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BOOK REVIEW

THE SELF-INFLICTED WOUND

BY FRED P. GRAHAM

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MOST of the voluminous writings about the work of the United States Supreme Court are directed at legal specialists: lawyers, judges, and scholars. This survey of the Warren Court's criminal justice decisions in the 1960's by Fred Graham of the *New York Times* is one of a very small number addressed to a larger audience. It presents an accurate, yet readable, description and analysis of this most important phase of the Court's work. Inevitably it invites comparison with two most successful books of this genre: *Gideon's Trumpet* by Anthony Lewis (1964), a fascinating account of the various steps by which the right to counsel in all serious criminal cases was finally established, and James E. Clayton's, *The Making of Justice* (1964), an insightful examination of the work of the Court during a single term. Graham's study of the Warren Court's criminal justice decisions in the 1960's is somewhat less successful, due in part to the far greater complexity of his undertaking, and his difficulty in resolving his own conflicting views of the Warren Court's achievements.

Graham's title derives from statements made in 1928 by former Chief Justice Hughes in a series of lectures, later published as *The Supreme Court of the United States* (1928). Hughes termed as 'self-inflicted wounds" the Dred Scott case,[1] the changed decision on the legal tender issue produced by Court-packing following the Civil War,[2] and the 1895 invalidation of the federal income tax[3] which made necessary the sixteenth amendment. Each represented judicial resolution of political issues of the highest order, with tremendous stakes turning on the decision of the Court. Each affected the power of the

[1] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[2] Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) *rev'g* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

[3] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *aff'd on rehearing*, 158 U.S. 601 (1895).

political branches to govern, and as a consequence, aligned the Court for and against the interests of a major part of the population. Graham's thesis is that the effort of the Warren Court in the 1960's to place legal controls on the nation's police, culminating in the 1966 *Miranda* case,[4] is of the same order of magnitude.

It is a fascinating and involved story that Graham tells. It begins in 1923, when for the first time, the United States Supreme Court determined in *Moore v. Dempsey*[5] that the due process clause of the fourteenth amendment required a federal district judge to determine whether or not a state defendant was detained in violation of his constitutional rights, based on allegations that his trial was influenced by mob threats and acts. Even earlier in the 1890's, the Court had discovered the potentialities of the due process clause as a weapon for protecting property rights and invalidating "unreasonable" social legislation.[6] In 1925, just 2 years after *Moore,* it held that the first amendment free speech guarantee was protected by the fourteenth amendment against state action.[7] From the 1920's to the present the story is one of increasing pressure by the Supreme Court on the states, first, to make them conform to standards of basic fairness (the "fair trial" rule) and later, in the 1960's, to adopt and apply the same procedures which the Bill of Rights required of the federal government. While the Court has never accepted the full incorporation theory pressed by Justices Black and Douglas, the Court has incorporated one by one all of the specific procedural guarantees of the Bill of Rights save grand jury indictment and jury trial in civil cases.[8]

What did the Warren Court actually do in the 60's, and what changes did its decisions produce in police and prosecutional practices? The process began with *Mapp v. Ohio*,[9] where the Court applied to the states the federal rule excluding from trial evidence illegally obtained, thus taking a step it had rejected in 1949.[10] Second, the Court began incorporating one by one into the fourteenth amendment due process clause various

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[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[5] 261 U.S. 86 (1923).

[6] *See generally* E. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, & DECLINE OF A FAMOUS JUDICIAL CONCEPT (1951).

[7] Gitlow v. New York, 268 U.S. 652 (1925).

[8] *Compare* Adamson v. California, 332 U.S. 46 (1947), *with* Duncan v. Louisiana, 391 U.S. 145 (1968). There has not yet been a Supreme Court holding that the eighth amendment bail provision is incorporated, but there is little doubt that the Court would include it.

[9] 367 U.S. 643 (1961).

