him along. They were always "more eager to make referrals than to deliver treatment," always more solicitous of local physicians who opposed any extension of their services than of patients who might have welcomed it, always more constrained by public expenditures devoted "almost exclusively to institutional care" than by their own putative program (pp. 326, 371).

In penal administration too, the most celebrated of reform measures took shape according to considerations of custody and cost. Parole did not begin as a rehabilitative device and then undergo gradual "dilution and diminution" (pp. 82-83). It always appealed to state legislators as a means to stave off the staggering cost of new prison construction. Probation did not arise in a flexible form and then become indifferent to the individuation that reform rhetoric required. It always reflected rigid budgetary priorities and the political pressures that produced them. It was always awarded for misdemeanors, where the culprits would otherwise have burdened local jails, and denied for felonies, where the offenders could be fobbed off on state-funded institutions.

In all these regards, Rothman's evidence undermines his assumptions by exposing far more powerful influences on affairs than the ideas of reform-minded intellectuals. In a wide range of other areas, his data undo his argument by showing that even those influences of "convenience" actually altered outcomes and attitudes very little.

Rothman begins with the assumption that Progressive reforms "transformed public attitudes and social policies toward the criminal, the delinquent and the mentally ill" (p. 3). But his narrative itself shows nothing of the sort. If anything, it lends itself more readily to the conclusion that nothing changed.

Rothman, of course, resists this recognition. He contrasts "the perspective that emerges from this study" with the perspective in Michel Foucault's *Discipline and Punish*, and he rebukes the Frenchman for finding in the prison "an unvarying form of discipline" from the early nineteenth century to the present (pp. 10-11). But Rothman never actually musters any evidence which would unduly disconcert his sardonically radical rival. Indeed, Foucault would find much comfort in Rothman's materials, because they suggest patterns of thought more persistent than the American is willing to acknowledge. The Progressives who condemned the asylums of the late nineteenth century echoed the concerns
of their predecessors of the Jacksonian period and anticipated the activists of our own day.

From the first, reformers have painted the same pasts of prior neglect and painted the same paths of prospective renovation. To the present, they have taken the same critique as their point of departure and arrived at the same assertion of incorrigibility at the end of their endeavors, and then started the cycle all over again. The very perenniality of their ideas and ideals seems, as Foucault says, the doom of the dream of progress.

Indeed, the invariance of ideas and ideals is only the beginning. For if those changed little in the early twentieth century, actual conduct changed less. Beyond the circles of their own sympathizers and the range of their own rhetoric, reformers were almost utterly without effect.

The Progressive prison, for example, never even "approximate[d] a normal community," as altruists assumed it would, let alone resembled a therapeutic community, as they imagined it might (p. 132). Reformers simply did not reach the wardens, who remained as obsessed as ever with "order to the exclusion of all other considerations" (pp. 148-49). Insofar as prison personnel even saw the conflict between reformation and control that seemed so fundamental to the intellectuals, they resolved it unfailingly in favor of control (pp. 148-49).

Probation never approached Progressive specifications either. As late as 1939, a survey showed that probation departments in only three states in the nation carried out intensive investigations. Under such conditions, the states were powerless to provide either of the things Progressives promised: they could not judge suitability for probation in the first place, and they could not sustain supervision after sentencing.

Parole boards failed so abysmally to maintain surveillance that Rothman himself concedes that the vast majority of parolees might as well have been allowed unconditional freedom. Reform schools perpetuated the repressive and essentially punitive modes of the past and proved as incapable as their predecessors of reforming the youngsters who passed through their gates.

Mental hospitals managed a record "meager even by standards of criminal and juvenile justice" (p. 324). In a very real sense, Rothman devotes almost one hundred pages to detailing a program that was never even attempted, let alone aborted. Throughout the Progressive period, mental institutions remained exactly what they had been in the Jacksonian and Victorian eras: almshouses and old age homes of last resort.

It is disconcerting enough that Rothman reports all this yet talks of transformation. It is more disconcerting still that he probes that institutional care with acuity, apprehends it as it was, and yet alleges water-
sheds. For the institutional usage he describes was the very antithesis of the individualized attention reformers said that they sought for inmates.

Under conditions that assured the impracticability of therapy and the persisting primacy of punishment, individuation was, in the words of a sociologist of the day, “a farce.” It was a farce in the field of juvenile probation, where the sociologist’s investigation showed it so, and it was a farce in every other area of asylum reform as well (p. 244).

