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Book Reviews

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Book Reviews

THE MODERN SUPREME COURT. By *Robert G. McCloskey*.† Cambridge: Harvard University Press, 1972. Pp. x, 376. $3.95.

Robert McCloskey devoted much of his professional life to attempting the intellectual and moral resolution of his own libertarian impulses with his view of the proper role of the Supreme Court in a democratic society. In a lifetime that spanned the judicial activism of the "substantive due process" era and the judicial activism protecting civil liberties, he lived at an appropriate time for such an adventure.

Indeed, the attempt to reconcile the lessons learned from the earlier period of activism with the impulses present in the later period ought to be a healthy exercise for anyone seriously concerned with the values of democratic processes and the furtherance of individual liberty. That it was, indeed, a healthy exercise for McCloskey is not to say that his attempt was wholly successful. It did, however, result in some perspectives, some helpful distinctions, and ultimately in some relevant standards of evaluation of the judicial performance from a political scientist's viewpoint, if not from a lawyer's.

What is the *Modern Supreme Court*? Writing in 1958, McCloskey defined his "modern" Court as that Court which had sat since the mid-1930's and responded in varying, but significant, degrees to the major premises of a "new jurisprudence . . . reduced concern for protecting economic rights, increased concern for protecting the other rights of individuals, and acceptance of the idea of judicial self-restraint."[1] Later, for reasons that are perhaps obvious from the subsequent activity of the Court in the 1960's, McCloskey's emphasis shifted unmistakably to the second of these premises and away from any tendency to self-restraint in the civil liberties area—"the judicial impulse to expand civil rights."[2] Measured by this standard, and from the perspective of our own time, the conclusion seems inescapable that this "modern court" is the Warren Court, for it is that Court that

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1. R. MCCLOSKEY, THE MODERN SUPREME COURT 192 (1972) [hereinafter cited as MCCLOSKEY].

2. *Id.* at 351.

to a degree radically and dramatically greater than any of its predecessors evinced a "propensity to intervene in the governing process,"[3] that demonstrated "a greater willingness to intervene in any major policy question that affects personal freedom."[4]

Thus, despite the broad title and the fact that the first two of the four substantive chapters are devoted to the Stone and Vinson Courts, this is indeed a book about the Warren Court. It is in the articles about the Warren Court—all of them previously published and apparently not significantly revised for inclusion here—that the interesting aspects of McCloskey's dilemma are raised and wrestled with. The Stone and Vinson chapters, written subsequently and especially to round out this volume, are relatively pedestrian historical background and perspective.

The change in the major premises emphasized by McCloskey from his 1958 article to the book's last article, originally published in 1965, is no doubt reflective of a perhaps unperceived change in McCloskey's own attitudes and assumptions about the Court's proper role. It is a subtle change in assumptions, or expectations, that must have been shared by many observers of the Warren Court. It is an interesting phenomenon in the psychology of the law that each new surprise—each entry by the Court into a new area of the governing process—tends to make the older surprises appear more appropriate and less unique, regardless of whether or not their constitutional or other legal rationale was originally persuasive. Thus, for example, *Jones v. Alfred H. Mayer Co.*,[5] may initially be perceived as the fabrication of a statute, but the next year it has become precedent, and *perhaps* someday we will even be persuaded by its process of construction.

It is, of course, important to note that we may be as surprised at the Court's assumption of legitimate power (given the doctrine of judicial review) as we are by some of its more questionable assumptions of governing power. The element of surprise is not necessarily any lack of articulate legal rationale. In fact, for most of the non-lawyer public, the legal rationale is probably a negligible factor in its evaluation of the Supreme Court's performance. Perhaps the lack of successful congressional, executive, or other public citizen attempts to curb the Court, and its acceleration of its own role despite such attempts, indicates

3. *Id.* at 338.
4. *Id.* at 10.
5. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

that the Court's actions over the past two decades are not so inappropriate or so far divorced from the traditional role of the Court in America's decision-making. McCloskey suggests that, although the Warren Court was the most activist Court in our history, the areas for its activity made it more *appropriately* activist than the activist Courts that gave us *Scott v. Sanford*,[6] or *Lochner v. New York*.[7]

There is also a suggestion in McCloskey's works that the Court itself was subject to the phenomenon of becoming accustomed to itself—that this was almost a necessary ingredient of the Modern Court becoming modern. He describes the moderately liberal performance of the Stone Court, and emphasizes the stops and starts of the Vinson Court in building on this foundation—the lack of confidence in its role or in the major libertarian premise that for McCloskey defined the Modern Court. The first article on the Warren Court analyzes the 1955 Term and is called *The Supreme Court Finds a Role*. Toward the end of the book, he summarizes the Warren Court as one that "appears to have succeeded impressively in freeing itself from the self-doubts that deterred constitutional development during the 1940-1953 period. With a zeal that seems to have increased as the years went by, the justices have advanced boldly along the civil rights front."[8]

It is an interesting idea that the performance of the Warren Court is a function of an increasing *confidence* to govern. A corollary must be a developing confidence that the *thrust* of the libertarian decisions is correct, and perhaps a growing confidence, or assumption, of the simplicity of knowing the "right" decisions to the problems represented in the cases before the Court. Such growing confidence might well lead not only to an increased willingness to intervene in governance, but also to an impatience with the need for rational doctrines that concerns McCloskey throughout his analysis.

Although this concern for rationale persists to the end, the last two articles seem to increase the emphasis on the limits and potentialities of judicial power and the maintenance of the Court's role in the governing process by its exercise of discretion and perhaps some of the "passive virtues."[9] Thus, the focus is shifted, especially in the last

6. 60 U.S. (19 How.) 393 (1857).
7. 198 U.S. 45 (1905).
8. McCloskey, *supra* note 1, at 341-42.
9. Bickel, *Forward: The Passive Virtues, The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40 (1961).

article entitled *Reflections on the Warren Court*, from the question whether the Court *should* "play its modern elevated governmental role" to the question whether as a practical matter it *can* play it—the question of "judicial capability."[10] "Does the Supreme Court have enough [political] power to play its modern self-assigned role as a major initiative-supplying agency of modern government?"[11] The answer McCloskey gave was a guarded "yes."

