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Book Reviews

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BOOK REVIEWS

CARDOZO AND FRONTIERS OF LEGAL THINKING. By Beryl Harold Levy. Cleveland: The Press of Case Western Reserve University, 1969. Pp. xi, 365. $9.95.

This book, first published in 1938 when Justice Cardozo was still alive, will serve to recall why so many people still talk of the Holmes-Brandeis-Cardozo combination as the ideal of the American judiciary.

Unless preceded by an extensive study of legal trends and actual decisions, it is difficult to speak with authority of the characteristics and long range effects of a particular judge or court. The current controversy over the Warren Court is evidence for this generalization.

In the case of Benjamin Cardozo, such an evaluation is made easier by the judge's extra-legal writings: *The Nature of the Judicial Process* (1921) and *The Growth of the Law* (1924). From these volumes we know what the judge thought was his duty in deciding cases. As Judge and Chief Judge of the New York Court of Appeals from 1917 to 1932, one of his primary objectives was to assist in the development of a consistent and rounded body of law for the use of the people of New York State. This inevitably involved the application of existing law to new and unforseen economic and social situations.

It is the very idea of such an expansion of the frontiers of the existing law that brings to mind the name of Cardozo. He had no doubt that a judge must push ahead into new areas. A term like "strict construction" could have little meaning or usefulness in his work. The only real issue was one of pace. Hence the technical problem was devising a method to accomplish this task without, for example, throwing away the obvious advantages of consistency and uniformity.

Professor Levy's text is an analysis of Cardozo's method of pushing into new areas or adjusting old rules to new social needs or new conceptions of justice. The techniques so pithily stated by Cardozo have been elaborated in subsequent decades, most notably by Karl Llewellyn[1] and Julius Stone.[2] But the more general account given by the judge himself serves better to understand the problems of a judge as they were in his day, as they are today, and as they will be so long as men must judge in a world of change and what is deemed to be progress.

Cardozo indicates four paths along which the directive force of a

1. K. LLEWELLYN, THE COMMON LAW TRADITIONING: DECIDING APPEALS (1960).
2. J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS (1964).

legal principle may be advanced. These are the methods of philosophy (symmetry), history, custom, and sociology (ethics).[3] Philosophy for the judge was merely the effort to make a rounded, coherent, orderly, and logical whole out of the precedents and principles of law. If there was to be a pushing out of the frontiers of the law, it was to be in the terms of the existing body of law. The expansion was always to be clearly in line with historical development with no quantum jumps; it was to be in agreement with the customs of the community; and, finally, it was to use the method of sociology to insure that any development recognized the mores of the day, the present stage of thinking in justice, morals, and social welfare.

To be a completely successful practitioner along all of these four lines would be an extraordinary accomplishment. It is credible that an exceptional intellect could so work with precedents and principles as to evolve the necessary roundedness and consistency. Perhaps an adequate library could provide the materials for keeping straight the line of historical development. But consider how much more is necessary to be in tune with the customs of the times in all fields of law; consider the antennae needed to reach out and touch the notions of justice, morals, and social welfare likely to be the ones to prevail. The continuing admiration for the work of Cardozo attests to the accepted belief that he, to an exceptional degree, encompassed the intellect, factual knowledge, power of expression, and moral sensitivity necessary to perform as he said a judge must.

It is of interest to note those issues on which Cardozo guessed wrongly or missed what was to be the line of development. For example, Professor Levy describes the long judicial effort to undo the Cardozo decision to exempt charitable hospitals from liability for the negligent acts of their employees.[4]

In summary, it is suggested that the interested reader first read the Cardozo opinions collected in Professor Levy's volume. These opinions demonstrate how a great judge wraps up a case and the issues posed in it. Then Cardozo's two previously cited volumes on how a judge ought to perform should be read. These works together illustrate that there is more to the business of law than triumphantly stating "it is well established by a long line of cases, etc., etc." One would not believe what a Cardozo can do with a long line of cases.

STANLEY D. ROSE*

3. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30 (1921); B. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 48 (1969).

4. Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914); B. LEVY, *supra* note 3, at 321.

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CITY POLITICS AND PLANNING. By Francine F. Rabinovitz. New York: Atherton Press, Inc., 1969. Pp. 192. $6.95.