In Progressive theory, probation was to “develop the personality through adjustment...individual by individual” (p. 89). In practice, probation rarely provided more than an impersonal set of printed stipulations to be signed by its recipients. Probation officers spent an average of ten minutes a year with each probationer in the jurisdictions where they saw their cases at all. They rarely had time to do more than ask a few stereotyped questions and mark and file a card. And such indifference to individuality in the administration of probation merely amplified the insensitivity to personal predicaments and potentials with which probationary status was conferred in the first place. Courts ignored the claims of felons and favored those of misdemeanants according to the dictates of the local budget. Judges disdained the appeals of the poor and promoted those of the affluent according to the directives of a “dual system” that afforded leniency to culprits closest to the magistrates in their course of life (p. 103). In one way or another, probation was generally granted or denied by men making categorical judgments completely oblivious to the character of the individual offender.

In the institutions themselves, therapists were far too few to have had any substantial effect. Prison psychiatrists never did offer individualized treatment. They simply segregated inmates into inert categories such as improvable, hardened, and hopelessly defective. “They fit offenders into boxes but did not explain how [those offenders] came to enter such a box, nor how they could be moved out of it” (pp. 134-35).

Asylum work remained custodial work, and prison work in particular remained police work. The perseverance of wardens in recruiting prison personnel trained only for guard duty did not indicate distortion of the reform impulse as Rothman avers. It declared the bankruptcy of the reform impulse in the first place. The persistence of penal authorities in holding inmates en masse rather than helping them one by one did not demonstrate subversion of the fine design of the reformers. It represented a realistic appreciation of the reformers’ incapacity to carry out the individuation they extolled.
Insofar as the individuation the Progressives prescribed was ever instituted, it was, ironically, detested by its recipients. Incarceration that had no definite end in sight entailed exquisite mental pain and often cost considerable physical suffering besides. Prisoner protest never influenced the Progressives because they were always confident that they knew what was best for the inmates. From their lofty moral vantage, the reformers simply ignored the actual experiences of the asylum. *Conscience and Convenience* traces the reformers' indifference to the life that evolved behind those thick walls. Rothman's perspective is the external, managerial perspective of the Progressive intellectuals. He fails to penetrate the secret precincts of asylum communities even where his own theoretical premises compel him to do so.

The Progressive model of rehabilitation made the inclination of the inmates crucial. They had "to be so open and receptive to treatment as to be almost already cured" (p. 397). Yet the reformers never attempted to fathom the conditions of the receptivity that their theories required. They just put a psychiatrist or social worker in place and presumed that all would be well.

In fact, all was rarely well, for the norms and values of the captive community generally intervened. Prisoners refused to confide in their assigned therapists because they believed the therapists were agents of the authorities, prying for information that could not honorably be given. Furthermore, convicts scorned psychotherapy itself because they believed it a mark of inferiority reserved for the mad.

Rothman does not explore the collective values that vitiated the therapeutic enterprise. Ultimately he is as uninterested in the culture of the asylum as his reformers were. He senses the inmates' "hostility to Progressive innovations" (p. 404), but he never examines the causes or consequences of their animosity.

It is not easy to know what to make of men and women who went on reciting reform rhetoric when it bore so tenuous a relation to reality. Rothman sees them as honorable and decent people, and he excuses their complicity in the continuing callousness of the asylums with George Eliot's dictum that "ignorant kindness may have the effect of cruelty; but to be angry with it as if it were direct cruelty would be an ignorant unkindness" (pp. 82-83). But Rothman's excuse bends over too far backwards on the reformers' behalf and obscures some obvious truths. The reformers could not have been ignorant of their cruelty. Their failures were neither subtle nor slow to appear. They were, on the contrary, blatant from the beginning.

The penal reformers who placed their highest priority on the practice of probation could not have avoided noticing that their innovation
was a fiasco. Although they had insisted that "in probation the work of investigation ... is two-thirds of the battle," they burdened probation officers with caseloads that insured that any attempted investigations would be "perfunctory and superficial" (pp. 66-67). Though they had "composed lists of personal attributes for probation officers that came dangerously close to the requisites for educated sainthood," they proposed to pay salaries substantially lower than those of unskilled factory workers (p. 64). Reformers must have comprehended that the defeat of their design was inherent in the structure of such situations. And yet, reformers accepted the frustrations of their efforts without much more than an occasional murmur of protest. When conflicts between custody and rehabilitation were consistently resolved in favor of custody, they uttered no complaint. When institutional discipline proved cruel and capricious, they bowed before the insistence of wardens that there was no other way. When probation officers were assigned impossible loads, "impossible in the sense that reformers' expectations could not be met," they launched no campaigns to improve "the absurd conditions" under which their agents labored (pp. 86-87, 90).

As Rothman portrays them, the Progressives had no breaking point whatsoever, no position beyond which they could not be pushed. In their advocacy of the juvenile court, they called probation "the keystone which supports the arch of [the] law" that constituted the court. They swore that, "without it, juvenile court could not exist" (p. 218). Nevertheless, they stood silently by while probation personnel remained undertrained, underpaid and utterly incompetent to their calling. In their championship of the mental health movement, they gave "central significance" to the outpatient clinics. Yet they remained immobile while institutional superintendents scuttled such clinics and preempted public moneys almost exactly as they had in the past (p. 367).

