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Denial of Justice

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DENIAL OF JUSTICE. By *Lloyd L. Weinreb*. New York: The Free Press. 1977. Pp. xi, 177. $12.95.

Denial of Justice is a provocative book which examines the basic structure of criminal investigation and prosecution in this country. Its author, Professor Lloyd Weinreb, finds the condition of American criminal justice entirely unsatisfactory. However, he does not simply curse the darkness of the system. Neither does he light any candles. Instead he suggests setting the system ablaze. After a step-by-step analysis of the criminal process, the author, a former federal prosecutor, concludes that only drastic alterations of the roles of the police, the advocates, and the courts would make meaningful the pursuit of justice in this country. Since comprehensive, fundamental criticism is too rare in this field, Weinreb's work deserves the attention of those concerned with crime and punishment in the United States.

Denial of Justice is divided into two parts. First, the author critically examines our system of criminal justice. This section encompasses discussions of police investigative techniques, the prosecution of crimes, and guilty pleas. Second, the author proposes that the process be replaced by a continental magisterial-inquisitorial system.[1]

THE FAILURE OF THE AMERICAN CRIMINAL PROCESS

Weinreb argues that the police are inadequately trained for investigating crime and that investigating crime conflicts with their historical role as peacekeepers.[2] The vast power of the police to arrest, conduct line-ups, take physical samples and conduct interrogations, is usually exercised without immediate judicial supervision. Yet the courts have required police to understand and weigh delicate constitutional questions in exercising that power.[3] Weinreb contends

1. The book contains an appendix dealing with the constitutional aspects of compelled governmental questioning of the defendant. This Review will not deal comprehensively with this or the many other constitutional concerns raised by the book. However, when appropriate, court rulings pertinent to specific points raised by Professor Weinreb will be noted.

2. L. WEINREB, DENIAL OF JUSTICE 13-43 (1977) [hereinafter cited in the text by page number only]. There is far from complete accord on the dimensions of the peacekeeping function. *See, e.g.*, Murphy, *The Role of the Police in Our Modern Society*, 26 REC. ASSN. B. CITY N.Y. 292 (1971). Former New York Police Commissioner Murphy suggests that peacekeeping itself is complex and demands "the exercise of discretion and decision-making of a very sensitive nature." *Id.* at 295.

3. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977); Chimel v. California, 395 U.S. 752 (1969); Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Draper v. United States, 358 U.S. 307 (1959). For a graphic illustration of the dilemma which faces law enforcement officers, *compare* Carroll v. United States, 267 U.S. 132 (1924), *with* United States v. Chadwick, 433 U.S. 1 (1977).

this demand is unrealistic. The exigencies of police work—the danger, the imperatives of preserving public order—call for a police style incompatible with "the reflectiveness of a scholar, dispassion of a judge, or gentleness of a nurse" (p. 17). Asked both to maintain order and to investigate crimes, the police can perform neither duty effectively.

The prosecution of cases fares no better, in Weinreb's view. He argues that much of our pretrial procedure disserves justice. Investigation after arraignment is rare. For the government, the most significant evidence is the police report; for the defendant, his recollection of the incident. Delays before trial cause even that evidence to grow stale.

Plea bargaining, Weinreb contends, produces punishments which do not fit the crime. He observes that neither the prosecutor nor defense counsel bases his position on a detailed examination of the particular facts of the case. Rather, the prosecutor wishes to avoid costly trials, and the defense counsel seeks to minimize punishment—goals unrelated to the alleged purposes of a criminal justice system. The author contends that the defendant is aware throughout this process that he will be penalized for choosing to go to trial.

Professor Weinreb argues that the structure of the trial, including jury selection, the presentation of evidence by two "sides," and the passive role of the judge maximize the importance of the attorneys' technique to the detriment of the search for truth. No disinterested effort is made to elucidate facts: lawyers call witnesses and ask questions in order to present only the most favorable testimony. Weinreb observes: "In one way or another, every aspect of the trial is distorted by the presentation of evidence exclusively through the prisms of the prosecution and defense" (p.102). He condemns the system for limiting the judge to referee and the jurors to spectators.

In sum, the author argues that the system handicaps truth-seeking. It relies on evidence procured chiefly by incompetent agents—the police—and artificially presented. To Weinreb, the theory of our adversary system bears little relation to what actually confronts a person charged with a crime.