[10] Wolf v. Colorado, 338 U.S. 25 (1949).

specific procedural guarantees from the Bill of Rights, a policy the Court had refused to follow during the previous 70 years. In 1963, *Gideon v. Wainwright*[11] imposed the sixth amendment right to counsel on state trials. *Douglas v. California*[12] extended the right to appeal. In 1964, *Malloy v. Hogan*[13] extended to state proceedings the privilege against self-incrimination, and in *Griffin v. California*[14] the Court reversed precedents of long standing in holding invalid comment by a state trial judge on the failure of a defendant to testify on his own behalf. Perhaps most devastating to both state and federal officials was the decision in *Miranda v. Arizona*[15] which went beyond any previous decision in laying down specific rules governing the advice and warning to be given a suspect before his statement would be admissible in court. Now a suspect has to be told of his right to remain silent, that his statements could be used against him, that he has a right to counsel of his own choice or, if indigent, to receive the assistance of appointed counsel. Ever the realist, the Court then provided an escape mechanism by recognizing the suspect's capacity to waive his rights and make a statement in response to questioning. In a related development, a suspect was given the right to have his own or appointed counsel at a line-up,[16] but this too could be waived. The double jeopardy bar was applied to the states in *Benton v. Maryland*;[17] the sixth amendment right to confront witnesses was incorporated in *Pointer v. Texas*;[18] compulsory process for obtaining witnesses was held applicable in *Washington v. Texas*;[19] speedy trial was incorporated in *Klopfer v. North Carolina*;[20] the right to trial by jury in *Duncan v. Louisiana*;[21] the bar against cruel and unusual punishment in *Robinson v. California*.[22]

In other pro-defendant decisions the Court tightened the requirements for using arrest and search warrants (*Aguilar v. Texas*[23] and *Spinelli v. United States*[24]), invalidated a New York

[11] 372 U.S. 335 (1963).
[12] 372 U.S. 353 (1963).
[13] 378 U.S. 1 (1964).
[14] 380 U.S. 609 (1965).
[15] 384 U.S. 436 (1966).
[16] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).
[17] 395 U.S. 784 (1969).
[18] 380 U.S. 400 (1965).
[19] 388 U.S. 14 (1967).
[20] 386 U.S. 213 (1967).
[21] 391 U.S. 145 (1968).
[22] 370 U.S. 660 (1962).
[23] 378 U.S. 108 (1964).
[24] 393 U.S. 410 (1969).

law permitting wiretapping (*Berger v. New York*[25]), limited the scope of a search incident to an arrest (*Chimel v. California*[26]), and required certain minimal safeguards in juvenile proceedings (*In re Gault*[27] and *In re Winship*[28]).

If this were the whole story, the Warren Court critics would seemingly have open-and-shut proof that the justices, frequently by 5-4 and 6-3 votes, had embarked on a crusade in aid of criminal suspects. However, Graham is too competent a reporter to present such a one-sided view. He rightly points to a number of significant decisions by which the Warren Court sought to take account of the public interest in convicting guilty persons. One of those, involving the doctrine of waiver of rights, has been mentioned above.

Starting in 1965, the Warren Court, in an unprecedented move intended to keep the prison doors from swinging wide, made its innovating decisions prospective in their application, so that, save for the individual defendant who brought the case, only those who were denied *Miranda* warnings, *Wade* lineups and other rights after the date of the relevant Court decision, could obtain their benefit.[29]

Second, the Court made several decisions which were extremely favorable to the prosecution. In *Chapman v. California*,[30] it held that many trial errors, even those involving constitional rights, might be deemed "harmless" and that the error must appear harmless beyond a reasonable doubt. In *Harrington v. California*,[31] however, the Court seemingly adopted a less stringent test. In cases where there is a substantial body of evidence in addition to the tainted element of proof, lower courts clearly have a way of escaping from the effect of error. In *Katz v. United States*,[32] the Court described a warrant procedure that justified wiretapping. *Warden v. Hayden*[33] threw out the old "mere evidence" rule and allowed searches for evidence of crime. *Terry v. Ohio*[34] authorized police stopping and questioning of suspects in situations that would not justify an arrest,

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[25] 388 U.S. 41 (1967).
[26] 395 U.S. 752 (1969).
[27] 387 U.S. 1 (1967).
[28] 397 U.S. 358 (1970).
[29] *See* Desist v. United States, 394 U.S. 244 (1969) (summary of decisions having only prospective application).
[30] 386 U.S. 18 (1967).
[31] 395 U.S. 250 (1969).
[32] 389 U.S. 347 (1967).
[33] 387 U.S. 294 (1967).
[34] 392 U.S. 1 (1968).

