

## BOOK REVIEWS

**The Suspect and Society.** WALTER V. SCHAEFER. Evanston: Northwestern University Press, 1967. Pp. vii, 99. \$3.50.

In this small, cogent volume, Mr. Justice Walter V. Schaefer of the Illinois Supreme Court—like Mr. Chief Justice Traynor<sup>1</sup> of the California Supreme Court and Judge Henry Friendly<sup>2</sup> of the United States Court of Appeals for the Second Circuit—expresses concern about the Supreme Court's oversimplified answer to one of the more complex problems that bedevil it. In doing so, he is courting the damnation of the Liberal Establishment. For he has violated, however gentle his language, the Eleventh Commandment—or is it the First—of the Liberal Creed: "Thou Shalt Not Criticize the United States Supreme Court." Whether Mr. Justice Schaefer is thereby, like Judge Learned Hand,<sup>3</sup> to be forever precluded from admission to the Liberal Pantheon remains to be seen. The judgment will not be overtly made. But the oracles are to be read grimly if the responses to his patent defection from the faith take the form of epithets and labels rather than attempts at reasoned answers to the charges made. One knows, for example, that Professor Alexander Bickel<sup>4</sup> is not yet damned, because his efforts occasioned an attempt to meet his arguments.<sup>5</sup> One knows, on the other hand, that there is little hope for Professor Herbert Wechsler's salvation,<sup>6</sup> since the typical reaction to his position was that there is no such

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<sup>1</sup> See Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. CHI. L. REV. 657 (1966).

<sup>2</sup> See FRIENDLY, *BENCHMARKS* (1967), especially chapter 11: "The Bill of Rights as a Code of Criminal Procedure," and chapter 12: "A Postscript on Miranda." The latter begins delightfully with some of Miranda's words in *The Tempest*:

"O, wonder!

How many goodly creatures are there here!

How beauteous mankind is! O brave new world,

That has such people in 't!"

<sup>3</sup> See HAND, *THE BILL OF RIGHTS* (1958). These were the Oliver Wendell Holmes lectures at Harvard for 1958. The 1963 edition contains an apology by Judge Wyzanski as an introduction.

<sup>4</sup> See Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>5</sup> See Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). I am not sure, however, that Professor Gunther has the necessary status in the Liberal hierarchy to grant dispensation.

<sup>6</sup> See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

thing as "neutrality."<sup>7</sup> The latter is a tragic case, for it is clear that Wechsler had set out to slay the dragons loosed by Judge Learned Hand in his *Bill of Rights*, only to be impaled on the shafts of other enemies of Hand's position.

The first fundamental sin committed by Mr. Justice Schaefer is to be found in the suggestion that the problem of the proper scope and methods of police interrogation of suspects involves a balancing of interests. Indeed, it is because he would make the catechism into a dialogue that he falls into the errors of his ways. He begins thus on his road to perdition:

The disruption of existing practices by the expansion of constitutional ideals creates the tension that pervades this area of the law. And when our ideals and our institutions confront one another, it is important that both be analyzed objectively.<sup>8</sup>

He goes so far as to suggest that in this area the legislative process may have advantages that the judicial process lacks. And, although he genuflects properly to his masters on the Supreme Court, he also points out that expedience of judicial administration may have taken precedence over refinement of proper rules:

I ask you to keep in mind the situation that confronts the Supreme Court of the United States. That Court bears the ultimate responsibility for the quality of justice that is administered in this country. . . . Any technique by which its responsibility to guard against improper police conduct can be effectively delegated, with the assurance that the exercise of the delegated authority can be readily supervised, is bound to be attractive to the Court.<sup>9</sup>

There is no doubt in his mind as to the Court's ultimate destination:

A number of constitutional doctrines have been brought to bear on the interrogation problem, and legal doctrines, like other ideas, have a tendency to push on to their logical conclusion. . . . Today, I believe, the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted.<sup>10</sup>

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<sup>7</sup> See Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

<sup>8</sup> P. 7.

<sup>9</sup> Pp. 9-10.

