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Book Review

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BOOK REVIEWS

A Look At A Revolution

THE SELF-INFLICTED WOUND. By Fred P. Graham. New York: The Macmillan Co., 1970. Pp. x, 377. $7.95.

A revolution wrought by judges with the pen is more rare than one carried out by citizens with arms. The Warren Court did make a revolution—"the due process revolution," as the author calls it—and it is this transformation in our law that is the subject of Fred Graham's book, *The Self-Inflicted Wound*. The wound referred to in the title is *Miranda v. Arizona*,[1] in which the Supreme Court of the United States held that before the police can interrogate an accused in custody, they must warn him that he is entitled to a lawyer and that anything he says may be used against him in court. The author makes clear his view that the Court in this case went too far in its protection of the rights of criminal defendants. But, using his experience as a lawyer and as Supreme Court reporter for the *New York Times*, he has organized and presented the material to enable the reader to make his own reasoned judgment of the Court's actions.

Beginning with a general chapter on "Crime and the Supreme Court," Graham deals with the Warren Court's "due process revolution" which delineated in depth the rights of criminal defendants. He discusses well over a hundred cases in his treatment of such topics as confessions, illegal searches and seizures, identification of suspects, and eavesdropping by the police. He also examines the politics of crime, the mathematics of crime, and the problem of policing the police.

As with most good writing, the book can be read on several levels: as an attack on the Supreme Court, as a narrative of the development of a body of constitutional law, or as a study in the exercise of judicial power. The author's treatment of the topic, for example, makes clear a basic, but seldom-recognized fact: Justices of the Supreme Court, like other men, are affected by personal factors in their exercise of power. Background, experience, and education count for much more than settled rules of law in their decisions. If this were not the case, there would be far fewer five-to-four decisions. The "due process revolution" was in large measure a product of the personalities of the justices who made it.

1. 384 U.S. 436 (1966).

The revolution was also the result of another fundamental fact—that Supreme Court Justices exercise political as well as judicial power. The drafters of the Constitution of the United States made the judiciary one of the three coordinate branches of government.[2] In so doing, they made the Supreme Court a political as well as a judicial body and invested the men who sit as the nation's highest judges with enormous political power. As Chief Justice Charles Evans Hughes said, "We are under a Constitution, but the Constitution is what the judges say it is . . . ."[3] This power of the Justices is not disturbing as long as the Court's view of the Constitution is consistent with one's own views. When the Court rules contrary to one's view, this power becomes a matter of great concern. Unlike elected officials who are not protected by tenure, the Justices cannot be held to account directly for their actions. The only recourse for those who oppose specific decisions is to attack the Court.

Whether the Court was right in its decision in *Miranda* is a question that admits to no absolute answer. The fundamental problem in the case—the inevitable conflict between the twin goals of order for society and justice for the individual—underlies the administration of all our criminal law. Unfortunately, however, observers treat the disagreement of the Justices—essentially disagreement over means rather than ends—as one between conservatives and liberals, terms which do little more than express an emotional bias. Everyone acknowledges that the ultimate goal is justice. But there are subsidiary goals about which people disagree, such as whether the control of crime or the rights of the individual are more important. When pushed, the extreme conservative will say that as long as the guilty are punished the means—use of coerced confessions—justify the end—control of crime. The extreme liberal, on the other hand, will insist that the means—exclusion of coerced confessions—justify the end—protection of individual rights—even if guilty men go free.

The basic problem of *Miranda*, as the author states, is fairness to the criminal defendant. In seeking this fairness, the question arises whether the conduct of police officers can be controlled by an exclusionary rule of evidence. As Mr. Graham points out, such a control might be effective if all police officers were lawyers. Since they are not, the

2. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § I.