Any person who was privy to the cocktail conversation of planners during the 1950's will be intrigued by Dr. Rabinovitz' competent comment on planners in politics. Practitioners of the planner's art were, during the 1940's and 1950's, examining, appraising, and reappraising their relationship to the real world of decision making. Uncertain of their professional identity, but certain that they were destined to play a major role in charting the courses of urban development, this new breed of planning technician debated its organizational position in the municipal scene and considered the ethical issues of political involvement. Dr. Rabinovitz takes a careful look at the whole problem of planners in politics and makes a perceptive appraisal which is worth the reading time.

The analysis begins with an estimate of the planner's historical notion that his role is that of a technician, preferably functioning as an advisor to an independent commission. It describes an aloofness from policy making and disinclination vigorously to "sell" planning proposals in the political market place. The author concludes this segment by observing that unless most communities are elitist, the traditional technician's role, played in an independent organizational setting, will not make planning effective.

The central theme of *City Politics and Planning* is that planning effectiveness varies with the ability of the planner to recast his concepts of role and to adjust his estimates of organization to fit the political community in which he seeks to function. This premise is developed through an assessment of planning programs in six municipalities. The author detected four unlike political situations in these communities: a cohesive system; an executive-centered system; a competitive system; and a fragmented system. In each, the efficiency of the planner was great or small, depending not upon a generalized notion of role or organization, but upon an adaption of role and organization to the characteristics of local politics.

Chapter V, captioned "Resources and Constraints," will be of special interst to persons seeking to guide a local planning program from the printed brochure to practical implementation. It is an inventory and estimate of the assets which a planner brings to the political wars. Thus, his expertise—in reputation or in fact—may insulate him from some lay criticism and may provide a technical mask for some hard decisions. His information and his inventiveness may give him a criticial edge. His bureaucratic position may furnish some

leverage in political decision making. And his possession of time and motivation may enable him to outlast his opposition. Against these assets, of course, certain liabilities must be charged. Chief among these is his lack of a constituency.

This interesting essay will undoubtedly inspire some introspection and reappraisal by planners whose programs have languished. It will give their cocktail conversations a new dimension. And it will spark new insights in all who deal with planning and its practicing professionls.

ROBERT M. ANDERSON*

EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM. By Howard Jay Graham. Madison: State Historical Society of Wisconsin, 1968. Pp. xiv, 631. $12.95.

Forged in the fierce heat of civil strife and political controversy, the fourteenth amendment to the federal Constitution has remained controversial for more than 100 years after its adoption. No provision of the Constitution, including the commerce clause, has been so productive of litigation, so stimulative to scholarly enquiry, and so conducive to scholarly and judicial disagreement as the first and fifth sections of the fourteenth amendment. Many years ago Edward S. Corwin began his pioneering studies in due process of law,[1] but the task of exploring the abolitionist origins and the legislative history of the fourteenth amendment remained for and has been performed admirably by the late Jacobus tenBroek in his provocative study, *The Antislavery Origins of the Fourteenth Amendment*,[2] and by Howard Jay Graham in a notable series of articles which began in 1938 and continued through 1964. *Everyman's Constitution* is primarily a collection of these articles with introductory notes and two new chapters on frontier tax titles and due process and equal protection.

The notable contributions of Mr. Graham's articles to constitutional history are so great that it is surely no denigration of

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1. These studies began with Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909), and Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); and culminated in E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

2. J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

them to say that there is little that is new in *Everyman's Constitution.* To provide scholars and libraries with these essays in one volume is more than ample justification for their re-publication in book form. The book begins with Mr. Graham's convincing refutation of the "conspiracy" theory of the fourteenth amendment first enunciated by Roscoe Conkling in his argument before the Supreme Court in *San Mateo County v. Southern Pacific R.R.*[3] and accepted uncritically by Charles A. and Mary R. Beard in 1927 in *Rise of American Civilization.* The theory was that one of the major purposes of the first section of the fourteenth amendment was the protection of corporations and other business interests against hostile state legislation. After a digression on Justice Stephen J. Field and the fourteenth amendment, the author returns to the anti-slavery background of the amendment to argue persuasively for *affirmative* due process and *affirmative* equal protection. The theme of this argument is that the abolitionist views of due process, equal protection, and privileges and immunities of citizens point to the conclusion that the equal rights of all persons must be positively protected by the government. Behind the demands of abolitionists like John A. Bingham, who wrote most of the first section, was the intent to endow the federal government with the power to enforce rights deemed immanent within the Declaration of Independence and the Bill of Rights. In his subsequent discussion of the fourteenth amendment and segregated education, the author is equally explicit in arguing that the prohibition against the denial of equal protection of the laws imposes a positive duty on the states to provide full and equal protection to all persons within their jurisdiction.