<sup>10</sup> Pp. 8-9.

In excellent summary he encapsulates the Court's history that has intertwined a number of different constitutional provisions to bring about the result that he fears. It starts with the ban under the due process clauses of the use of involuntary confessions, first because of their untrustworthy nature and then as a means of preventing illegal police practices. It proceeds with the strand provided by the fifth amendment's privilege against self-crimination, to which is added the newly created sixth amendment right to counsel and the fourth amendment's new limitations on the right of arrest. His willful failure to see the light is apparent here too:

I see nothing in the language of the Fourth Amendment, which prohibits unreasonable seizures of the person, that requires it to operate as a blunt instrument. It seems to me more relevant to ask whether there is probable cause for restraining a suspect than to ask whether there is probable cause for believing in the suspect's guilt. The Fourth Amendment does not, I submit, preclude us from weighing the extent of the detention against the strength of the evidence that justifies it.<sup>11</sup>

All the while, he persists in the heresy that the government and its police and prosecutorial agents have a proper function to perform—the arrest and conviction of those guilty of criminal activity:

Police interrogation seems to me a useful and desirable technique of law enforcement; yet interrogation seems threatened by constitutional developments which, in the main, are the product of logical efforts to make the Constitution effective in the police station.<sup>12</sup>

. . . .

It is primarily this secret quality of station-house interrogation that has caused the problem. There have been abuses and there will continue to be abuses, so long as it is impossible to know exactly what occurred during the course of interrogation. Enough has been disclosed in reported decisions to establish incontrovertibly the necessity for supervision. But because some confessions and admissions are the result of improper, even abhorrent, police conduct during station-house interrogation does not mean that the appropriate remedy is to outlaw all interrogation and all confessions and admissions made during a period of police custody. The appropriate cure for the undue influence that is sometimes brought to bear on

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<sup>11</sup> Pp. 25-26.

<sup>12</sup> P. 36.

a testator is not to prohibit all communication between a testator and his potential legatees.<sup>13</sup>

He even praises the efforts of the framers of the American Law Institute's Model Code of Pre-Arrest Procedure in their efforts to solve what he sees as the fundamental problem:

I think that the Code proposes a rational adjustment between considerations of individual liberty on the one hand, and the law enforcement needs of society on the other.<sup>14</sup>

After examining the A.L.I.'s proposals, however, he concludes that they are defective because they would provide only a police official rather than a judicial officer to oversee the interrogation that the proposed Code would authorize. It is fairly clear that the decision of the Supreme Court in *Miranda v. Arizona*<sup>15</sup> has, since the delivery of the lectures that make up this book, effectively diminished the possibility of effectuating the A.L.I. proposals.

In any event, Mr. Justice Schaefer would resort to a different resolution of the problem and, in so doing, commits his second fundamental violation of the Liberal Creed. For he proposes a solution that would be brought about by constitutional amendment, thus putting himself in the category of those who have sponsored similar devices to repeal the effect of the Supreme Court's one-man one-vote decisions and the decisions banning prayer in the public schools. And the proposition he puts forth is one that questions the very foundations of the dogma, for it suggests that the privilege against self-crimination should be rested on a rational rather than an allegedly historical base:

As we examine the justifications advanced to support the privilege, you will note that even at this late period in our history it remains a doctrine in search of a reason. As Professor Kalven has said, it "is the product of a tangled and complex history of abuses many of which have been corrected today by other legal safeguards. . . . [T]he law and the lawyers despite endless litigation over the privilege have never made up their minds just what it is supposed to do or just whom it is intended to protect." As we shall see, the Supreme Court has experienced this difficulty.<sup>16</sup>

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<sup>13</sup> Pp. 37-38. Mr. Justice Schaefer disposes of the argument that other common-law countries have functioned effectively in their police work in the absence of police interrogation. See pp. 31-35.

<sup>14</sup> P. 38.

<sup>15</sup> 384 U.S. 436 (1966).

<sup>16</sup> P. 61.