and allowed a patting down of the outer garments where there was reasonable suspicion that a suspect might be armed. The Court also upheld the use of police informants to obtain evidence,[35] and allowed them to be equipped with electronic devices to record a suspect's conversation.[36]

The incorporation process, imposing more rigid procedures on the states than the previously applied "fair trial" rule, along with tightening up of federal procedures in some areas, all of this occurring in a period when the rate of crime showed dramatic increase, accounts for the hostile public reaction and, in part, for the anti-Court upsurge of opinion in Congress. It should be remembered, however, that many legislators and their constitutents have been anti-Court as the result of decisions outlawing segregated schools and other public facilities, upholding conscientious objectors' pleas, protecting civil rights and anti-war protestors, safeguarding rights of welfare recipients, and other pronouncements of an egalitarian, pro-minorities coloration. In other words, the revolution in criminal justice which Graham describes is really part of a broader movement by the post-1937 Supreme Court that had the effect of enlarging constitutional safeguards of individuals and groups who, because of their socio-economic or minority status, or their anti-majoritarian activities, are usually incapable of exerting influence on the political arms of government. In short, once the Court looked realistically at the plight of disadvantaged individuals and groups, it found no ready stopping place.

While the seeds of doctrinal change were planted long before 1961, that year marks a significant change in the Court's attitude toward state criminal justice. Herbert L. Packer has described two models of the criminal justice process:[37] one crime-control oriented, the other directed toward achieving due process goals, protective of individual rights. The Warren Court was regarded by its critics and the public as a due process court. As Graham writes:

> The Justices of the Supreme Court had decided [in 1961] that the time had come to make the major restrictions of the Bill of Rights that apply to criminal procedure enforceable against the states.... Prior to 1961 each state had virtually gone its own way on criminal procedure, administering criminal justice with the degree of punctiliousness or muscle that suited

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[35] Hoffa v. United States, 385 U.S. 293 (1966).

[36] Lopez v. United States, 373 U.S. 427 (1963); Osburn v. United States, 385 U.S. 323 (1966); United States v. White, 401 U.S. 745 (1971).

[37] Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964); *See also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

> the style of its own people, and with little regard for the Constitution and courts of the United States.[38]

The latter statement is perhaps unfair to the states insofar as the "fair trial" rule laid down by the Supreme Court was a *post hoc* standard of such glaring ambiguity that states were virtually invited to continue loose practices so long as the cold record, retrospectively examined, revealed a result that appeared not "unfair."

Why did the Court change course in 1961, knowing well that it was courting public disfavor and severe backlash from a variety of law enforcement officials, as well as state and lower federal court judges, and that it could expect support only from that small minority of the population known as "civil libertarians"? Obviously, the beneficiaries of the Court's pro-defendant rulings constitute one of the least effective interest groups in the nation. Why did the Warren Court choose to take this hard road in the 1960's, a time when the crime rate appeared to increase substantially in the United States as it did in most industrial nations of the world?

The fact that the apparent statistical increase in crime was challenged by knowledgeable observers at least until 1968 had little effect on the FBI-created popular judgment that crime was getting out of control and that courts should be blamed for coddling criminals. As Graham observes, before 1968 there was serious doubt that the rate of violent crime was dramatically rising. Experts thought that the rate had been higher in the past: "[T]he crime scare had been generated by crime statistics that were so questionable and by distortions and exaggerations of those statistics that some critics considered them unworthy of belief. Finally, even those statistics didn't show an alarming rise in violent crime until 1968 . . . ."[39] Graham's observation is accurate, but perhaps irrelevant. The anti-Supreme Court attitude of the population was clearly manifest before 1968, the year that Chief Justice Warren announced his intention to retire. Responsible state and federal officials and the communications media had established in the minds of most citizens that a crime wave existed, and this — along with the terror of big-city riots, the fears resulting from the revolt of the young, and strong anti-establishment actions of minority group activities — created a "state of siege" mentality that is still evident in the early 70's. One reason that many whites

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[38] F. GRAHAM, THE SELF-INFLICTED WOUND viii (1970) [hereinafter cited as GRAHAM].