Accordingly, it is Mr. Graham's conviction, fortified by historical evidence, that many constitutional cases, like the *Slaughter-House Cases*,[4] the *Civil Rights Cases*,[5] and *Plessy v. Ferguson*,[6] were wrongly decided and that decisions of the Supreme Court since 1954 are more nearly in accord with the Constitution both with respect to the meaning of the first section of the fourteenth amendment and the power of Congress to enforce it under section five.

The author's meticulous collection and presentation of evidence and his thorough attention to every detail of scholarship combined with the nature of the work as a compilation render an adequate summary impossible. Nonetheless, the volume has a persistent theme which is

3. 116 U.S. 138 (1882).
4. 83 U.S. (16 Wall.) 36 (1873).
5. 109 U.S. 3 (1883).
6. 163 U.S. 537 (1896).

best expressed in the author's statement that what the United States under the guarantee of due process, equal protection, and privileges and immunities has done for corporations, "it can and must do for itself, and for still disadvantaged minorities, using the same techniques and weapons, and in this case, *intended* process and protection [and] . . . provide for others what others provided for them—economic opportunity, the protection of law, and the opportunity to realize to the full their inherent capacity and potential."[7] As a consequence, *Everyman's Constitution* has fewer infirmities than most compilations of previously published essays, and it would be querulous to complain of the repetitious, and, at times, irrelevant nature of portions of a work which is one of the best histories of the origins and early history of the fourteenth amendment.

ROBERT J. HARRIS*

THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY. By William R. Keech. Chicago: Rand McNally, American Politics Research Series, 1968. Pp. ix, 113. $3.95.

One of the historic changes in modern American democracy has been the extension of the suffrage to the Southern Negro. As V.O. Key's classic *Southern Politics* ably demonstrated more than two decades ago, the exclusion of the Southern black from the ballot was a basic tenet of the traditional Southern political system. Key compared the relationship of the Southern white, especially in the Black Belt, with that of the Dutch in the West Indies and the British in India during the heyday of colonialism. In the decades since the Second World War much has changed, abroad and in the Old South. In the modernizing process the Southern Negro has gained considerable access to the ballot.

Key's analysis of Southern politics still stands as a classic in modern American political science. But he wrote at a time prior to the great changes that have swept the South in the 1950's and 1960's. Since Key's work, only a few book length studies focusing on the Negro in Southern politics have been published. The authors include: Hugh Doublas Price, Donald Matthews and James W. Prothro, Everett Carll Ladd, Donald Strong, this reviewer, and now William R. Keech.

7. H. GRAHAM, EVERYMAN'S CONSTITUTION ix (1968).

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The perspective from which Keech begins is democratic theory. Voting is widely celebrated as fundamental to democracy, but the Southern Negro was long excluded from this privilege. What happens when this group gains access to the ballot? The subject is obviously important, and the South offers an excellent opportunity to explore it. Furthermore, Keech wanted to undertake more than the usual voting study with the emphasis, typically, on why people voted as they did. Instead, the author argues for a focus on the impact, the effects, and the policy outcomes. If voting is as important as democratic theory would have us believe, then it should make a real difference. The vote should bring benefits of some kind to those previously excluded. But what kind of benefits? And how would one measure them?

The author's approach is to examine closely two Southern communities: Durham, North Carolina, and Tuskegee, Alabama. The focus lies on the role of the Negro electorate and the payoffs achieved by the electoral process for each Negro community. The two opening chapters of the book deal with democratic theory, political science, and the setting and method. Succeeding chapters analyze the operation of the Negro electorate in each community, the payoffs in the public sector, the payoffs in the private sector, and, finally, the conclusions and implications of the study.