Decade after decade, Progressives defended systems violative of all their purported priorities. They disregarded the "distortion of their original designs," blaming "stingy legislators and poor administrators" without ever making any discomforting demands on either (p. 113). Moreover, the reformers were not unaware of the situation. "National surveys, investigations of particular institutions, and institutional reports themselves all confirmed" the dismal truth that reform was a nullity (p. 269).

Despite failure upon "pitiful" failure, the reformers never once reconsidered their tactics or reconceived their strategy (pp. 83-84). Their eagerness to do good testified to the fervor of their faith, but their ignorance of how to implement their policies served as evidence of the ultimate incoherence of their ideas. For though they thought of themselves as pragmatists, they failed to connect beliefs and behavior.
Nonetheless, they proceeded in the luminous logic of their true belief, which enabled them to justify incarcerating a youngster who had committed no crime in the full assurance that confinement would be in the boy’s best interest. Once they intoned their ritual conviction that “individual welfare coincided with the well-being of the state,” they felt free to dispense with the adversarial apparatus that had governed juvenile justice for centuries (p. 213). Once they embraced the pious presumption that the institution to which they consigned the lad was a place of treatment, not punishment, they could justify the abrogation of his procedural rights. Once they assured themselves that there was no discernible distinction between humanitarianism and social control, they could accept almost any imposition upon the child in the sublime certainty that the state was simply doing a duty it “owed” its “helpless members” (p. 234).

Reformers who redefined reality under the aspect of their faith, hope and charity reverted after a very short span to the same verbal mystification in which the nineteenth century superintendents had taken refuge, namely, that the institutional milieu had a remedial value in itself, apart from any particular therapeutic programs it did or did not provide. Ensnconced in that metaphysical cocoon, the reformers were quite beyond the reach of the facts that they professed to prize.

Rothman regularly grants the reformers “the best of reasons” for their actions (p. 214). Good motives outweigh bad results, and only reformers have good motives in his account. Their benevolent designs deteriorate, but only because selfish politicians undermine them. Intellectuals do not defend their vision effectively, but only because they are insufficiently mean and cunning. They depend upon the naked purity of their ideas. They embody “the ideal,” in occasional alliance and ultimately unremitting tension with the institutional powers who personify “the practical” (p. 45).

Rothman fails to see the other side. He concedes no “conscience” at all to the administrators, who are stick-figures devoid of ideas or integrity. Conversely, he admits no “convenience” at all in the reformers, who are stick-figures devoid of all pragmatic interests.

If we would come to a more adequate conception of the reform impulse, we would do better to see it in ideological than in altruistic terms. For ideology conveys not only its imperviousness to experience but also its elements of self-serving convenience.

Reformers were never the altruists that Rothman alleges. They did not take “patient welfare” as their “ultimate consideration” any more than superintendents did, and they did not disdain “institutional survival,” either (p. 375). They expressly aimed to incarcerate more Ameri-
cans than ever; and if they meant to improve some asylums, they also
meant to leave others untouched, as “back-ups,” to contain the incorri-
gible and incurable and to terrorize the rest of the institutional popula-
tion into better behavior.

Progressives may not have had precisely the same interest in the
asylums as district attorneys or guards on the wards, but they also al-
ways placed their highest priorities on ends other than the well-being of
prisoners and patients. Indeed, they sought their own convenience more
self-servingly than some others, because they set themselves so exaltedly
above all empirical accounting. The justification of the convenience of
researchers has always been that, whatever their present ineptitude, they
will learn for the future. That justification has never afforded a convinc-
ing answer to the question of the cost of such learning. On the evidence
of this book and its predecessor, it affords no answer at all to the ques-
tion of the benefits of such learning. Rothman has now traced a tradi-
tion in the treatment of the deviant and dependent in America which
spans nearly a century and a half. In all that time, he has uncovered
almost nothing to indicate that the country would act on the ideas of the
reformers even if they had any.

On the back of the jacket of Conscience and Convenience, Sheldon Mes-
singer says that the book “contains important lessons for current reform-
ers, above all the need to monitor the results of their efforts.” And
indeed it does. But Messinger goes on, in that comment, to concede all
virtuous initiative to reformers, so he misses the more disturbing lesson
that Rothman all too rarely draws. As important as it may be for re-
formers to monitor the results of their efforts, it is more important still
that they assess the condition of their own consciences, and that they
and the rest of us consider the conveniences hidden there. For under
color of selflessly serving others, reformers have served themselves very
well. It may be that their inability to advance the interests of those they
have chosen to champion owes something to their more earnest absorp-
tion in efforts on their own behalf.

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Crime and Justice is a continuation of an annual series of commissioned essays on crime, law and the administration of justice sponsored by the National Institute of Justice. The essays in this volume review writing and research on topics from psychiatry, psychology, history, philosophy, criminology and political science. This review briefly summarizes the specific topic of each essay and then examines two of the essays in greater depth.

