

## The Self-Inflicted Wound (Fred P. Graham)

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## REVIEWS

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

Since declarations of neutrality often portend savage partisanship it was with some skepticism that I read the preface of Mr. Graham's book in which he styled himself a "neutral" observer of the Warren Court and its criminal law revolution. He does indeed have an outlook favorable to the Warren revolution discernible in such comments as: "the differences from state to state in the treatment of persons who ran afoul of the law had become intolerable in a nation where state lines had come to mean so little."<sup>1</sup> If, as I am willing to assume, Mr. Graham is reflecting not a peculiar prejudice but a basic outlook of our times, it is testimony to the erosion of the old federalist principle that, far from being per se a reproach to the administration of justice, the existence of various centers of governmental power and the consequent multiplicity of legal rights was an essential bulwark of political liberty in this country. Everyone is entitled to a basic set of prepossessions, however, and I am happy to confirm that Mr. Graham is as neutral as I ever expect anyone to get. A certain catholicity is needed to distribute criticism all the way from Justice Douglas<sup>2</sup> to F.B.I. Director Hoover.<sup>3</sup>

The author, who is The New York Times reporter covering the Supreme Court and Justice Department, occupied a uniquely advantageous position to observe the *dramatis personae* of constitutional change during the critical period covered in this book. I do not mean that he tells tales out of school or engages in Rodelian muckraking, although I recall one remark which does not raise the tone of the book. When a liberal Justice of the Supreme Court is called "flexible" in his principles, and the "flexibility" illustrated by his alleged withdrawal of the appointment of a law clerk because of criticism of the young man's protest activities in the southern press, you have the kind of innuendo a newspaperman ought to avoid. More in the spirit of good humor is the epigram comparing Justice Black's pre-judicial political indiscretions with his record on the Court.<sup>4</sup>

The author's knowledgeable extends beyond anecdotes concerning the Justices. It occasionally furnishes interesting insights into

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<sup>1</sup> F. GRAHAM, THE SELF-INFLICTED WOUND 4 (1970) [hereinafter GRAHAM].

<sup>2</sup> *Id.* at 51.

<sup>3</sup> *Id.* at 71, 257.

<sup>4</sup> It is not the place of a review to steal the author's jokes, so the reader is referred to page 49 of the book.

the vagaries that can influence the process of decision itself. One instance is the series of decisions on the retroactive application of newly created rights of criminal defendants. Constitutional doctrine, however startling, used to be thought of as theoretically timeless and as applicable to old criminal convictions as to the case in which they were announced. It was possible, therefore, that convicts long in prison could compel reexamination of their conviction through federal habeas corpus. While the impact of this possibility was formerly dampened by deference to state procedural forfeiture rules, the case of *Fay v. Noia*,<sup>5</sup> in 1963, eliminated this barrier—thus opening the door to the application of new rules to old trials in which they had never been dreamed available. When the first major step in the criminal law revolution came in *Mapp v. Ohio*,<sup>6</sup> the search and seizure case, the author suggests that the retroactivity problem was not foreseen until the Court had already routinely and uncritically applied the rule to a few convictions based on pre-*Mapp* trials not yet final when *Mapp* came down. The Court then saved what it could in *Linkletter v. Walker*<sup>7</sup> by holding the *Mapp* rule inapplicable to convictions that had become final by the date of *Mapp*. The Court, according to the author, was about to apply the *Linkletter* cutoff rule to the *Miranda v. Arizona*<sup>8</sup> confession case when the Justices realized that such a distinction would result in reversing the convictions of some heinous offenders and affirming those of some who, in the author's words, "had been treated rather shabbily by the police." The author intimates that the enormity of the crimes of some appellants led the Court, especially Chief Justice Warren, to search for a rule of retroactivity which would exclude them. In a last minute scramble, the retroactivity case was severed from the *Miranda* appeal and handed down the following week with a change from the previous pattern. The *Miranda* rule was to be applicable only to trials occurring after the date of that decision. Trials that took place after *Miranda* which used confessions obtained previously were still left within the rule. Pure prospectivity, of which the author approves, was not attained until the holding of *United States v. Wade*,<sup>9</sup> affording the right of counsel at lineups, was applied only to lineups held thereafter.<sup>10</sup>

The author is in his element when analyzing politics. One of

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<sup>5</sup> 372 U.S. 391 (1963).