The author's findings, as he states them, offer limited comfort to those who see salvation in the vote. The vote can accomplish some things but has its limitations even where, as in Tuskegee, blacks became a majority in 1964. In Durham where they comprised about a third of the total population their "really striking gains" came through resources other than votes (p. 105). The vote was best at producing incremental changes that altered discriminatory application of the law, especially in its crudest and most blatant forms. The vote was less effective in bringing about whole new programs and especially those that involved integration and the private sector, particularly housing. Above all, the vote was not effective in attacking the effects of past discrimination. Although the author attributes some of the last to lack of knowledge of how to cope with such problems, he also attributes this result to opposition from whites who see such programs as a favoring of the Negro.

A study such as this certainly is welcome and all the more so since the author sought to determine the effects of the vote. In the jargon of the trade these days, he was looking for "outputs" as well as "inputs." What he has to say is well organized, to the point, and well written.

There are, however, some weaknesses. Chiefly the book reflects a

narrow and almost mechanistic approach to the democratic process. If one may reasonably view the South in the traditional-to-modernizing perspective suggested by V.O. Key's comparisons with colonial areas and by others since (including this reviewer), then far-reaching change has overtaken the region. Is it conceptually wise or desirable to try to isolate the Negro vote alone to study its impact? The author himself admits that this is a problem.

Certainly the fundamental factor in this changing Southern scene would seem to be the growing participation of the Negro and the variety of forms, including direct action, that it has taken. The results may not be adequately measured in candidates elected, streets paved, and new programs instituted for the poor. One early and important change may be a reduction in the climate of fear that so many Southern Negroes experienced, and just having the *right* to vote, whether one exercises it or not, matters some. To be a part of a participant political culture in the sense Gabriel Almond and Sidney Verba analyzed it in their book, *The Civic Culture*, means a good deal more than policy outputs that relate directly to votes.

Next, what of the whole matter of outputs or payoffs as the issue has been posed by some militants? In their eyes the real payoff should be the achievement of substantial equality, economically and socially, here and now. They are not concerned, apparently, as to whether they get their results through action by local, state, or federal officials or by those who are elected, appointed or who happen to be in the private sector. The author's analysis tends to confine itself to elected local government officials. This emphasis is not surprising for a political scientist, although he does recognize in some degree these non-local and non-governmental influences. But the focus on the electoral process and its impact necessarily casts into the background outputs of various kinds from other sources.

In the end, much of the criticism amounts to an attack on what the author set out to do. He set a limited objective which he has executed in a clear, well-organized, coherent manner. In this sense what he has done is a good beginning; the author himself would probably agree that much more remains to be done.

HARRY HOLLOWAY*

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THE LIMITS OF THE CRIMINAL SANCTION. By Herbert L. Packer. Stanford: Stanford University Press. 1968. Pp. xi, 385. $8.95.

In *The Limits of the Criminal Sanction* Herbert L. Packer, Professor of Law at Stanford University, argues forcefully that doubt concerning purported justifications for punishment and the cumbersome nature of safeguards necessary to protect the individual defendant render the criminal process a frequently inexpedient means of social control. He would restrict its application to situations satisfying at least six conditions (p. 296):

> (1) The conduct is prominent in most people's view of soeially threatening behavior, and is not condoned by any significant segment of society.
> (2) Subjecting it to the criminal sanction is not inconsistent with the goals of punishment.
> (3) Surpressing it will not inhibit socially desirable conduct.
> (4) It may be dealt with through even-handed and nondiscriminatory enforcement.
> (5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
> (6) There are no reasonable alternatives to the criminal sanction for dealing with it.