It is worth noting that McCloskey, as a political scientist and citizen-observer, has a perception that is not necessarily of daily concern to a practicing constitutional lawyer. The lawyer is less interested in the "appropriateness" of the Court's assumption of governing powers than he is in working with constitutional precedents and principles. The two, of course, are closely intertwined and both are relevant to such litigation. By the same token, however, the constitutional lawyer may furnish some institutional perspectives on the role of the Court that McCloskey, the political scientist somewhat surprisingly largely ignored or underplayed: the limitations on the Court by virtue of its functions as a "court of law," and the implications that the democratic process has for establishing the appropriate role of the judiciary.

Certainly, the Supreme Court is more than a mere court of law. With some of the same effect as Congress or the Executive, the Court does set forth the "law of the land" as it decides cases involving individual litigants. It does and must take policy considerations and constitutional "values" into account. But under the function defined by article III, its nature as a court of law has to be a major factor in defining the nature of the Supreme Court's role in our governing process. It is, however, a factor that McCloskey does not expressly articulate on anything close to a par with the other factors in his analysis.

The implication of the democratic process in determining the proper role of the Court begins with the question *why* the Supreme Court is limited by its role as a "law-finding" judicial agency. One significant answer, aside from article III itself, is that the Court is not a part of the majoritarian political process. There are reasons for appointing judges and for giving them lifetime tenure. It is not so they can legislate some judicial idea of policy, but rather so that they can have the independence from the majoritarian democratic political process that

10. McCloskey, *supra* note 1, at 325, 366.
11. *Id.* at 353.

will help to assure both their power and their disposition to decide cases rationally and according to law, and to protect certain "minoritarian" values that are presumably set out in the Constitution.

There are two major dangers in an activism not persuasively tied to constitutional analysis. One is the institutional policy that caused men like Holmes, Brandeis, and Frankfurter to oppose the substantive due process of the early 20th century—the nonrepresentative Court was upsetting the people's will in major policy making areas. The second danger—and one that bothered McCloskey as he feared the Court might be reaching beyond its de facto political power—is the risk of losing the Court's power in protecting minoritarian values because of an acceptance of governance opportunities constitutionally assigned to the majoritarian political process.

These two limitations—of the law court role and the democratic process—are basic to any analysis of the Supreme Court's proper function. Indeed, McCloskey does not ignore all of the issues that would be covered under these headings. But in the overall book, explicit recognition of these factors seems strangely under-articulated.

The most popular current question, of course, is what the Burger Court will do to the "modern" Court concept. The present record is mixed. But it may be no more mixed than that of the early Warren Court, as described by McCloskey.[12] In 1958, after five terms of the Warren Court, McCloskey was still listing judicial self-restraint as one of the major premises of the "modern" Court.[13]

It is clear that the Burger Court has willingly intervened in the governing process in favor of individual rights in major ways. The following examples of Burger Court activism had the concurrence of at least a majority of the Nixon appointees to the Court. The Court made alienage a suspect classification under the equal protection clause in striking down state statutes discriminating on that basis in granting welfare benefits,[14] admission to the bar,[15] and state civil service employment,[16] and came close to placing sex discrimination on the same basis, holding unconstitutional laws giving men preference over women in appointment as administrators of estates,[17] and granting military

12. *Id.* at 221-22.
13. *Id.* at 192.
14. Graham v. Richardson, 403 U.S. 365 (1971) (unanimous decision; Justices Powell & Rehnquist were not yet on the Court).
15. *In re* Griffiths, 93 S. Ct. 2851 (1973) (Burger & Rehnquist, JJ., dissenting).
16. Sugarman v. Dougall, 93 S. Ct. 2861 (1973) (Rhenquist, J., dissenting).
17. Reed v. Reed, 404 U.S. 71 (1971) (unanimous decision; Justices Powell & Rehnquist were not yet on Court).

dependency benefits to servicewomen on a different basis than to servicemen.[18] Busing and affirmative action to disestablish racial school segregation were held to be constitutionally required.[19] Discrimination against dependent, unacknowledged illegitimate children in a state workmen's compensation law was held to violate the equal protection clause,[20] and the Court reaffirmed the principles of the Warren Court's decision in *Levy v. Louisiana*.[21] Wisconsin's compulsory education law was constitutionally required to yield to the religious convictions of Amish who wanted to cut short their children's schooling.[22] Last, but certainly not least, the Burger Court intervened to decide that a state's policy of protecting an unborn fetus' "potentiality for life" must yield to a woman's right to decide not to bear an already conceived child during the first trimester of pregnancy.[23]

While there are other decisions in which the new Court has seemed to backtrack or to decline to extend the Warren Court doctrines, it seems clear that the new justices are not without confidence in their own ability to govern and to protect what they conceive to be individual or civil rights. As McCloskey said in reference to the Vinson Court, the "modern" Court "has been substantially unanimous in its high regard for the values of what has here been called 'humane democracy.' "[24] Perhaps the Burger Court has acquired enough confidence from the example of its predecessor to carry out the libertarian impulse.

Indeed, the ultimate proof of the Warren Court's uniqueness as an activist "modern" Court may be the fact that its example and "tradition" have made the Nixon Court more activist than any Court at least prior to President Eisenhower's appointment of a Chief Justice.

*Merle W. Loper**

18. Frontiero v. Richardson, 411 U.S. 677 (1973) (Powell, Burger & Blackmun, JJ., concurring but declining to reach the issue whether sex is a suspect classification; Rehnquist, J., dissenting).