[39] *Id.* at 71-72.

found it easy to believe in a "crime wave" was the high Negro arrest rates for violent crime as shown by FBI statistics.[40] Overlooked was the fact that Negroes were the victims of most black-committed crimes, and that the NAACP has advocated a tough policy against crime. Equally ignored have been the findings and recommendations of the President's Commission, *The Challenge of Crime in a Free Society,* that the causes of crime, including black crime, were extremely complex, and simplistic solutions were not in sight.

The answer to the question, then, of why the Warren Court chose an unpropitious time to tighten judicial controls has to be a combination of its despair that the states would ever take the many hints of needed changes that the Court had dropped in pre-1960 decisions and its broader concern with justice for individuals who had no effective voice in the political system. Reform of criminal justice through legislative change or executive initiative, particularly at the state level was simply not likely to occur; hence, the Court felt it had to assume the unpopular burden of making the necessary changes, on the additional assumption that it alone would take steps to correct an unjust situation.

This, essentially, is the story Graham has to tell. The "self-inflicted wound" resulted from the Court's attempts to increase the safeguards of criminal suspects and defendants at a time when the national mood was particularly unripe for such a development. Query: When is this likely to be a popular move? His own conclusion, based on numerous interviews and various empirical studies, is that the decisions did not substantially diminish the ability of police to arrest and prosecutors to convict criminals.

It is at this point that Graham's own confusion becomes evident. Clearly sympathetic to the Court's reaching out to help the underdog, he nevertheless is struck by the Court's willingness to act in accordance with values that lie outside the popular consensus. This clash between an "unrepresentative Court," responsive to the highest ideals of equality and justice, and a perhaps more representative Congress and President, attuned more closely to popular opinion, is unique in our history.[41] More typically it has been the Court that preferred ancient and more conservative ways and tried to defy popular opinion

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[40] *See id.* ch. V, "Negro Crime and the Supreme Court."

[41] The lack of popular support for civil liberties has been well-documented. *See e.g.,* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM ch. 1 (1968) (summarizing this tendency).

as revealed through presidential-legislative representatives. The Court fight of the 1930's comes quickly to mind.

In the final analysis, it is doubtful if the "self-inflicted wound" analogy is correct. The signal characteristic of the "wound" cases cited by Chief Justice Hughes was that each decision tended to affect the power of the political branches to govern. In support of that thesis, Graham's evidence is relevant but not wholly convincing. He cites the fact that in 1965 the Gallup Poll found 48% of the public believing that courts were too lenient with criminals and, by 1968, found 63% feeling that way.[42]

> In 1968 Congress voted overwhelmingly to include in the Omnibus Crime Control Act a provision that purported to reverse *Miranda* in the Federal courts. Abe Fortas was denied confirmation as Chief Justice. . . . Richard Nixon won the Presidency after promising to appoint Justices to retract *Miranda* and other decisions. Finally, Earl Warren was replaced, upon his retirement, with Warren E. Burger, a judge who had criticized much that the due process revolution had produced.[43]

Yet, as on earlier occasions in Supreme Court history, the controversy subsided with changes in Court personnel. A few Congressional threats of impeachment directed at Justice William O. Douglas in 1970-71 marked the withdrawal of Congress from the battlefield. Title II of the Omnibus Crime Control Act,[44] however, stands as a monument to Congressional displeasure with the Warren Court, but it is yet to be tested, and it applies only to federal proceedings. In one proposed revision of Title II the Congress would have stripped away the Court's review power over certain state decisions, but this failed to pass.[45]

Only time will establish how many of the Warren Court's criminal procedure holdings will survive. The 1970-71 decisions show clearly a tendency to cut back, but only Justice Blackmun seems ready to join Chief Justice Burger in wholesale rejection of *Mapp v. Ohio, Miranda,* and the other controversial decisions. President Nixon, however, has decided to move the Court further toward "strict construction," a euphemism for conservatism. Yet, to predict the long-range outcome is impossible. The idealism of the Warren Court may yet find reflection in a more youthful public opinion and consequent greater concern by political leaders who value equality and justice.

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[42] GRAHAM at 8.
[43] *Id.* at 9.
[44] Omnibus Crime Control and Safe Streets Act of 1968, Title II, 18 U.S.C. §§ 3501-02 (Supp. V, 1970).
[45] *See* GRAHAM at 327-29.

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