Particular hostility, the author points out, is shown toward institutionalized harassment of drunks, addicts, prostitutes, and homosexuals, many of whom are often unable to purchase protection and whose actions cause little harm to others but merely transgress formal behavioral norms. Attempts to regulate the trivial or the inherently uncontrollable are disparaged as unnecessary and damaging to the prestige of the law.[1] The author stresses that official inaction, currently a fortuitous consequence of limited funding and only tenuously linked to a conscious commitment to nonenforcement of legislated standards, is in many cases a viable alternative to present practices. Discussion of criminal procedure contrasts a Crime Control Model, characterized by the overriding importance of repression of criminal conduct, with a Due Process Model, where emphasis is placed on avoidance of error. Given a budget constraint, the former approach would seek to maximize the number of guilty punished, while the latter would attempt to minimize the number of innocent wrongly convicted. The second goal must necessarily be qualified by a required minimum

1. In illustration, Packer offers an ordinance of the New York City Council authorizing punishment of smoking in bed with a fine of $100, a jail sentence of 30 days, or both. A more apt example is perhaps provided by "the notice of the Yorkshire moors which announced, quite simply, 'It is forbidden to throw stones at this notice.'" D. FROST & A. JAY, THE ENGLISH 133 (1968).

level of repressive activity: utter inaction appears the only certain way to avoid error. The posited dichotomy thus focuses attention on the cost in terms of incorrect convictions which society is willing to incur to achieve the punishment of various proportions of offenders.[2]

These polar models provide a useful framework for analysis by the author of problems involving arrests for investigation, electronic eavesdropping, the sanction for illegally secured evidence, access to counsel, pretrial detention, guilty pleas, the right to collateral attack, and retroactivity in the application of changed procedural norms. Packer argues that in practice the criminal process generally approximates the Crime Control Model. Although he applauds efforts by the Supreme Court to alter this approach, he is concerned that recent judicial advances are frequently ignored by police and prosecutors and may be abrogated not only by explicit rejection at the highest level but also by a diminished willingness to continue scrutiny of enforcement activities.

Protests against the harshness of the criminal process and its consequences frequently dissipate their force in intellectually contentless emotive outbursts, argumentative ideological explications, or tortuous analyses from constitutional postulates.[3] Packer, however, supports his conclusions by dispassionately demonstrating the inadequacy of traditional justifications for punishment given modern ethical and scientific standards. As he indicates, even recent criminological studies have been unable to carry debate over premises very far beyond the speculative level; indeed many such efforts appear little more convincing than Boosie's work with cats:

> Boosie in 1948 studied the behavior of cats in an aqueous environment. Typically, a cat which is confined to a cage totally immersed in water exhibits an initial period of disorganized, apparently random action, involving great muscular activity. This pattern of behavior ceases, often quite abruptly, when the animal discovers that a state of reduced energy expenditure permits cessation of respiratory activity. That learning, in fact, takes place is unquestionable, since

2. *See* Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 881-82 (1968).

3. Examples of the last approach may tend toward the scholastic: "Unless it can be seriously urged that denying unemployment benefits to a Sabbatarian who refuses to work on Saturdays is a greater infringement of right to free exercise of religion than is execution of a felon who is or who might otherwise become religious, Sherbert demands that a state demonstrate that capital punishment serves a compelling state interest which 'alternative forms' of punishment could not serve while permitting a felon the free exercise of religion for the remainder of his natural life. Since no state can demonstrate that any legitimate state interest is more adequately served by the death penalty than by life imprisonment with possibility of parole, no court could legitimately sustain capital punishment." Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1363 (1968).

presentation of further stimuli do not cause the animal to return to its initial active (and ill-adapted) condition.[4]

Packer asserts that H.L.A. Hart's definition of punishment as intentional infliction of pain by a legally constituted authority on a supposed offender against legal rules is incomplete without the addition of a teleological term.. He notes that the criminal process has traditionally implemented demands for retribution: punishment was characterized by suffering imposed upon those whose disapproved conduct demanded expiation or aroused a community craving for revenge.[5] The "utilitarian or preventive position" is advanced as usually in opposition to the retributive approach (p. 39):

> Its premise is that punishment, as an infliction of pain, is unjustifable unless it can be shown that more good is likely to result from inflicting than from withholding it. The good that is thought to result from punishing criminals is the prevention or reduction of a greater evil, crime. There are many different, and often inconsistent, ways in which punishment may prevent the commission of crimes, but the inconsistencies should not be allowed to obscure the fact that the desired result is the same in every case.