The present volume consists of a very brief introduction followed by seven contributed essays. Martin Orne's review of the use of hypnosis in court describes the role of hypnosis in forensic psychiatry and proposes safeguards regarding its use to minimize potential abuses. The next essay, written by Elizabeth Loftus, is an examination of studies of eyewitness testimony and the impact of such testimony on decisions of juries. A third essay, written by Michael Ignatieff, reviews his own recent social history of punishment (A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1978) along with the works of Michel Foucault (Discipline and Punish, 1978) and David Rothman (Discovery of Asylum, 1971). Ignatieff's review and criticism are excellent—he effectively characterizes those historical accounts as misconceiving the role of the state in maintaining social order and regulating individual behavior.

In a fourth essay, Clifford Shearing and Phillip Stenning discuss the growth of modern private security as an emerging form of social control. David Richard's essay entitled "Rights, Utility, and Crime" reviews the philosophical perspectives of John Rawls and H.L.A. Hart in the context of a broader discussion of the antagonism between the utilitarian and natural rights perspectives on criminal law and the administration of justice. The two remaining essays by Richard Sparks and Ted Robert Gurr examine surveys of criminal victimization and historical trends in criminal violence respectively, and are discussed in greater length below.

In general, the essays included in this volume cover much important writing and research. Some, however, are less balanced than others, and a few of the essays are wanting in thoroughness. The problem of balance is exemplified in an otherwise excellent essay by Richard Sparks entitled "Victimization Surveys—An Optimistic Assessment." The essay reviews the brief history of victim surveys and describes the purpose and nature of the ongoing National Crime Survey program. Sparks concentrates primarily on methodological difficulties in victim surveys and effectively describes how the difficulties may invalidate sur-
vey estimates of the incidence of crime. His chary treatment of the utility of victim surveys, however, is unjustified. While some caution regarding the surveys' utility may be warranted given their methodological shortcomings, there is too little in the essay regarding the value of victim surveys that is—as the subtitle suggests—optimistic. Greater discussion of the surveys' strengths and their uses in criminal justice policy and research would have given the essay more balance and the tone of optimism that Sparks intended.

In contrast is Ted Robert Gurr's contribution on historical trends in violent crime in England, the United States and other Western countries. While Gurr devotes great attention to the limitations of official records on interpersonal violence for historical analysis, he seems to ignore those limitations in interpreting the results of previous historical studies of violence. One of the limitations Gurr notes is that most estimates of rates of violence for the medieval and early modern periods of England are "subject to substantial error because population data for pre-modern English towns and counties were considerably less accurate than records of violent deaths" (p. 305). The ensuing analysis is therefore quite surprising; Gurr compares annual homicide rates between thirteenth and twentieth century England with little regard for errors in population data, and argues that medieval England was considerably more violent than contemporary England. Indeed, he concludes that early English society was "a society in which men [but rarely women] were easily provoked to violent anger and were unrestrained in the brutality with which they attacked their opponents" (p. 307). At a later point he adds:

The general trend which emerges from the evidence is nonetheless unmistakable: rates of violent crime were far higher in medieval and early modern England than in the twentieth century—probably ten and possibly twenty or more times higher . . . . The evidence thus clearly favors the possibility, raised at the outset of this section, that the nineteenth and early twentieth century decline in violent crime in England was the latest phase of a substantial longer trend. (pp. 313-14).

Although it is quite possible that Gurr is correct and medieval England was more violent, empirical comparisons between two historical periods may produce seriously flawed estimates of actual differences in levels of violence, due to the limitations of historical data that Gurr notes at the beginning of the essay. The result is a problematic and unconvincing treatment of trends in violence between the thirteenth and twentieth centuries. Gurr should have discussed at greater length the possible impact of flaws in the cross-century comparisons and supplemented the analysis with other historical accounts less reliant on empirical trends.
Quite certainly, many of the essays included in *Crime and Justice* are scholarly and well written. In some instances, however, readers will be disappointed by an essay’s unbalanced character, and in others by an essay’s wanting treatment of a subject. And because the essays are reviews, readers familiar with the essay subjects will find little new material in many of the selections. Nevertheless, all of the essays are useful for reference and review, and a few significantly advance the understanding of crime and society’s reaction to it. As a series, *Crime and Justice* is designed with the optimistic hope of making a “growing and lasting contribution to knowledge about crime and its treatment” (p. vii). The present volume would have more completely realized this hope if the editors had more effectively screened and edited the selections they published.

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**IN DEFENSE OF WHOM? A CRITIQUE OF CRIMINAL JUSTICE REFORM.**

This small paperback is a historical overview of the development of criminal law, the legal profession and the public defender system in the United States as seen by a member of the New Criminology school. It is primarily an attack on the public defender system which is seen as a ploy to assuage the collective conscience in a cost-effective manner.