19. Keyes v. School Dist., 93 S. Ct. 2868 (1973) (Rhenquist, J., dissenting); North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43 (1971) (unanimous decision; Justices Powell & Rehnquist were not yet on the Court); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) (unanimous; Justices Powell & Rehnquist were not yet on the Court).

20. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (Rehnquist, J., dissenting).

21. 391 U.S. 68 (1968) (Harlan, Black, & Stewart, JJ., dissenting).

22. Wisconsin v. Yoder, 406 U.S. 205 (1972) (Justices Powell & Rehnquist were not yet on the Court).

23. Doe v. Bolton, 410 U.S. 179 (1973) (White & Rehnquist, JJ., dissenting); Roe v. Wade, 410 U.S. 113 (1973) (White & Rehnquist, JJ., dissenting).

24. McCLOSKEY, *supra* note 1, at 153.

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RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS. Washington: United States Department of Health, Education and Welfare, 1973. Pp. xxxv, 346. $2.35.

In a 1971 survey[1] conducted by *Time* magazine and the American Federation of Information Processing Societies, Inc., major concern was expressed in respect of the use (and potential for abuse) of massive computerized information files. Of the audience surveyed (1,001 adults eighteen years of age and older), 63 per cent agreed with the statement that development of large computerized information files would help make government more effective, while simultaneously concluding that "because of computerized information files, too many people have information about other people" (58 per cent) and that such massive information storage and retrieval systems ". . . may be used to destroy individual freedom."[2] A significant number of the survey universe expressed concern about information being kept (62 per cent).[3] Approximately the same number of persons further concluded that the government is concerned about regulating the use of computers for information retrieval.[4]

The fact of the government's concern was demonstrated in the same year by then Secretary of Health, Education and Welfare, Elliot L. Richardson, who established an Advisory Committee on Automated Personal Data Systems (Advisory Committee). The Advisory Committee, chaired by Dr. Willis H. Ware, Corporate Research Staff of The Rand Corporation, issued its report this summer. The report, *Records, Computers, and the Rights of Citizens*, deals in a generally concise and forthright manner with the potential harm that might result from the *uncontrolled* application by public and private organizations of evolving computerized information retrieval technology to the collection, storage and use of data about individual citizens.

Former Attorney General Richardson, in accepting the report, acknowledged the Survey's expressed concern about ever-expanding computer technology for record-keeping about people:

We must learn to temper this particular technological application

1. AFIPS-Time, *A National Survey of the Public's Attitudes Toward Computers*, New York: Time, Inc. (monograph undated).
2. *Id.* at Table 23.
3. *Id.* at Table 27.
4. *Id.* at Table 30.

with sensitive concern for due process and the average citizen's wish to be let alone.[5]

The significant *minimum* principles which the Advisory Committee concluded are necessary to effectively control automated personal information data systems are five:

First. No personal data record-keeping system, the existence of which is secret, can be permitted to be established.

Second. Every individual must have the right to review the data about himself in the automated record-keeping system and to determine the manner in which such data is being used.

Third. Every automated data record-keeping system must provide a means by which an individual can prevent information about himself consensually obtained for one purpose from being used for any other purpose without his prior consent.

Fourth. Any such system must provide the individual with a means expeditiously to correct or amend the record of identifiable information about himself.

Fifth. The responsibility for insuring system reliability and to prevent misuse of identifiable personal data is that of the organization which creates, maintains, uses or disseminates the records.[6]

It must be noted that the Advisory Committee wisely distinguished between two types of automated data systems: personal data systems and statistical-reporting and research data systems. Obviously the former, essentially a computer-accessible collection of records containing personal data that can be associated with identifiable individuals, must be subject to more stringent controls to preclude abuse of individual privacy than systems designed to provide information in gross to be utilized in conjunction with the administration and evaluation of either public or private programs and services. The report rightly concludes that the latter, administrative record-keeping operations seldom keyed to identifiable individuals, ". . . can and do constitute rich sources of statistical . . . data useful for many purposes,"[7] citing by way of example, the use of IRS records as the data source for the quinquennial Census of Business and Manufacturers or of hospital records to develop data banks on particular diseases or disabilities.

5. COMPUTERWORLD, Aug. 8, 1973, at 1, col. 2-3.
6. ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYS., REPORT ON RECORDS COMPUTERS AND THE RIGHTS OF CITIZENS 48-75 (1973) [hereinafter cited as REPORT].
7. *Id.* at 82.

The report can be criticized in two particulars which merit further consideration and debate.

In the first instance the Advisory Committee strongly opposes the use either of individual Social Security numbers or evolving any other standard universal identifier (SUI). The advantage of some form of SUI is essentially practical: duplication and error in automated record-keeping may be substantially reduced, thus benefitting the individual whose data is on file, and, ultimately more significant, facilitating the interchange of data between various automated systems. In fact in most European countries SUIs have been in use for at least a decade.

The Advisory Committee concedes the significance of establishing an SUI, stating that they ". . . . are not opposed to the concept of an SUI in the abstract . . . . ," but concludes, erroneously in this reviewer's judgment, that the dangers in use of an SUI outweigh *any* practical benefits.[8] Indeed, if the previously mentioned principles are implemented, the dangers inherent in the use of an SUI would in large measure be eliminated. To await some future event—at a time when increasing effort is being given to the implementation of a more sophisticated, economical and efficient means of transferring funds,[9] to cite but one example—is no more than contemporary Ludditism.

The ANS X3 Committee, established by the American National Standards Institute to consider a standard identification of individuals for information interchange, in 1971 addressed the social implications of an SUI. That study concluded that adequate legal and operating controls could be implemented to protect individual privacy in data interchange while simultaneously permitting the use of an SUI. In an extensive series of articles on the Advisory Committee's report, the editors of *Computerworld* marshalled the social benefits to be derived from data interchange based upon an SUI.[10] Summarized, the ANS X3 Committee's favorable conclusion on the issue of an SUI was premised upon (1) individual data file interchange now being legally permissible and socially acceptable; (2) data systems, to insure a high degree of

8. *Id.* at 112.