<sup>6</sup> 367 U.S. 643 (1961).

<sup>7</sup> 381 U.S. 618 (1965).

<sup>8</sup> 384 U.S. 436 (1966).

<sup>9</sup> 388 U.S. 218 (1967).

<sup>10</sup> GRAHAM 192.

the great ironies of the Court's revolution in defendant's rights was its concurrence with the staggering growth of crime in the United States. While there is some question of the effect of court decisions on crime, there is little doubt of their effect on the politics of crime, and as the author put it, "crime replaced communism as the hobgoblin of American politics."<sup>11</sup> The Court's contribution to this phenomenon was widely viewed as "a sort of judicial nymphomania, a compulsion to bestow the favors of justice too freely, which the critics saw as a weakness of liberal thinking."<sup>12</sup>

The treatment of political pressures on the law is enriched through an unfailing historical perspective of the several areas of criminal procedure. For example, we are given a full development of the relation of the Bill of Rights to the fourteenth amendment from *Barron v. Baltimore*,<sup>13</sup> through *Adamson v. California*,<sup>14</sup> to the present technique of selective incorporation under which the Bill of Rights was converted from a set of restraints on federal power into personal guarantees of freedom from governmental abuse. The author's explanation of these developments, strong on factual detail, is a model of clarity and dramatic appeal, even to such recondite subjects as federal habeas corpus for state prisoners. Through actual illustrations of abuses corrected, we see the conflict between the search for the needle of injustice in the haystack of state convictions and the corrosive effect such a remedy has on the finality without which state convictions can be neither a deterrent to the criminal nor an impetus to rehabilitation of the convict.

Similar journalistic talents are manifest in the comprehensive discussion of the search and seizure guarantee of the fourth amendment from before *Wolf v. Colorado*<sup>15</sup> to the present problems of stop-and-frisk and electronic eavesdropping. Singled out for special treatment is the danger inherent in police searches without a warrant, as exacerbated by the Supreme Court decisions scrutinizing warrants so microscopically as to discourage their use by police. The discussion gives point to the old quip that trial courts search for truth and appellate courts search for error. Although the continuity of the search and seizure discussion and that of electronic eavesdropping is annoyingly interrupted by a chapter on lawyers and lineups, the eventual treatment of eavesdropping is knowledgeable, factually as well as legally.

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<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 16.

<sup>13</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>14</sup> 332 U.S. 46 (1947).

<sup>15</sup> 338 U.S. 25 (1949).

The irrationality of the traditional law is exposed through a discussion of *Olmstead v. United States*<sup>16</sup> and *Goldman v. United States*.<sup>17</sup> The political dangers inherent in indiscriminate wiretapping are exemplified by the federal taps on prominent Negro leaders such as Dr. Martin Luther King and Elijah Muhammad.<sup>18</sup> The chapter closes with reference to the brewing crisis over whether the Judiciary or the Executive shall supervise and control electronic surveillance of the nation's violent revolutionary movement.