The historical material is interesting and informative. It starts with the nineteenth century shift from a laissez faire criminal justice system and the beginning emphasis on capitalism, carrying the theme of exploitation of the poor to our present justice system.

Despite its obvious biases against corporate capitalism, which is posited to be the cause of the majority of crime problems in this country, the book is well worth reading. It is provocative in the sense that the author highlights well-known weaknesses in the justice system with which one must agree. Whether the author’s solution of informal, as opposed to the present formal and institutionalized, methods of crime control would work in our society must be an academic decision on the part of the reader.

Although the dialogue is relatively easy to read, the inclusion of numerous direct quotes, many of which are taken out of context, interrupts the flow of the author’s ideas. Therefore, it is a book you will have
no trouble putting aside, but you will not hesitate picking it up again. It is provocative and worth the time spent to read it.

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The greatest value of Courts, Prosecution, and Conviction, an analysis of English criminal procedure based upon research done in England and Wales in 1978, is as a text for university courses in comparative criminal justice systems. The arrangement of the material, being generally the same as that followed by American texts, lends itself to such an exercise. The book monitors the defendant’s progress sequentially from pre-arrest contacts through arrest and court disposition. The corrections component of the system is not covered. Throughout the book, the authors use the Packer models, Crime Control and Due Process, as the basic theoretical perspective.

It may come as a surprise to many American students, even those at the graduate level, to learn that the English criminal justice system does not afford defendants as many civil rights protections as the American system. For some unknown reason educated Americans have a fixed idea that the English system is implicitly fairer than ours simply because it is the English system.

The authors attempt to dispel this notion. In England there is no Miranda decision and no articulated Bill of Rights. The English defendant’s rights as to regulation of interrogation and access to legal counsel are embodied only in the Judges’ Rules. The authors argue that the Judges’ Rules “are routinely ignored or flouted, that the suspect’s right to remain silent is illusory, and there is almost unlimited scope for an unscrupulous officer to exploit the weakness of the accused’s position.” (p. 5).

The authors contend that from the very first police-suspect encounter, the safeguards available to suspects are virtually non-existent and the disparity in resources between the state and the accused is overwhelming. This last contention, of course, is the same charge Packer makes against the American system.

The authors’ English and Welsh statistics show, as do ours in the
United States, that an overwhelming majority of defendants plead guilty at trial. The authors contend this practice erodes due process. In the United States, as a general rule, we have tended to blame the extensive use of plea bargaining on caseload pressure. Recently, however, more and more critics have blamed the practice not only upon external pressure, but also upon a willful tendency on the part of the attorneys within the system to develop cooperative working relationships for their own convenience regardless of external pressure. The authors claim that this practice is also prevalent in England and Wales. They cite examples of widespread plea bargaining in courts whose resources are actually under-utilized to support this assertion.

Some of the book topics particularly useful for pedagogical comparison with our procedures are:

(1) Pre-trial identification of weak cases.
(2) Protective mechanisms of the prosecution system.
(3) The importance of the police to the prosecution case.
(4) The importance of confession evidence.
(5) The system for verifying confession evidence.

It becomes obvious that even in the “adversarial” criminal justice systems utilized in the United States and Great Britain—as opposed to the “inquisitorial” systems used by such countries as France—the overwhelming power of the governmental institutions themselves tend to overwhelm and subordinate the individual. Any objection raised by a defendant to speeding up the process or attempt to exercise any time-consuming right which interferes with or slows the informal cooperative procedures created by actors within the components of the Anglo-American criminal justice system is frowned upon as “inconvenient” and resented by the actors even though their caseloads may be low.

According to the authors, researchers in the past have assumed that attachment of penalties to any exercise of rights permitted by the legal code but resented by the bureaucratic process was a mere deviation from standards of legality. These penalties were “a product of informalities and unintended consequences at the level of petty officials. . . .” (p. 99), not a characteristic of the system itself.

The authors cite McBarnet who has challenged this assumption by insisting the practice may not be informal at all but may be “institutionalized into the formal law of the state” (p. 99). They contend that the law itself often discourages a suspect’s right to freedom from arbitrary arrest, particularly in cases involving vaguely defined offenses such as breach of the peace, loitering, possession of instrumentalities of crime, and some others.

Many law enforcement practitioners reading this book, police, pros-
ecutors and even some public defenders, may attribute most of the sys-

tem's failings to human fallibility. However, the authors charge that

such practices as selective investigation, inaccurate recording of evi-
dence, imperfect screening of weak cases, denial of rights and other
faulty practices are so widespread that they indicate "systematic" failure
rather than the incidental aberrations of a sound system.