Dissatisfied with any unitary rationale, Packer proposes (p. 62):

> (1) It is a necessary but not a sufficient condition for punishment that it is designed to prevent the commission of offenses.
> (2) It is a necessary but not a sufficient condition of punishment that the person on whom it is imposed is found to have committed an offense under circumstances that permit his conduct to be characterized as blameworthy.

The obvious acceptability of preventive criteria as at least a partial basis for punishment leads the author to defend his position primarily by attempting to demonstrate that these alone are insufficient. Preventive measures may deter, incapacitate, or rehabilitate. Punishment can discourage unlawful conduct not only by rendering it

4. Cadwallader-Cohen, Zysiczk & Donnelly, *The Chaostron*, in A STRESS ANALYSIS OF A STRAPLESS EVENING GOWN AND OTHER ESSAYS FOR A SCIENTIFIC AGE 139, 140 (R. Baker editor, Anchor edition 1969).

5. Such reasoning excludes the possibility that attribution of guilt has at times been a selection process subordinated to the goal of legitimated injury. Huizinga, discussing punishment during the middle ages, states: "Torture and executions are enjoyed by the spectators like an entertainment at a fair. The citizens of Mons bought a brigand, at far too high a price, for the pleasure of seeing him quartered, 'at which the people rejoiced more than if a new holy body had risen from the dead.' The people of Bruges, in 1488, during the captivity of Maximilian, King of the Romans, cannot get their fill of seeing the tortures inflicted, on a high platform in the middle of the markct-place, on the magistrates suspected of treason. The unfortunates are refused the deathblow which they implore, that the people may feast again upon their torments. . . . The chronicler Pierre de Fenin, having described the death of a gang of brigans, winds up naively: 'and people laughed a good deal, because they were all poor men.'" J. HUIZINGA, THE WANING OF THE MIDDLE AGES 15, 17 (1924). *See* Jackson, *The Lottery*, in THE MAGIC OF SHIRLEY JACKSON 137 (S. Hyman ed. 1966).

prospectively unprofitable to the amoral individual but also by serving as a sign of societal disapproval which may activate in others nonrational internal controls primarily dependent on learned responses of guilt or shame. Its impact, however, has not yet been reliably quantified. Special deterrence or intimidation is felt discredited by rates of reconviction as high as 50 percent which appear positively correlated with the severity of the prior punishment. That incarceration restricts the criminal activity of those currently confined generally cannot alone justify such a sanction: less oppressive safeguards will often preclude recidivism, while life imprisonment where only minor violations are anticipated might appear warranted given incorrigibility. Rehabilitative treatment, defined to include the prefrontal lobotomy, would, even if highly successful, raise problems concerning the propriety of actions by the state to restructure the personalities of its citizens. Summarizing, Packer states (p. 63):

> Deterrence . . . is the only goal we can accept in advance for punishing all crimes committed by all persons, without scrutinizing the facts of the particular case in which punishment may be imposed. Yet acceptance of its existence, let alone its efficacy, involves a leap of faith. Incontrast, intimidation, incapacitation, and rehabilitation are all partial and fragmentary goals, and their relevance in any given case is always at issue. Although it is easier to make an empirical assessment of their effectiveness than to do the same for deterrence, they involve difficult moral puzzles, central among which is: what is the calculus by which one determines whether punishment in their name serves or disserves even the limited goals of crime prevention, let alone the range of goals that a legal system is designed to achieve?

Unaugmented utilitarian premises are thought insufficient to motivate current practices. That application of sanctions must today almost invariably be justified by proof of previously proscribed conduct on the part of the accused is advanced as the most important restriction on the criminal law as "purely the servant of the utilitarian ideal of prevention" (p. 76). Packer posits that incarceration based on prediction of future illicit conduct might more effectively limit criminal activity. Excuse doctrines are likewise believed evidence of divergence from the utilitarian paradigm. Their existence is felt to offer opportunities for deception; in addition, and less convincingly, Packer argues that, for example, "there is nothing about the fortuity of homicide in self-defense that demonstrates lack of dangerousness" (p. 111). He concludes (pp. 112-13):

> The reasons for recognizing excuses do not . . . have much to do with the prevention of antisocial conduct. They have to do with other values that, to put it bluntly, interfere with absolute efficiency in the prevention of antisocial conduct. . . . [I]t is a matter of judgment whether the utilitarian losses that

> inevitably attend the recognition of an excuse are outweighed by the gain in freedom from state intervention . . . .