The Proposed Solution

To remedy these evils, Weinreb proposes basic changes, including the creation of an independent arm of the judiciary with full investigative responsibility, so that the whole criminal process—from

investigation through trial—will be conducted by one agency.[4] Weinreb argues that his proposals will assure speedy adjudication while liberating the police to perform effectively their role as peacekeepers. Plea bargaining would be largely eliminated, and evidence would be dispassionately presented.

Under Weinreb's proposal, police investigations would be limited to what must be done at the scene of the crime. He urges that this would eliminate the schizophrenia of the present system, which requires the police to operate aggressively in the unpredictable world of crime prevention *and* to be disinterested investigators. Immediately after an arrest, the police would bring the suspect to an independent magistrate who would conduct the investigation.

The magistrate would have the power to summon witnesses. Because he would not be burdened with the peacekeeping and emergency functions of the police, he would be better able to be neutral in his investigation. That investigation would include a detailed interrogation of the suspect. Before questioning, the magistrate would inform the suspect of his right not to speak. The suspect's lawyer would have the right to be present, but only to suggest questions and help resolve ambiguities in his client's testimony. The lawyer could not advise his client, either at the interrogation or privately, to remain silent.[5] The advantage of such a procedure, Weinreb states, is that the suspect is allowed to participate in and possibly influence the initial stages of the investigation. He argues that the present system excludes from the investigation of the crime not only the suspect and his counsel, but also the prosecutor, who thus becomes unduly dependent on the police.[6]

Following the investigation, the magistrate would determine, subject to appeal by the prosecutor, whether the suspect should be tried, and, if so, the specific crime for which he had found sufficient evidence of guilt. The magistrate's record would contain all the relevant evidence developed by his investigation and would replace the

4. These suggestions seem innovative only from an American perspective; they are an idealized version of the continental system. For an exhaustive discussion of one such continental system, *see* Keedy, *The Preliminary Investigation of Crime in France* (pts. 1-3), 88 U. PA. L. REV. 385, 692, 915 (1940). For a general discussion of the two systems, see Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

5. "The roles of prosecutor and defense counsel in an investigation . . . should . . . be conceived . . . as those of aides to the magistrate: to suggest witnesses who should be examined, indicate lines of inquiry, and see that relevant issues are not overlooked" (p. 133).

6. *See* note 2 *supra*. Although the author recognizes that his proposal raises significant fifth amendment problems, he does not deal with the sixth amendment problems it also involves. *See generally* Escobedo v. Illinois, 378 U.S. 478 (1964). Adhering to the position taken in note 1 *supra*, this Book Review will not analyze these constitutional issues.

pro forma police report and indictment which presently form the pretrial "record." Since the prosecution would be based on this record and the defendant would have been involved in the investigation from the outset, adventitious factors such as legal manipulations, the state of a court's docket, and luck, all of which play too great a part in prosecutions, would be eliminated.

Weinreb seeks to change not only the method of investigation but also the procedure at trial. For Weinreb, the chief problem with American criminal trials is that they are dominated by the prosecutor and defense counsel. Under Weinreb's system, the advocates' role would be greatly diminished, and the jury would be replaced by a court composed of a judge (who would direct the presentation of evidence), two members of the bar, and seven lay persons. All the members of the court would, as a group, determine the verdict (p.139).

A Brief Critique

At first glance, Professor Weinreb's proposals to limit and change the roles of the participants in the criminal process are appealingly pragmatic. One must wonder, though, if this somewhat simplified approach to efficiency would produce the desired results. For instance, would the peacekeeping function of the police be subject to the same judicial supervision if the investigatory functions were centered elsewhere?[7] Additionally, might not limiting the investigatory tasks of the police lessen their sensitivity to citizens' rights? If we recognize the need for detached supervision of the police, we should be reluctant to adopt a system which would liberate police actions from judicial scrutiny.[8] Finally, the European experience has been that such a system can in fact increase the power and responsibility of the police to investigate crime.[9]

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7. Minimal judicial supervision of public agencies is fundamental to our system. The police, in their peacekeeping role, are subject to few external restraints except the exclusionary rule. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976). Under Weinreb's proposed system, concededly, lawsuits based on violations of constitutional rights would continue to be available. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Monroe v. Pape, 365 U.S. 167 (1961).

8. For a discussion of the effect of the absence of the exclusionary rule in continental systems, see Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 Yale L.J. 240, 263-64 (1977): "Prosecutors and judges rely heavily on conclusory assertions in the police papers and rarely question the officers or call witnesses to determine whether there was a valid basis for an arrest, a search, or even a charge. The overwhelming presumption is that official action has been regular and lawful."