This point brings the authors to their final conclusion that in the

English system, as far as the protection of individual rights is concerned,
the system conforms more to Packer's Crime Control Model than to the
Due Process Model. Hence, much to our intuitive chagrin, the English
system tends to downplay the protection of individual rights to a much
greater degree than the American system.

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This book is intended to be an ethnomethodological approach to
understanding the criminal justice system. Using information gained as
a participant and an observer in a police department, as well as inform-
ation provided by courtroom observers, other researchers and stan-
dard "academic and non-academic" sources, Gilsinan leads the reader
through the process by which experiential data are transformed into
patterns of belief and acted upon by police officers, attorneys, judges,
correctional officers and victims of crime (p. 19). The goal is to convince
his reader that the "gurus of social science" are to be avoided (although
the author's justification of his "distinctly unpopular" perspective makes
him appear to be a pied piper for ethnomethodology) and to provide
information amenable to policy considerations (p. 133). Along the way,
moving from theoretical explanation to policy recommendations, he
does battle with the traditional enemies of ethnomethodologists, "scien-
tific criminology" and symbolic interaction. Scientific criminology as-
sumes pathology in the etiology of crime; it focuses on the criminal as
the point of reference rather than the system which processes him; it
emphasizes determinism to the detriment of free will; it assumes a nor-
mative, rather than negotiated, social order; and it assumes a knowable
reality independent of the actor. Symbolic interaction allows for the pos-
sibility of an independent reality and assumes that preconceived, shared symbols determine action.

For the reader unschooled in the ethnomethodological perspective, Gilsinan provides a primer. Ethnomethodology seeks to understand the process by which groups construct order or make sense out of their social activity. Thus "the existence of any preconceived pattern" cannot be taken "for granted" (p. 14). In a similar vein, Gilsinan describes the task of the participant observer as a sensitive and inductive process. The observer must, without "preconceived notions," begin with "specific behaviors and extract from them those elements that are common across behaviors." If preconceived notions cannot be avoided, they must be used not as "definitive concepts," but as "sensitizing concepts . . . which merely suggest directions along which to look" (pp. 142-43). This is the standard fare of ethnomethodology.

The author's perspective dominates the tone of the book and, perhaps more importantly, there is little else which distinguishes this book from any standard monograph on the criminal justice system. The chapters concerning police officers demonstrate this point. Essentially we are reminded that police persons, in the process of becoming veteran officers, learn to describe their own behavior in favorable terms. Gilsinan augments this theme by arguing that officers learn "police rules" which include "being suspicious, being authoritarian, being a good actor, living with contradiction through humor and depersonalization, covering oneself bureaucratically, and using common police sense" (p. 39). If this sounds like the standard fare of scientific sociology, one must remember that Gilsinan and other ethnomethodologists believe that these "police rules" are rules, not norms, and that they are not passed on in a process of socialization, but are constructed by each person in a "restructuring process . . . guided by instructors" (p. 26). The distinction between rules and norms is crucial to the perspective and if one does not appreciate the difference, the book may not be meaningful. Little else in the chapters on the police is novel to anyone who has read Skolnick,¹ Reiss² and Niederhoffer.³

Even the discussion concerning the plight of the victim, surely an often forgotten subject in criminal justice tomes, fails to enlighten the reader. The ethnomethodological approach to understanding the victim is to describe the rules constructed for being a victim. In other words, the ethnomethodologist synthesizes the victims' explanations for their circumstances. In so doing, Gilsinan notes that victims feel ignored

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¹ J. Skolnick, Justice Without Trial (1975).
³ A. Niederhoffer, Behind the Shield (1967).
and abandoned since "the justice system does not do a great deal to reintegrate the victim into the view that life is essentially a routine, rational, controllable experience." In fact, victims "believed that the system was directed toward the criminal" (p. 224). Again, the rules for being a victim are the contribution of this chapter and one must embrace ethnomethodology to recognize the importance of such arguments.

The policy recommendations will be the most important contribution for those who are caught up in scientific sociology, since the rationale for them is meaningful for those involved in the struggle to maintain the relevance of sociology as a discipline in a society that is increasingly hostile to sociological findings. Gilsinan argues that if social scientists can make practical contributions to the issues which concern citizens, then the role of social science will be strengthened. To avoid naive, extreme, but politically popular solutions to problems, he recommends that citizens become active in their communities. They can profitably create systems of court watchers to monitor the activity of local court personnel; city block watchers to be alert to suspicious behavior in their neighborhoods; and victims self-help groups to aid crime victims. He also advocates community mediation and arbitration of civil disputes as a method for making the justice system more responsive to citizens. These worthwhile recommendations do not derive from the ethnomethodological perspective which defines the rest of the book. One wishes that the author had expanded this section, even at the expense of earlier chapters.