9. *See, e.g.*, research respecting installation of point-of-sale terminal systems for electronic credit card transactions, AMERICAN BANKER, Sept. 13, 1973, at 1, col. 2-4; electronic interchange of bank credit card sales drafts, AMERICAN BANKER, Aug. 29, 1973, at 1, col. 3-4; experimental implementation in several regions of the United States of electronic funds transfer systems, AMERICAN BANKER, Jul. 19, 1973, at 1, col. 1-3, which are intended to resolve the problem of some 29 million checks a day being circulated through the banking system; J. Clarke, *Mechanized Check Collection*, 77 BANKING L.J. 449 (1960) and *Automation—The Banks' Legal Problems*, 87 BANKING L.J. 99 (1970).

10. COMPUTERWORLD, Aug. 8, 1973, at 8, col. 4.

reliability and accuracy, requiring comparative source information from other record-keeping systems, whether manual or automated; (3) insuring accuracy in data system processing and reporting thus avoiding the potentially serious consequences of misidentification of an individual; and (4) providing a means to permit open-ended growth of data systems and thus permitting existing systems to handle greater volumes at relatively lower costs.

The second major issue posed by the Advisory Committee's report places in sharp contrast the continuing, but beneficial tension between social needs and individual rights. The report implies that a need exists for standardized data collection efforts in criminal data systems operated by the several levels of government, federal, state and local.[11] For example, the Federal Bureau of Investigation presently compiles and maintains relatively sophisticated dossiers on individuals *suspected* of being involved in organized crime. Similarly the LEAA is investing in the creation of a national computerized criminal offender information file which is intended to serve various public agencies.

Clearly a need exists for systematic collection and correlation of data of this nature to assist in the investigation and control of criminal activity as well as to provide a means by which the courts and correctional institutions can make better informed judgments respecting sentencing, control of recidivism, and confinement or parole. However, the report recommends that, for the present, funding of such interfacing efforts be stopped, urging a further study of:

> . . . the necessity for various possible kinds of information (and intelligence) systems to effective law enforcement; the most appropriate structure(s) for such systems (centralized, decentralized, state controlled, law enforcement controlled, etc.); the kinds of safeguards that can and should be built into such systems; the relationship of the data bands developed under such systems to other data banks; and the proper forms for public regulation of such systems.[12]

This reviewer suggests that the need for such a study indeed exists, but concludes that that effort in evaluation ought not impede present efforts to rationalize the collection of data throughout the multiple jurisdictions in this country so as to permit more meaningful and intelligent judgments about the disposition and effective rehabilita-

11. REPORT, *supra* note 6, at 222-46.
12. *Id.* at 244.

tion of individuals accused of crimes. Certainly society need not await another study in order to achieve this valid social goal and the constitutional imperative to protect the rights of the individual accused can now be met by application of one of the Advisory Committee's own principles: *any* individual, subject of a personal data record-keeping system, must enjoy the absolute right to correct or amend the record of identifiable information about him.

The Advisory Committee has rendered this nation an invaluable service by articulating in this report its concerns. That task completed, a more difficult task remains. The public and, more particularly the members of the legal profession, must address the issues raised by the Advisory Committee, resolving the ever-present conflict between societal benefits and individual rights, a conflict that has been aggravated by the new technology of automated information systems. Ronald A. May, chairman of the First National Conference on Automated Law Research, stated in his opening remarks to the conference that:

> . . . the bar has not accepted its responsibilities [having] moved from hostility toward [the] new technology, to indifference . . . to . . . empty enthusiasm.[13]

The ubiquitous computer is now a reality. We are obliged to see to its proper use in serving us.

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CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES. Edited by *Jerome Alan Cohen.*† Cambridge: Harvard University Press, 1972, Pp. x, 417. $15.00.

Jerome A. Cohen's *China's Practice of International Law: Some Case Studies* is an outstanding selection of ten studies on Chinese legal behavior in specific instances, published by Harvard University Press. Professor Cohen, who chaired a panel on China at the annual convention of the American Society of International Law, has succeeded in

13. A.B.A. DEP'T OF STATE & LOCAL BAR SERV., COMPUTERS AND THE LEGAL PROFESSION 1 (Special Issue No. 2, June, 1973).

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bringing together a group of legal experts who examine from different points of view the behavior of the People's Republic of China (PRC) based on actual cases beginning with the Communist takeover of all of China.

Professor Cohen was instrumental in starting legal research at Harvard Law School into China's attitudes, and is now Director of the Law School's East Asian Legal Studies. He has assembled a group of scholars, versed in the subject, who are keen observers and frequently participate in the actual events. It is a great merit of the book that the authors engaged in a sophisticated investigation of all the available and published records in an attempt to extract a definite pattern of the attitude of the PRC. However, since a great deal of the information, particularly in the Western countries, is still not available, there is a certain tendency to give more weight to the Chinese position, particularly so, since the collection of documents relating to foreign relations is readily available to Chinese-speaking scholars. In some cases this might lead to a tendency to be tolerant towards China's attitude to international law.

The problem of the acceptance of the norms of international law by new revolutionary states has always been considerable. In its early days, the United States government promoted, on the basis of ideology, the establishment of Republics in Europe. The Napoleonic government exported its domestic systems by force, in disregard of previous rules, over all of Europe. The Russian Revolutionary government for a long time refused to recognize previous commitments by the Czarist government.

The new revolutionary Chinese government under Sun-Yat-Sen, and later under Chiang Kai-Shek, attempted to revise or modify unequal treaties. The new People's Republic of China initially was less willing to accept even the minimum rules previously more or less condoned by the Soviet Union.