9. *Id.* at 281.

As to the envisioned roles of the judges and lawyers, Weinreb's scorn for the adversary system is even more troubling. First, the adversarial model has distinct advantages over the inquisitorial one. Second, it is unlikely that this reform would accomplish its goals.

While trial lawyers do often rely upon "technique," the initiative and energy of advocates produce much evidence which might not otherwise come to view.[10] The probing and the legitimate bias of the litigants promotes thorough analysis of the evidence,[11] and vigorous cross-examination is one of the best guarantees of a complete assessment of testimony.[12] A judge-directed presentation with little scope for the prosecutor and defense attorney may be an inadequate substitute.[13]

The proffered plan calls for a markedly less "passive" judge. Whether a jurist who is responsible for selecting and presenting evidence from a magistrate's record can also disinterestedly assess the legal and factual issues is dubious.[14] While the current system may not always live up to our expectations, it may also be unrealistic to expect a judge to manage the combined responsibilities of juror,

10. *See* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 3 (Approved Draft, 1971): "Two adversaries, approaching the facts from entirely different perspectives and objectives and functioning within the framework of an orderly and established set of rules, will uncover more of the truth than would investigators, however industrious and objective, seeking to compose a unified picture of what had occurred."

11. One criticism of the adversary system has been that it does not provide the best setting for the discovery of truth with respect to the facts of the particular case or for resolving legal policy. Insofar as the law-making function of the courts is concerned, it must be recognized that the presentation of opposing views in vigorous debate as a prelude to decision is a feature common to the legislative and executive as well as the judicial process. By contention, provided it is kept within proper bounds, the area of dispute is narrowed and specious arguments revealed in the course of debate. Contest spurs each side to greater efforts of intellect and imagination, so that, in Macaulay's words, "[I]t is certain that no important consideration will altogether escape notice." *Id.* at 2-3.

12. *Id.* at 3. In the Continental system, "genuinely probing trials take place only in those few cases in which the defendant actively contests the charges against him." Goldstein & Marcus, *supra* note 8, at 265.

13. *See also Professional Responsibility: Report of the Joint Conference of the A.B.A. and the A.A.L.S. on Professional Responsibility*, 44 A.B.A.J. 1159 (1958).

14. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

The matter assumes a very different aspect when the deciding tribunal is compelled to take into its own hands the preparations that must precede the public hearing. In such a case the tribunal cannot truly be said to come to the hearing uncommitted, for it has itself appointed the channels along which public inquiry is to run. If an unexpected turn in the testimony reveals a miscalculation in the design of these channels, there is no advocate to absorb the blame. The deciding tribunal is under a strong temptation to keep the hearing moving within the boundaries originally set for it. The result may be that the hearing loses its character as an open trial of the facts and issues, and becomes instead a ritual designed

expect a judge to manage the combined responsibilities of juror, judge and selector of evidence. Aside from the obvious constitutional problems inherent in such a proposal,[15] there is a genuine and reasonable doubt that anyone could adequately and fairly do all that would be required.

It is interesting to note that judges, whom Weinreb sees as helpless to prevent these abuses, are assigned new and crucial responsibilities in Weinreb's reformed system. Developing a more committed and competent judiciary, which could remedy the problem of plea procedures and insure speedy trials, appears to be a more realistic goal than the radical surgery suggested by Professor Weinreb.

CONCLUSION

Professor Weinreb's proposals reflect the current widespread dissatisfaction with our criminal justice system. But whatever the shortcomings Weinreb identifies, his solutions tend to go beyond genuine criticism—they would destroy a valued and proved process of delivering criminal justice. Perhaps the greatest significance of this book is the fact that a serious scholar and former prosecutor was moved to return such a sweeping indictment. We must defend what is good and improve what is bad in our system; we need not damn the accuser.

Denial of Justice should be examined by those involved in or concerned with the American system of justice, for such examination requires the reader to reassess how the system operates, whom it affects, and how it can be improved. A book which can provoke such thoughts is worthy of notice.

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to provide public confirmation for what the tribunal considers it has already established in private.

Id. at 1161.

15. One aspect of the constitutional separation of powers is "that the courts are not to interfere with the free exercise of the discretionary powers" of government attorneys. United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub nom.* Cox v. Hanberg, 381 U.S. 935 (1965). *See also* Confiscation Cases, 74 U.S. (7 Wall) 454, 457 (1868).