One suspects that the author has been stylistically sabotaged by his editor. The style of writing in the chapter on becoming a police officer—a sort of "you-are-there" approach in which the reader is repeatedly addressed in the second person and, almost as frequently, is referred to an "above mentioned" paragraph, phrase, or idea—smacks of a sophomore term paper. Happily, later chapters are less problematic. However, another problem arises. While the author admits that the quotations used and attributed to fictional persons are condensed from actual conversations with many persons, his "fictionalized" quotations fail to "ring true" and, instead, seem to be constructs to support his assertions about the process of becoming an actor in the legal system. And since the words of legal actors are crucial to an understanding of their construction of meaning systems, the quasi-authenticity of these quotations is quite problematic for the legitimacy of the monograph.

This work may be appreciated by those who are seeking an introduction to ethnomethodology or who prefer an ethnomethodological explanation of the world. It is unlikely to persuade those committed to a traditional sociological approach to switch allegiance, as much be-
cause of the style of writing as its failure to contribute to our understanding of the criminal justice system, which Gilsinan naively believes to be "virgin territory" for explanation (p. 17). One has only to look at his citations to know that the "territory" lost its virtue some time ago.

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Ericson and Baranek's book, The Ordering of Justice is an important piece of work. It deals with two critical issues—the powerlessness of the accused at the hands of criminal justice agents and the shallowness of what masquerades as reform. This book is a study of social control that is both macrosociological and internationally informed. The authors' arguments are buttressed by painstakingly extensive research within the Canadian system.

The authors claim at the outset of this venture that "our study raises many questions, and answers some, about how the criminal process is ordered according to the relative power of the various participants." Among these questions are: Which actors in the process have the power to effect compliance that serves particular interests over and against other interests? How is this power used? What are the implications of this for the accused person? The authors tackle such issues in the space of seven chapters as follows:

1. The Ordering of Justice
2. Police Orders
3. Lawyers' Orders
4. Order out of Court I: The Process of Plea Transaction
5. Order out of Court II: Position of the Accused and the Plea Decision
6. Order in Court
7. The Ordering of Justice

The Ordering of Justice, generally speaking, remains faithful to its task. In sharp contrast to the bulk of the sociological and legal literature which focuses almost exclusively on the processes of social control as seen through the eyes of its agents, the present approach takes the viewpoint
of the accused as a focus of inquiry in studying the criminal process. Drawing heavily upon case histories from a carefully obtained research sample, the authors address key issues from the perspective of the accused, dealing with what happens at the police station and beyond—from the moment of accusation to sentencing. The presentation of research data is appropriate to the basic themes of the book.

The amount of data collected and its utilization lend to this volume form and substance. Empirical material is provided from a program conducted at the Centre of Criminology, University of Toronto. The authors supplement data on police, crown (prosecuting) attorneys and defense lawyers with their own verbatim interviews of persons within the system. The detailed accounting of one case, in particular, provides an appropriate point of departure for considering wider issues in the ordering of justice.

The writing style and structure are adequate. The writing is superior to most books in the field. Nevertheless, crucial terms for this discourse are not defined (such as “the ordering of justice” and “reordering of justice”) when they should be. A more serious shortcoming is the monotony of the kind of information given from the case studies—trivial information that at times causes the book to read like a log of police reports.

Clearly, this treatise is intended for a graduate or post-graduate audience. The wealth of reference material presupposes a thorough grounding in the field of criminology. Because of the comprehensive research provided, the book is an indispensable resource for researchers and professors in the field of justice. What I liked best about this book is the final chapter, “The Ordering of Justice.” Separate in tone and substance from the previous (rather dry) chapters, this one shines forth with a brilliance that is almost a vengeance. Following a brief summary of research findings, the authors embark on what can best be described as a blast at the new liberal rhetoric and at the hypocrisy thereof. The only criticism I would make of this portion of the book is that the authors demand a change without making clear what kind of drastic reform the system requires. Nevertheless, the attack itself is formidable as the following quotes illustrate:

The whole business of selecting the cloth with the proper label, cutting it up, and then sewing it back together to suit the offender’s apparent new image is called “corrections”.

Diversion programs divert only in the sense of drawing attention away from the coercion they entail or they simply signal neglect.

No matter what else might be involved, all reform alternatives include an added role for some group of professionals. This is the axiom of reform.

Introducing one or two rights, like all liberal tinkering reforms, serves not as change but as an excuse for not changing.
The authors are not reformers; they are revolutionaries. As they talk of the dangers of the new means of social control, they are talking of all types of control agency—the mental health control system, the welfare control system as well as the other areas of governmental social control. These control systems are perceived collectively as constituting a major force of dependency in our society. And thus is the link established between this final section (that is so different in tone and substance) to what has gone before.

In sum, *The Ordering of Justice*, although overly long in some passages and too brief in others, is not only appealing in a radical sort of way, but also convincing in its proof. This memorable volume does for criminal justice what C. Wright Mills’s, *The Sociological Imagination*, once did for sociology. In exploding the myths of “the adversary system” and “corrections,” Ericson and Baranek aptly show that the emperor has no clothes.