Philippe Ardant, in an article on Chinese Diplomatic Practice, clearly states that the PRC expected two standards for diplomatic relations—the most elementary and the oldest area of international law. Chinese diplomats enjoyed all the rights of other diplomats in Western countries such as France, the Netherlands or Great Britain, but all diplomats in China were subject to standards set and approved by the Chinese government. The Chinese assumed that they could develop their own rules and make the reality in China conform to the ideo-

logical needs and the interests of the revolution in China, irrespective of reciprocity.

> The Foreign states and their representatives in Chinese territories must not expect to be esteemed and humored simply because they are foreigners; rather, they will be treated according to the objective attitudes towards revolution and this revolution is taking place every day the Chinese live it.[1]

On the basis of this attitude, it seems difficult to explain consistency on the part of Chinese behavior, even taking into account the constant shift in internal policy.

The book is divided into eight areas; recognition, establishment of diplomatic relations and immunities, diplomatic practice, non-recognition and trade from the first section. The next essay in the book is devoted to negotiation with China. Three articles are devoted to disputes, one to the Soviet-Sino dialogue on territorial issues, one to comparing views on unequal treaties by the PRC and Nationalist China, and another to the conflict with India, concerning internment of all Chinese Nationals.

The last two articles are treating Peking's relationship to international organizations and its relationship to the International Red Cross. The selection of subjects shows a sophisticated approach to the Chinese situation and an attempt to cover the situation from all points of view.

The authors are similarly carefully selected. All but one are presently university professors, some are of Chinese origin and others are veteran observers of the Chinese scene. They all appear to share an admiration of China and its culture, except perhaps for Philippe Ardant who takes a more unemotional approach.

Professor James C. Hsiung of the Department of Politics, New York University, divides his observations between an introductory analysis of recognition, the first period of the PRC's struggle for recognition, and the second period during which the PRC is in the forefront of recognizing newly independent states formed between 1956 and the present. The methods used for recognition during the last period are unorthodox, but can be explained. The attitude was largely based on the PRC's struggle to be "the sole legitimate government of China,"[2]

1. Ardant, *Chinese Diplomatic Practice During the Cultural Revolution*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 127 (J. Cohen ed. 1972).
2. Hsiung, *China's Recognition Practice and its Implications in International Law*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 40 (J. Cohen ed. 1972).

and also to be in touch with revolutionary movements such as the Algerian provisional government and other units attempting to form a state. This pragmatic approach is probably exaggerated by the author who attributes this action to "cultural and ideological backgrounds totally different from the 'older' Western states."[3] While this difference obviously exists, it is also true that India, Indonesia, Pakistan, Egypt, Japan, Nigeria and practically all of the African states, have acted in foreign policy along the lines of the norms of international law, with any deviations being more or less within the limits of the European system during the 18th, 19th, and 20th centuries. It would seem less the cultural, religious or ideological differences which have lead to the denial of the accepted rules of international law than the expression of revolutionary elan and the desire to bring about change in the status quo by Napoleon's France, the Soviet Union, Castro's Cuba and the PRC.

The author rightly considers this revolutionary attitude in recognition as a "serious challenge to the original European-defined value system and the international law derived from it."[4] It might also be considered a return to a more elementary stage of the development of intercourse between states. Professor Hsiung's analysis shows that recognition de ideologica was practiced by the PRC following the footsteps of Soviet attitudes "during the 1920's when they recognized the warlord government in Peking (de jure), the Kuomintang opposition in Canton (de facto) and the nascent Communist movement in China (de ideologica)."[5] Similarly the Chinese government employed different methods by using the five principles with communists and "anti-imperialists and anticolonial" states, a second form with Western countries replacing Nationalist China and a third one with smaller or less important states, skipping all mention of principles.

Professor Ko Swan Sik, professor of the Inter-University Institute of International Law, in a learned discussion of the Dutch experience with China, comes to the conclusion that "a number of acts on the part of the Chinese could be characterized as violations of the traditional rules."[6] Some of the acts have been motivated by non-legal considera-

3. *Id.* at 19.
4. *Id.*
5. *Id.* at 53.
6. Sik, *The Establishment of Diplomatic Relations and the Scope of Diplomatic Immunity: The Dutch Experience with China*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 84 (J. Cohen ed. 1972).

tions, although, in Professor Sik's conclusion, violations of international law are "not exceptional in the practice of states."[7]

Professor Philippe Ardant, who, as a French diplomat, was an observer in China, in his analysis of Chinese diplomatic practice, expands the views previously expressed. He clearly states that Chinese behavior is "difficult to understand in terms of norms and customs currently accepted in international society."[8] Offensive episodes and the permanence of provocative behavior denote an obvious unwillingness to bend to the rules of diplomatic life. The Chinese attitude is "a strategy based on a coherent, original conception" of diplomatic relations, dictated by the actual state of international society. In the Chinese opinion it is the only correct model and is "intended as a substitute for the diplomatic rules consecrated by the Convention of Vienna of 1961."[9] It is, as Ardant concludes, behavior in the interest of the revolution in the contemporary world. The Chinese policy is strengthened by most embassies which have never taken any collective action, even after the most marked attacks on customary diplomatic practice. It seems that foreign states do not wish to run afoul of the Chinese and "that they accept from them what they would never suffer in their relations with one another."[10]

Professor George Ginsburgs and Professor Carl Pinkele dissect the territorial issue between the Soviet Union and China, and come to the conclusion that it did not "contribute a significant dimension to the Sino-Soviet controversy."[11] Professor Hungdah Ciu of Taiwan's National Chengchi University, finds that unequal treaties are opposed by both the Chinas. However, the PRC declares these treaties invalid while Nationalist China considers revision, or abrogation necessary, under the principle of *rebus sic stantibus.*

Professors Jerome Alan Cohen and Shao-Chuan Leng, in their article on the Sino-Indian dispute over internment and detention of Chinese in India, confirm the previously reported attitude that China desires application by India of the rule of law—even an extension of it by including Indian nationals of Chinese extraction—but is un-

7. *Id.*
8. Ardant, *Chinese Diplomatic Practice During the Cultural Revolution*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 86 (J. Cohen ed. 1972).
9. *Id.* at 87.
10. *Id.* at 128.
11. Ginsburgs & Pinkele, *The Genesis of the Territorial Issue in the Sino-Soviet Dialogue: Substantive Dispute or Ideological Pas de Deux?*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 237 (J. Cohen ed. 1972).

willing to grant access by the International Committee of the Red Cross to prisoners in China. China's efforts to adopt two standards, one for India and one for its own behavior, is characterized by the authors as a case of a new approach in international law: The Chinese Communist elite adopted a "do-as-I-say, not-as-I-do" approach to international law.