Although Packer is not alone in urging that punishment can be justified only when both retributive and utilitarian prerequisites are satisfied,[6] his rejection of a purely utilitarian standard appears a consequence of the narrowness with which he defines it. Equating the utilitarian with the preventive contradicts rather than implements the utilitarian model. Community well-being is not solely a function of the level of criminal activity; if it were, maximization would entail ludicrously rigorous controls or—from a semantic perspective—elimination of the concept of crime. Competing values, such as the right to privacy and other aspects of individual liberty, are also vital to utilitarian calculations. Packer employs retributive restraints to balance these diverse claims so as to achieve what he considers the greatest good. Modest changes in terminology would have permitted him to reach identical conclusions without contesting the universality of utilitarian principles.

The utilitarian ideal as correctly applied to the criminal process is more vulnerable to criticism as a spurious exercise in abstract self-righteousness by a bourgeoisie which, like its modern counterpart, realistically expected the sanctions it established to be used almost exclusively against the lower orders. From this point of view the retributive standard appears indispensable to utilitarian goals: since in general it is not the purpose of the criminal law to regulate the behavior of the middle class, its members should value highly the security provided by assurances that only offenders will be punished.[7] Avenues of attack alternative to the Marxist polemic similarly beckon. Utilitarian responses to criticism may have so generalized the root concept as to render it almost meaningless;[8] moreover, remaining content cannot escape condemnation by the less materialistic:

> Suppose that it were discovered that a state of pleasure is always associated with a particular kind of space-time pattern of electromagnetic field, or other physical system, and that we were capable of producing such patterns in the laboratory. . . . Would we be justified in spending a large part of the world's resources in producing pleasure-fields of high intensity? . . . Should we breed billions of rats and supply them each with a pleasure-producing machine? . . . The absurdity of such a scheme, either for rats or for people, seems to constitute a common-sense refutation of altruistic hedonism.[9]

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6. *See, e.g.*, Strong, *Justification of Juridical Punishment*, 79 ETHICS 187 (1969).

7. G. RUSCHE & O. KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 73 (1939). *See* Sprogge, *A Utilitarian Reply to Dr. McCloskey*, 8 INQUIRY 264, 282 (1965).

8. "[W]e always pay for generality by sacrificing content, and all we can say about practically everything is almost nothing." K. BOULDING, BEYOND ECONOMICS: ESSAYS ON SOCIETY, RELIGION, AND ETHICS 84 (1968).

9. Good, *A Problem for the Hedonist*, in THE SCIENTIST SPECULATES: AN ANTHOLOGY OF

In the fifth century B.C., Hippondamus of Miletus "held that there were but three kinds of laws, as the possible subjects of judicial procedure were but three, namely, assault, trespass and homicide."[10] Nearly one third of the five million arrests in the United States during 1965 were for drunkenness; an additional one sixth were for other victimless crimes or breaches of the peace.[11] That the criminal process is currently inappropriately employed to control conduct which should be either left unregulated or regulated by other means appears unquestionable. Packer convincingly presents the case for restriction and reform. Bentham would have concurred:

> With what chance of success . . . would a legislator go about to extirpate drunkenness and fornication by dint of legal punishment? Not all the tortures which ingenuity could invent would compass it: and, before he had made any progress worth regarding, such a mass of evil would be produced by the punishment, as would exceed, a thousandfold, the utmost possible mischief of the offence.[12]

ROBERT L. BIRMINGHAM*

PARTLY-BAKED IDEAS 199, 199-200 (I. Good ed. 1962). As a possible alternative objective the author suggests "that we should maximize the chance that the human race should be immortal . . . ." *Id.* at 200. *See* P. WEISS & J. WEISS, RIGHT & WRONG: A PHILOSOPHICAL DIALOGUE BETWEEN FATHER AND SON 165 (1967).

10. Pound, *The End of law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 203 n.33 (1914)

11. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 20 (1967). *See* Silver, *The President's Crime Commission Revisited*, 43 N.Y.U.L. REV. 916 (1968).

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