Despite Ramsey Clark's soothing assurance in 1968 that "the level of crime has risen a little bit, but there is no crime wave in this country,"<sup>19</sup> two chapters of this book are devoted to a probing survey of crime statistics which prove that a crime wave is indeed sweeping this country. Even after discounting improved crime reporting techniques and other factors that might affect statistical reports, the figures confirm what is obvious to anyone who has his eyes open to conditions today and a reliable memory of how they were ten and twenty years ago. Certain crimes by their nature are always reported, e.g., bank robberies, which rose 248 percent from 1960 to 1967, and assaults by gun, which rose 84 percent in the five years from 1962 to 1967. While conceding that the much maligned Uniform Crime Reports of the F.B.I. seem to have been vindicated by conditions no longer open to dispute, the author nevertheless aims his severest criticism of the book at the F.B.I. and J. Edgar Hoover personally for the flair for publicity with which they use "crime clocks" and other techniques of dramatizing crime statistics. Mr. Graham views this as an attempt to "wring the maximum amount of terror out of the public." No such strictures are addressed to the academic criminologists who, it is conceded, underplayed the problem in their public pronouncements if not in their professional journals. The most solemn duty the state has to perform is the protection of the physical security of its citizens. To carp on the niceties of public disclosure of government's massive failure in this task seems to me to come with ill grace from a newspaperman.

More in the tradition of journalism than bemoaning the F.B.I.'s over-dramatization of criminal statistics is the author's revelation that, for a benevolent purpose, the National Violence Commission suppressed a set of alarming statistics on Negro crime. While Mr. Graham does not question the motives of the Commission members and refrains

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<sup>16</sup> 277 U.S. 438 (1928).

<sup>17</sup> 316 U.S. 129 (1942).

<sup>18</sup> GRAHAM 259.

<sup>19</sup> *Id.* 69.

from characterizing the withholding of the data, he candidly publishes the statistics in his notes<sup>20</sup> and discusses the serious national implications in a chapter devoted to race and crime. Although not skirting the relationship between black social militancy and its spillover into criminal retaliation against white society, the author correctly assesses the historical blame. "This is the ultimate product, most experts feel, of the economic and cultural ravages of a segregated system that has been presided over by whites."<sup>21</sup> After reading the current statistics and the criminologists' projection that things will get worse before they get better, it is difficult to argue with the conclusion that "it seems inevitable that race and crime will become firmly linked in the public mind, and that the Supreme Court and other institutions that are caught up in the crime crisis will be affected by it."<sup>22</sup>

The author reserves his gloomiest forecast for the fate of the confession code which the Court created in *Miranda v. Arizona*,<sup>23</sup> the case he had in mind when he titled the book. The tension that preceded the *Miranda* decision is reflected in the 40 appeals that the Court had held up for more than a year, marked "E.C." by the court clerk to indicate that they were *Escobedo* cases — a reference to the enigmatic 1964 decision<sup>24</sup> in which the Court departed from the voluntariness test and found a confession inadmissible because a lawyer had been denied access to his client during the interrogation. Undoubtedly impatient with the gradual pace of criminal law reform in the states, frustrated by the traditional case-by-case determination of voluntariness, and obviously intending to protect the ignorant against the impulse to answer questions designed to elicit admissions of guilt, the *Miranda* Court grasped the nettle and extended the fifth amendment freedom from compelled testimony to include the furnishing of a set of warnings. What has been accurately called the dominant impulse of modern constitutional law, egalitarianism,<sup>25</sup> also informed the decision. If the wealthy and intelligent criminal could be aware of and advised against inadvertently stumbling into the hands of justice, then the poor and ignorant offender ought to be furnished with equality of opportunity. Consequently, what was originally a restraint on governmental power to use external compulsion in obtaining involuntary admissions became an affirmative governmental obligation to apply an

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<sup>20</sup> *Id.* 340.

<sup>21</sup> *Id.* 90.

<sup>22</sup> *Id.* 88.

<sup>23</sup> 384 U.S. 436 (1966).

<sup>24</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>25</sup> A. COX, *THE WARREN COURT* 86 (1968).

external check on voluntary admissions. Yet critics of *Miranda* can always take comfort in the thought that the decision was not as extreme as it might have been. We shall probably never know what was present to former Justice Fortas' imagination when he characterized *Miranda* as "a conservative decision."<sup>26</sup>

The congressional attempt, embodied in the Crime Control Act of 1968,<sup>27</sup> to replace the *Miranda* rule in the federal courts with the former voluntariness test is explained not as legal myopia in reading the constitutional basis for the decision but as a realistic guess at the likelihood of a change in position by a reconstituted Court.<sup>28</sup> The author quotes Senator McClellan as saying privately that the bill was his "petition for a rehearing" on *Miranda*.<sup>29</sup> While this sort of temporal forum shopping is not edifying, the possible accuracy of Senator McClellan's prediction must be laid at the door of a Court that can hope for as little respect from its successors as it has shown its predecessors.