Of the last two essays concerning China's attitude towards international organization, the first one by Professor Byron Weng on Peking's participation in International Organizations, has been overtaken by events. Communist China's replacement of the nationalist government in the United Nations in 1971 and the joining of many specialized agencies, create a new situation. Before the resolution giving PRC representation in the United Nations, China asked for substantial revision of the Charter and freeing of the United Nations from "the control of the United States and other big powers."[12] In 1971, the PRC settled for the expulsion of Nationalist China and receipt by the PRC of all rights given previously to China as a founding member.

The final essay by G.I.A.D. Draper of the University of Essex is an indepth study of the PRC and the International Red Cross. It indicates similar behavior on the part of the PRC as is found in previous essays. Between 1952 and 1966 the PRC consistently insisted on the expulsion of Nationalist China and full recognition of itself as sole representative of China. Its delegates, despite the good intentions of the conference, refused to accept the impartiality and neutrality of the International Red Cross and continued to attack the good faith of the officers of the organization. The PRC finally stopped attending Red Cross conferences when Nationalist China was seated at the New Delhi conference in 1957.

Jerome Alan Cohen's book is a must for all students of international law and of China. Despite the long opposition of the United States to the PRC, American scholars painfully collected documents for an indepth study of contemporary China. While most of the authors show sympathy with China, they clearly describe, often critically, China's behavior, its strengths and its weaknesses. All deplore the lack of respect for the general rules of international law at one time or the other, but they try to explain it in relation to China's past history, its isolation and its self-reliance as a revolutionary Asian power. It might be

12. Weng, *Some Conditions of Peking's Participation in International Organizations*, in CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 341 (J. Cohen ed. 1972).

argued that collective action by diplomats in China and foreign offices would have helped the PRC to see the wisdom of accepting minimum standards of international behavior within their boundaries. An article by an Indian or Soviet international lawyer would probably have provided a further insight into the problem and have helped to assay the situation from all sides.

The analysis contained in the book ends, despite some updating by the authors, with the beginning of the PRC's participation in the international community in September, 1971. At that time the PRC became a member of the Security Council and was recognized by the most important nations. China may now be entering a new stage of development and be on the way to creating a new approach based on adaptation to international behavior.

Until now, however, the keynote to China's behavior as developed in this outstanding book, is the observation by Jerome Alan Cohen that "any government strong enough to rule the China mainland will be ardently nationalistic for some time to come and unwilling to promote world order on other people's terms."[13]

*Franz B. Gross**

DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL. By *Franklin E. Zimring*† and *Gordon J. Hawkins.*†† Chicago: The University of Chicago Press, 1973. Pp. xiv, 376. $13.50.

At the beginning of every criminal law course it is a convention to make reference to the purposes of criminal law before we get on with the important job of memorizing rules. These purposes are, compendiously, retribution, rehabilitation, deterrence, and incapacitation. To the philosophically minded these ends justify, indeed sanctify, the erection of the complex division of labor (policemen, judges, lawyers, probation officers, and assorted payrollers) that is known in some circles as the criminal justice system. But if one peeks behind the ritual

13. *Id.* at 342.

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invocation of this conceptual boiler plate, it is quickly apparent that these are empty names, terms dangling in the airy empyrean of speculative thought. There is one exception to these strictures. The concept of retribution seems to have been thought through at one time by a certain Kant. The great merit of retribution as a theory is that it has no pretense to be other than speculative, *i.e.*, it does not depend for its validity upon the truth or falsity of matters of fact. The justification for punishment is thus imposed on the world of cause and effect and is independent of such data. One accepts or rejects the Kantian theory because of the value system it presupposes. The other theories, however, stand or fall on their power to predict and control behavior in the real world—does punishment *P* attached to crime type *X* have a measurable effect on type *X* criminal behavior in the large? Did punishment *P* imposed on criminal *C* have an effect on his future behavior in the desired direction? Did the benefits of incarcerating criminal *C* in view of the probability of a free *C* committing criminal acts outweigh the costs of such confinement? The hooker is, of course, that such questions have remained unasked or unanswered, thus rendering claims to sanction based on deterrence indices of the invoker's allegiance to pseudo-scientific rhetoric, over, all competing forms of hokum.

The point of the book under review is to marshall the assets of the bankrupt, one *Deterrence*, not for the purpose of winding up its affairs but for the purpose of promoting its reorganization so that it can serve as a conduit for cash flowing from the Law Enforcement Assistance Association people to your friendly neighborhood law and society researchers. Thus, the only pretense the joint authors make to originality is confined to making sense of current theories and suggesting promising, middle range research alternatives for the armies of graduate fellows presumably stumped for a usable thesis topic.

The first 30 pages of the book make the point that deterrence theory (like nearly every other aspect of the criminal justice system) is polarized along ideological, absolutist lines. The two opposites in the instant case are: (1) the true believers in the universal efficacy of deterrence regardless of type of actor, crime or social context; and (2) the skeptics who truly believe that deterrence is a myth regardless of type of actor, crime, or social context. If I may be allowed an aside, it is my hypothesis that such charicatures as presented above have little explanatory power in predicting the actual expectations or practices of

the participants in the real world. They seem the straw men that are the stuff of law professors' dreams. At any rate, the strategic value of these constructs is that they allow the authors to set up themselves as moderates (the American public rejects extremists) who favor empirical research.