His solution is one with a venerable, if unsuccessful, career. And he notes the irony that put the police in the vanguard of those who challenged the propriety of such legislation when it was first proposed in the thirties by, among others, the Wickersham Commission:

The proposal of interrogation before a judicial officer is thus central to the drive for broader discovery in criminal proceedings. The idea is by no means novel. The national concern in the 1920's and 1930's over third-degree practices stimulated a number of such proposals, principally those of Dean Pound and Professor Kauper, and legislation was urged in several states. Perhaps because constitutional doctrines did not then, as now, threaten the extinction of police questioning, the proposals met with public indifference or hostility. The police were especially hostile, although perhaps to take as typical these words of the Los Angeles Chief of Police about a California proposal would be unfair: "That bill was backed by the Communist Party of America, by the Constitutional Rights Committee of the Los Angeles Bar Association, the sob sisters, the prison reformers and all that type of individual, who wanted to see the law defeated, who wanted to set at naught the work of the peace officers of the state."<sup>17</sup>

There is certainly a lesson to be learned from the refusal of the group that was having things all its own way—the police at that time—to recognize that it was in its own best interests to negotiate a reasoned settlement that would both protect the individual and afford the police all the inquisitorial rights that they should properly exercise. The shoe is now on the other foot, and the question is whether the defense-minded organizations will perceive the desirability of doing something before it begins to pinch. For, I suspect, if such a solution as this book proposes proves unacceptable, the Liberals are likely to have imposed on them one that is the creature not of Mr. Justice Schaefer, but rather of someone more concerned with the protection of police interests, or

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<sup>17</sup> P. 77. The Wickersham Commission recommendation was: "[E]very person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chooses not to answer, it should be permissible for counsel for the prosecution and for the defense, as well as the trial judge, to comment on his refusal. The existing rule in many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished." NATIONAL COMMISSION ON LAW OBSERVANCE AND LAW ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5-6 (1931). Mr. Justice Schaefer suggests that: "To avoid overenthusiastic comment by a prosecutor, it might be wise to provide that only the judge may comment." P. 80.

what the police think their interests may be, and with little concern for the rights of individuals.

The defects of the Supreme Court doctrine are made patent here and in the writings of Mr. Chief Justice Traynor and Judge Friendly to which reference has already been made.<sup>18</sup> The merits of the Schaefer proposal are well set out in this small volume, for all those whose minds are not closed to examine and weigh. I am among those who like Mr. Justice Schaefer's answer. Perhaps, however, I should choose another path than the constitutional amendment, at least to begin with. Congress, too, was given authority to interpret and implement the substantive clauses of the fourteenth amendment. The Court has recognized this power and, indeed, in one instance has accepted Congressional interpretation with an alacrity and submissiveness that was almost unbecoming.<sup>19</sup> I should advocate, therefore, that the Schaefer proposal be embodied in legislation enacted by Congress pursuant to its fourteenth amendment powers. If and when the Supreme Court is confronted with such legislation, we shall, perhaps, have answers to questions even more fundamental than those so admirably treated in this book.

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<sup>18</sup> See notes 1 & 2, *supra*.

<sup>19</sup> See Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79.

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**Aid to Dependent Children.** WINIFRED BELL. New York and London: Columbia University Press, 1965. Pp. xvi, 248. \$6.50.

Of all the federally-aided public assistance programs, Aid to Families with Dependent Children (AFDC), formerly called Aid to Dependent Children, is the most notorious and least understood, the most costly yet the least adequate in grants. Some observers who witnessed the passage of its predecessors, state Mother's Pension laws, forecast controversy and ill effects from a program that provided cash payment, rather than the then-customary provision of aid-in-kind or in institutions—poor farms, orphanages, and the like. One critic, the well-known social worker, Mary Richmond, regarded Mother's Pensions as a backward step; they were providing "public funds not to widows only, mark you, but to private families, funds to the families of those who have deserted and are going to desert."<sup>1</sup> Yet another raised the basic

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1 NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS, PROCEEDINGS 492 (1912).