3. This famous quotation was from an extemporaneous speech by Hughes as Governor of New York. *See* 1 M. PUSEY, CHARLES EVANS HUGHES 204-05 (1951).

answer is almost surely "no." The typical police officer is interested in solving a crime rather than in obtaining a conviction. His pride is not vested in the trial, but in finding out who committed the act. Furthermore, if he has no pride vested in the trial and its fairness, he will have little hesitancy in borrowing a practice of common-law judges—the use of fiction—on the witness stand in testimony about the warning given the suspect. There is a vast difference, of course, between the use of a fiction in an appellate opinion and the use of one on the witness stand, but the difference is not apparent to the police officer.

Graham implies, probably correctly, that *Miranda* has been ineffective in achieving its goal of fairness to criminal defendants. It offers a doctrinaire solution to a practical problem. The difficulty is not in the conduct of police officers. The difficulty rather arises from the nature of the adversary trial which creates many dilemmas in an effort to obtain a balance of fairness between the prosecutor and the accused. One such dilemma is created when the defendant chooses to testify. The prosecutor then has the right to impeach not only his testimony, but also the character of the defendant himself. Thus the Supreme Court, in *Harris v. New York*,[4] has retreated already from *Miranda* and held that a confession, concededly inadmissible under the *Miranda* rationale, could be used for impeachment purposes.

The dilemma that *Harris* addresses is created in large part by the fact that a defendant, if he is to speak at all, must give sworn testimony and subject himself to cross-examination and impeachment. For innocent defendants, this is not a burden. But many, perhaps most, defendants brought to trial have in fact committed unlawful acts and they seek to escape conviction under cover of the requirement of proof beyond a reasonable doubt. The problem of fairness to the criminal defendant would be greatly simplified if we recognized this and gave him the privilege of telling his story without the necessity of an oath. In Georgia, this was the practice for many years. The defendant could make an unsworn statement in which he was allowed to say what he wanted to without being examined by either the prosecutor or his own lawyer. The jury was instructed that the defendant could not be sworn, and that it could give such weight to the statement as it chose. In 1961, the Supreme Court in *Ferguson v. Georgia*[5] struck down this practice, and held that a criminal defendant has a constitutional right to be sworn and to testify. The Georgia legislature then simply amended the statute, giving the defendant the option to be sworn. The practice continues as before,

4. 400 U.S. 924 (1971).
5. 365 U.S. 570 (1961).

except that the defendant is not in as favorable a position, since the jury cannot be instructed that he cannot be sworn.

Ferguson, like *Miranda*, represents a doctrinaire approach to the rights of criminal defendants. Here, too, the Supreme Court overlooked the fact that it was not dealing with abstract principles, but with practical problems. The practical solution is often the most effective way to implement the principle.

The Supreme Court's personnel have changed since *Miranda*, but, while the men are different, the power remains. With the power remains the fundamental and continuing problem with which the Court must always deal—resolving the conflict between order for society and justice for the individual. In achieving a balance between these two values, the political power the Court exercises is more important than its judicial power, but it can exercise the former only in the guise of the latter. A court exercises judicial power in the ordinary case when it defines the rights of individuals in conflict resulting from a dispute arising out of past events. In so doing, the court looks to the past, not to the future. A court exercises political power when it defines rights and duties for the future in an effort to redress the balance of power in our society. *Miranda* was directed to the role of police officers in dealing with accused persons. Because the Court had to exercise this power as a court, the sanction imposed—the exclusion of evidence—was indirect and consequently did not greatly affect police officers.

The lesson implicit in *The Self-Inflicted Wound* is that the Court cannot accomplish its political task alone. While individual rights are fundamental in a democratic society, so are individual responsibilities. The Bill of Rights, however, deals not with duties, but only with rights. To make these meaningful, the Court must seek to create a recognition of duties and this is what the Court attempted in *Miranda*—to compel police officers to recognize their duties in dealing with accused persons.

The failure of this decision is not so much the fault of the Court as it is the fault of court commentators in failing to recognize—and in failing to make others recognize—that the Supreme Court is more than a court. It is the only branch of government that exercises political power without the burden of having to cope with the influence of special interest groups. We may not always agree with the Court's decisions but we can be confident of its sense of responsibility.

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