While the author characterizes the *Miranda* decision as "an exercise in benevolent authoritarianism by the judiciary,"<sup>30</sup> his objection does not derive from any principled limitation on judicial power. His reasons are solely pragmatic. The decision simply could not and will not succeed. The power to get itself accepted in the political marketplace and nothing more pretentious is what the author means by legitimacy. Since judicial reform directed at police practices in the street and stationhouse are more difficult to supervise than courtroom procedures, a restraint that goes so thoroughly against the grain of law enforcers is bound to wind up as more of a symbolic irritant than a "successful" reform.

The reference to *Miranda* in the title of the book is taken from *The Supreme Court of the United States*,<sup>31</sup> written by the late Chief Justice Hughes during his few years out of high public office. It is more than coincidence that that work is also the *locus classicus* for the "the constitution is what the judges say it is" school of thought which Mr. Graham seems to endorse with the Machiavellian gloss of "if they can get away with it." The cynic of the old cult of the robe used to regard it quite proper for the Court to stand in the same relation to the Constitution as Edgar Bergen stands to Charlie McCarthy, as long as no

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<sup>26</sup> GRAHAM 182.

<sup>27</sup> 18 U.S.C. § 3501 *et seq.* (Supp. V, 1970).

<sup>28</sup> *Cf.* *Harris v. New York*, 401 U.S. 222 (1971).

<sup>29</sup> GRAHAM 320.

<sup>30</sup> *Id.* 157.

<sup>31</sup> C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1928).

one saw its lips move. The modern cynic doesn't even mind if the lips are seen to move as long as the audience likes what it hears. I do not believe the new cynicism is any closer to the truth than the old. Like Holmes' bad man theory of law, it may tell the wilful and lawless how far they may defeat the law's purposes without being called to account, but it gives no guidance to the honest judge who wants to give effect to the Constitution's purposes, not his own.

Of the trend of decision culminating in *Miranda*, some distinguished jurists are in accord with the late Judge John J. Parker, who commented in disbelief: "It is hard for a lawyer to really think . . . that this is the law in this country now — but it is!"<sup>32</sup> Since most men, however, have an infinite capacity for accommodating their judgment to the current fashions in belief, it will remain for a later generation of lawyers to evaluate the present body of criminal procedure law. In the meantime I recommend Lord Chesterfield's advice to his son:

The things which happen in our own times, and which we see ourselves, do not surprise us near so much as the things which we read of in times past, though not in the least more extraordinary; . . . when Caligula made his horse a Consul, the people of Rome, at the time, were not greatly surprised at it, having been in some degree prepared for it, by an insensible gradation of extravagancies from the same quarter.<sup>33</sup>

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UNDERSTANDING THE ANTITRUST LAWS. By Jertold G. Van Cise. New York: Practising Law Institute, 1970 Ed. Pp. xii, 363. \$20.00.

What one has done in a book, at least as to substantive content, should be judged by what the author purported to do. Mr. Van Cise tells us that his book is written for the general practitioner, and that

[i]nitially, there will appear in these pages a brief historical review of how our antitrust principles have evolved over the centuries — not in quiet — but in the stream of life. Thereafter, the statutes and cases will be analyzed; the procedures for dealing with them will be described; the application and enforcement of their pro-

<sup>32</sup> GRAHAM 109.

<sup>33</sup> Letter from Philip Dormer Stanhope, Fourth Earl of Chesterfield to Philip Stanhope, Sept. 13, 1748, in LORD CHESTERFIELD, LETTERS TO HIS SON AND OTHERS 68-69 (Everyman ed. 1929).

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