Our empiricists reject any attempt to give a theoretical grounding for their exclusive focus on criminal law as opposed to other systems of social control. This excludes from inquiry such troublesome practical problems as the deterrent effect of civil commitment of drug addicts, civil proceedings where penalties or punitive damages are authorized, and injunctive remedies. (I pass over without mentioning the deterrence rationale for the entrapment defense and for such exclusionary rules as *Miranda v. Arizona*.[1]) The parochial focus on contemporary American practices, in addition to putting the validity of such narrowly researched findings on deterrence into serious question,[2] results in a failure to consider alternative practices as measures of security or comrades' courts. Surely if society has a moral duty to "test the effectiveness of the policies pursued in light of available information and also to search for further information,"[3] the scholar's responsibility to give a tenable theoretical justification for failing to canvass other domestic and foreign sanctioning systems for policy-relevant information can be no less.[4]

Chapter Two, titled *The Rationale of Deterrence*, is divided into sections dealing with the official ideology and ethical, economic, and political aspects of deterrence. In the section on ethics, the authors make hash of the Kantian position by reinterpreting Kant as a due process liberal or, in the alternative, a utilitarian. This Procrustean treatment is both unnecessary and offensive. It should be sufficient to say that Kant's position, like so many other philosophical claims, has

1. 384 U.S. 436 (1966).
2. *See, e.g.*, L. POSPISIL, ANTHROPOLOGY OF LAW (1972).
3. F. ZIMRING & G. HAWKINS, DETERRENCE 43 (1973) [hereinafter cited as DETERRENCE].
4. This omission is an especially troubling one in view of the powerful theoretical arguments in favor of a wider focus made some years ago in R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961). For example, it will not do to say, with Holmes, that the state may adopt a frankly manipulative approach in criminal law because the state does it in so many other spheres of activity, *e.g.*, military conscription and taxation. Such an argument leads to the inference that it is necessary to study all authoritative deprivations as of a piece. This broadens the focus from the criminal law in isolation to the criminal law as the extreme on a continuum involving the proper relations of the individual to state power. As Allen has it, "We are concerned here with the perennial issue of political authority. Under what circumstances is the state justified in bringing its force to bear on the individual human being?" F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 36 (1964).

never been refuted; it has been discarded as irrelevant to another age and society.[5] We should be careful about subjecting philosophical positions to the same twisting and bending that we find so useful in manipulating precedents. I must also remark that the authors' effort to ground policies concerning the limits of retribution by the standard of allowing the state to do whatever does not "grossly exceed the community's normal expectation"[6] seems stunning, given recent Western experience with totalitarian regimes of the Hitler-Stalin stripe. When the authors descend from the clouds to discuss a mundane problem like the exemplary sentence, however, the treatment is penetrating and thought through.[7] The sections on economic and political factors steer clear of considerations which would force the authors to deal with any broad, systematic set of inquiries about the criminal law as a sanctioning system.[8]

Chapter Three, appropriately entitled *Definition*, contains a definition of deterrence and a discussion of some of the policies that deterrence may be thought to maximize (rational calculation of alternatives, expression of social disapproval, building habitual obedience to, respect for, and conformity to the law). The definition stipulates that deterrence is used in the authors' sense where there is a threat which causes individuals who would have committed the threatened behavior to refrain from doing so.[9] It seems to this reader that this definition does no more than operationalize Austin's well-known command theory of law so that its predictive power may be tested by a mighty array of social science techniques.[10] There is no attempt to discuss why this definition of deterrence is preferred over other definitions in accordance with such recognized scientific criteria as fruitfulness in generating alternative hypotheses, fit with existing theoretical paradigms, or superiority in ordering existing data. This is not to say

5. *Cf.* 1 J. RANDALL, THE CAREER OF PHILOSOPHY 11 (1962).

6. DETERRENCE, *supra* note 2, at 42. One might also ask whether there is any principled reason for preferring the "grossly excessive" formulation to any conceivable alternative formulation, *e.g.*, adopting the least coercive alternative that community expectations will tolerate.

7. *Id.* at 44-50.

8. "Economists have in fact begun to enter the field of crime and punishment; principally by way of superimposing economic theory . . . on data derived from this area." *Id.* at 55. One might profitably contrast the authors' resistance to looking beyond the criminal law with their University of Chicago Law School colleague's discussion of deterrence and the economic theory of remedies in R. POSNER, ECONOMIC ANALYSIS OF LAW 357-62 (1972).

9. DETERRENCE, *supra* note 2, at 71.

10. *Id.* at 249-367. Although these are blueprints devised by the authors to be put into effect by others.

that this definition is not the most useful, only that it is assumed to be without discussion of potential competitors. While on this tack one can further question what warrants singling out deterrence for book length attention as compared to, say, rehabilitation. That choice is worth somewhat more reasoned elaboration than Professor Vorenberg's pontifical assertion in the foreword that "deterring future misconduct is probably the principal aim of criminal sanctions."[11] From a theoretical point of view, it would be interesting to explore the notion that rehabilitation is simply the other side of the coin—deterrence involving the causal efficacy of threats for past noncompliance, rehabilitation involving the causal efficacy of promised rewards for future compliance.