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In 1974, the state of Michigan carried out radical surgery and restructured its archaic rape laws. The result was the innovative, far-reaching “model” Criminal Sexual Conduct (C.S.C.) statute. The C.S.C. law went into effect in April 1975 and, to a great extent, fulfilled the desires of the energetic state feminist lobby which had expeditiously collaborated with law-and-order forces to command enough legislative leverage to see the measure enacted. Among other things, the new state C.S.C. law defined a variety of degrees of assaultive conduct with some specificity and desexed the law in terms of the possibility of men and women being either victims or offenders. The law also made resistance and consent standards congruent with those for other offenses, so that a rape case no longer carries an idiosyncratic standard of proof.

In addition to its other provisions, the revised law banned inquiry into the sexual background of the complainant during preliminary hearings and trial except under a limited number of circumstances. The most common of such circumstances is when the victim earlier had been involved sexually with the defendant. This change, as Marsh, Geist and
Caplan's evaluation of the law points out, has had a particularly notable influence on making the reporting of rape and the burden of trial a less perturbing experience for victims than it previously has been. The C.S.C. statute also appears to have significantly raised the rate of convictions now secured by prosecutors.

The advocates of the change in the law in Michigan were unable, however, to get the legislature to remove the exemption of husbands from the possibility of being charged with rape, a provision which exists in almost a dozen states. Michigan husbands can be charged with rape only if the couple had separated.

Jeanne Marsh, Alison Geist and Nathan Caplan present in this thin volume (only 120 pages of exposition) an evaluation of the consequences of the substantial changes that were made in the Michigan sexual assault law. They do so in large measure so that other jurisdictions may determine on the basis of the Michigan experience what might be expected if they were to alter their laws. Unfortunately, the authors do not provide any blueprints regarding alternative methods other than those employed in Michigan to achieve even more desirable results.

The authors' conclusion is double-edged. The law did a great deal for rape victims and for the cause of justice, but it did not accomplish quite as much as its proponents had desired. In large measure, this was because both personal and institutional entrenched views and ways would not yield before the superimposed legislative dictates. The book's title refers to this inertia, and the authors call attention to it often, almost bitterly. The authors, for example, state that they are examining "a law promulgated by a social change effort . . . [but] administered by a traditional institution of social control," and that what had been enacted were "changes in procedures but not in basic attitudes."

The institutional resistance to which they call attention manifests itself in, among other things, the fact that prosecutors remain wary of proceeding with sexual assault cases that they might lose in trial. "You can't legislate a credible rape victim," one prosecutor observes. Additionally, defense attorneys can persist in jabbing and insinuating with regard to victims' sexual history, and thus circumventing their way around the law. "Now you just discredit with kid gloves," a defense attorney points out. Similarly, judges by their demeanor can undermine the intent of the reform movement—a matter that is invariably undetected in the appeals transcript. The authors blame this problem on a generational gap, as well as the insulation of the judicial office. This last criticism is not altogether convincing because most judges have come from the ranks of defense and prosecuting attorneys.

On the other hand, the authors document some notable advances
in the state of the law, notwithstanding the C.S.C. statute’s shortcomings. In particular, Michigan rape trials are much more decent proceedings than they used to be due to the restrictions against delving into a complainant’s sexual background. Furthermore, prosecutions have become more “efficient and successful,” largely because there has been “a shift in the balance of power between the complainant and the defendant.” The protective provision also seems to have encouraged more victims to take their complaints to the authorities and to proceed through the tribulations of a trial. The law reform, however, does not seem to have altered the total number of rapes.

The book merits commendation on a number of grounds. Generically, it is an excellent idea to try to ascertain what happens when a new and important law is put into place. Legislatures always should appropriate money to have their enactments meticulously evaluated, with a report sent to them so that they might amend the laws on the basis of evidence of their impact. Second, this evaluation of the C.S.C. statute is a multi-faceted and generally imaginative piece of work. The authors were handicapped in a number of regards by not having a firm foundation against which to measure some changes brought about by the law. As opposed to empirical data, the evaluation relied upon the memories and opinions of a variety of officials associated with court proceedings on the current procedure and treatment of rape victims as compared to the previous state of affairs. Hence, the authors’ conclusions are tenuous when they rely upon rape crisis center workers who testify on behalf of the victims. Efforts might have been made to locate a cadre of earlier and later victims to interview.

I also wish that a more intensive analysis of the Michigan law had been attempted. The ban on examining a rape victim’s past sexual history, which I strongly favor, probably deserves a more thorough review inasmuch as there are important scholars who deem this a retrogressive step with regards to civil liberties. The evaluation, however, is careful, decently partisan in its support of a good cause, and satisfactorily conclusive in its judgments on the impact of the law.

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