The proferred definition informs the 150 page Chapter Four which discusses the marginal deterrent effect of: (1) variations in the audience's perception of the threat; (2) variations in the probability of apprehension; and (3) variations in the severity of punishment imposed. The existing research on deterrence is constantly being criticized by the authors on the ground that it fails to distinguish between cause and consequence. That is another way of saying that the current literature fails to test out alternative rival hypotheses, thus producing results which are inconclusive. The solution for this is not necessarily as the authors seem to think, increasing the output of the tidy, domestic research characteristic of contemporary British social science. The underlying problem may be a variant of the classic lawyer's syndrome described by Thomas Reed Powell—"If you think you can think of something without thinking of the thing to which it is attached, then you have what is called legal thinking." So, too, the real failure of research on deterrence may be in the adequacy of a theoretical paradigm which treats the deterrence hypothesis as if it were in utter isolation from a broader theory of social control or legal behavior as an aspect of social control. The authors frequently refer to the abstraction "social control" as an explanatory factor which accounts for the inadequacy of past studies. They do not, however, take the inference that a usable macrotheory is a condition precedent to the deployment of a concept like deterrence. For example, the authors remark that the

11. DETERRENCE, *supra* note 2, at XI. *But see* J. CONRAD, CRIME AND ITS CORRECTION 60-62 (1967). To mention only one area of substantive crime, the most important function of inchoate crime under the Model Penal Code is not deterrence but incapacitation. *See generally* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute*, 61 COLUM. L. REV. 571, 957 (1961).

topic of group processes is "peripheral" to their concerns. So, in a section in which we might expect discussion of the deterrability of organized crime, the gangster state or corporate criminal behavior, we are treated to a warmed over summary of some of the literature on juvenile gangs and conscientious objectors.[12]

Chapter Five consists of an appraisal, from the authors self-confessed layman's point of view, of the various techniques of social research. The elaborate attention to the methodological tools of the sociologist's trade puts the authors' failure to deal with the logically prior problem of the construction of a usable macrotheory in even bolder relief. This reinforces my belief that law and social science courses should be conceived of as a curricular adjunct to the basic course on evidence. Absent some commitment to the problem of constructing social theories, it would seem most appropriate to treat social science information as one of the many ways of presenting complicated factual questions in judicial, administrative or legislative arenas. Such placement would formalize the subordinate role allotted to detached scientific inquiry by books such as this.

Chapter Six, *An Agenda for Research*, suggests a number of interesting studies for others to do setting forth the following criteria for selection: (1) social importance; (2) social significance; (3) amenability to study; and (4) significance for deterrent theory as a whole. Criterion four emphasizes again the narrow conceptions of theory which vitiates much of the book's argument. The first three criteria assume the would-be researcher's willingness to adapt himself to the priorities of public officials anxious to get an answer. While unhesitating identification with the demands of the government is unproblematic to our professional sense, it is by no means uncontroversial among social scientists.[13]

The preferred modality of research advocated by Zimring and Hawkins is the field experiment. One example of the ethical and legal problems raised by this research strategy is a study performed in San Diego County Municipal Court on the effects of probation on drunk arrestees.[14] Chronic drunks who were found guilty were randomly assigned to probation with no treatment, probation with compulsory

12. It might also be interesting to ask whether one could operationalize the assumption that the existence of the crime of conspiracy deters the formation of such groups.

13. *See* Becker & Horowitz, *Radical Politics and Sociological Research*, 78 AM. J. SOC. 48-66 (1972).

14. Ditman, Crawford, Forgy, Moskowitz & MacAndres, *A Controlled Experiment on the Use of Court Probation for Drunk Arrests*, 124 AM. J. PSY. 160 (1967).

clinical treatment, probation with compulsory attendance at Alcoholics Anonymous. The first difficulty is the court's abandonment of the duty of principled decision-making in sentencing by imposing a standard fine and probation term on all chronic drunk arrestees for the purpose of allowing the researchers to achieve uniformity in the sample. The second difficulty concerns random allocation in the stringency of the terms of probation. It will not do to argue that no arrestee was worse off than he would have been had the court selected imprisonment rather than probation as the appropriate punishment. The crucial problem which field experiments of this sort raise is exactly the same as is raised by any form of experimentation on human beings—the presence or absence of informed consent.[15] One can make an argument that the theorist is not obliged to engage in the task of clarifying the relationship between the goals of scientific knowledge and the dignity of the individual.[16] Advocates of applied research like Zimring and Hawkins can claim no such privilege.

If I may be allowed to resort to quotationism in summing up, there are three main alternative investments of intellectual resources in the knowledge business:

> . . . (a) to try to establish one proposition well, by studying or writing a monograph in which special data created for the purpose at hand are used to greatly increase the credibility of that proposition; (b) to make distinctions among phenomena in the area or to create (or learn) schemes of analysis which may be of use to others (or to oneself) in analyzing particular problems in the future, which enterprise is called "theory" at the present time in sociology; (c) to try to increase the credibility of a number of propositions in the area by the use of whatever information comes to hand, just enough so that it becomes clear that more resources ought to be invested in the study of these propositions.[17]

The Zimring-Hawkins performance at hand does not attempt (a), does not succeed at (b), and does tolerably well at (c) in the last thirty pages of a 370 page book with nearly one thousand footnotes. Given the deservedly high reputation of these authors in previous work and the obvious expenditure of scarce intellectual resources on this book, one

15. *See generally* J. KATZ, EXPERIMENTATION ON HUMAN BEINGS (1972).
16. *See* Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972).
17. Stinchcombe, *Social Structure and Organizations*, in HANDBOOK OF ORGANIZATIONS 191 (J. March ed. 1965).

can only say, with Horace, *montes parturentur, nascitur riduculus mus.*[18]

This book ought to have been an aperitif, bitter, astringent, but a necessary prelude to the empirical banquet to follow. What we get is a cordial whose taste is vaguely familiar, curious, not altogether unpleasing but quite out of place—not unlike a drink of Grand Marnier in the early afternoon.

*Michael E. Libonati**

18. Mountains have rumbled in the throes of birth pangs, a lowly mouse is born (unlike the authors DETERRENCE, *supra* note 2, at 5, I translate my Latin references for the benefit of the *illiterati*).

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