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Book Review of Disaster by Decree

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BOOK REVIEWS


No one can charge Lino Graglia with timidity in stating his views. Six years ago, when racially preferential admissions first became a hot topic for law schools, Professor Graglia took on Derrick Bell in the pages of an effete eastern law review, arguing the case against minority admissions programs. In their struggle Bell drew first blood by asserting that Graglia's presentation, "[w]hile assumedly written for the legal profession,... eschews legal analysis for vague, unsupported suggestions that such programs may constitute 'reverse discrimination.'"

_Disaster by Decree_ seems to have been written to answer Bell's criticism. Beginning with _Brown v. Board of Education_, Professor Graglia traces national efforts at school desegregation, constantly pricking the Court's egalitarian balloon with his needle of logic. How can the 1954 _Brown_ decision, he asks, which forbade consideration of race in school assignments, justify current relief decrees that require courts and school boards to consider race? This attack indeed may catch affirmative action proponents at their Achilles' heel, for preferential admissions programs, if not actually spawned by admiration of the courts' desegregation efforts, draw constitutional strength from the courts' own repeated assumption of the power to make race a factor in school admissions.

Although perhaps inspired by his debates with Bell, Professor Graglia aims this book at a much wider audience than that concerned with law school admissions. He lashes out at every judicial

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2. Bell, supra note 1, at 364.
5. See, e.g., Wright v. Council of City of Emporia, 407 U.S. 451, 457, 470 (1972) (parcelling of single school district into two districts resulting in imbalanced race ratio impeded process of dismantling discriminatory system and was enjoined); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (limited use of ratios of black/white pupil composition within equitable remedial discretion of district court); Green v. County School Bd., 391 U.S. 430, 439 (1968) (effectiveness of desegregation plan to be evaluated by degree of racial integration achieved).
action touching upon public school desegregation, consistently declaring the courts' incompetence and bad faith in formulating desegregation decrees. By exposing the supposed venality of the courts' shift away from Brown's colorblind standard to later cases approving color consciousness, Professor Graglia lays the groundwork for his concluding roar that busing is unconstitutional and that neighborhood schools are constitutionally required. 7

DISASTER BY DECREE

Historical in format, Disaster by Decree focuses primarily on the important Supreme Court cases that shaped school desegregation efforts during the decades following Brown. 8 Each case is treated in a standardized manner: a detailed statement of the factual circumstances of the litigation is followed by a scholastic, sometimes tedious discussion of the Court's opinion, in which Professor Graglia challenges the Court's reasoning and results. Strong historical continuity, as well as forays to attack administrative agencies and lower courts, 9 relieve any tendency toward boredom created by the standardized case analyses.

Although Graglia has fed many of the pages with the fodder that grows law review articles into books, his emphasis on detail is often the most interesting and valuable aspect of the book. The factual discussions of recent cases, in which the Supreme Court refused to review the lower courts' findings of discrimination and ruled only as to the remedy, are especially informative and go far toward bolstering the author's assertion that district courts have pushed desegregation too far. 10 On the other hand, his detailed dissection of court opinions often degenerates into unfortunate wordiness.

More unfortunate is Professor Graglia's unnecessarily combative presentation of his case. Puffery and caustic asides make books lively,

7. L. GRAGLIA, supra note 3, at 203-83; cf. id. at 76-77 (alternative "freedom of choice" plans called impermissibly discriminatory).
9. E.g., L. GRAGLIA, supra note 3, at 58-66 (blasting the Fifth Circuit; praising district court Judge William Cox); id. at 55 (criticizing Office of Education guidelines).
10. See id. at 104-32 (Swann); id. at 203-94 (Milliken); cf. id. at 160-76, 178-84 (Supreme Court's reexamination of district court's finding of violation, but in context of remedy).
but one quickly notices that a certain contrariness begins to infect the author's judgment. This impairment stands out especially in the opening chapters, where Graglia argues that Brown was an easy and popular decision, yet there was massive resistance to it; that the Court erred in arrogating to itself the power to decide the issue, yet Brown II\textsuperscript{11} was decided wrongly because the Court refused to arrogate to itself the power to foreclose local school board discretion;\textsuperscript{12} and that the Office of Education meddled too much in local affairs, yet the Office of Education deferred too much to local boards by permitting freedom of choice.\textsuperscript{13}

At times Graglia's desire to find the Court and the federal agencies wrong, not just on many points, but on every point, leads to serious historical distortions. Federal desegregation efforts take on a conspiratorial air when Graglia accuses the Civil Rights Commission and the Office of Education of permitting freedom of choice so that southern school boards would fall into the trap of allowing the agency subsequently to question the degree of desegregation.\textsuperscript{14} I have never noticed such crafty thinking in either agency.

This overzealous condemnation of the Court and the federal agencies is particularly unfortunate because the reader, having dismissed some arguments as contrived or contrary, also may reject some of the book's genuine accomplishments. The subtle shift of the Court and the agencies in defining desegregation is well documented, the author showing that the term initially contemplated only remedying officially imposed segregation, but was expanded later to include correction of all segregation, even that occasioned by private decisionmaking.\textsuperscript{15} Graglia also roasts a favorite liberal chestnut in his

12. One wonders whether the author seriously believes some of the arguments he uses in criticizing the Court. For example, in urging that the Court should have foreclosed local discretion and required district zoning as the only permissible remedy, the author appears to violate the cardinal conservative principle that courts should not replace local discretion but should merely confine the exercise of that discretion to constitutional limits. See L. Graglia, supra note 3, at 35-37, 77-79; cf. Reynolds v. Sims, 377 U.S. 533 (1964) (relief in reapportionment cases initially for legislature to enact); Perkins v. Elg, 307 U.S. 325, 349-50 (1939) (immigration and naturalization case; so long as government officer's exercise of discretion within constitutional bounds, court will not review it). Compare Evans v. Newton, 382 U.S. 296, 302 (1966) (despite express terms of devise of land to city, park could not be operated on racially discriminatory basis) with Evans v. Abney, 386 U.S. 486, 489, 445 (1970) (state court's discretion to provide equitable remedy of reversion of property to heirs and elimination of park not constitutionally limited; loss shared equally by both races).
14. Id. at 52-58.
15. Id.
discussion of the Civil Rights Act of 1964. The Act provides that, while officially imposed segregation is prohibited, correction of mere racial imbalance is not required. Liberals always argue that this provision applies only to de facto violations and that court remedies after a finding of de jure segregation may go further and cure mere racial imbalance. Graglia's excerpts from the legislative history of the Act convinced me that the statute's drafters intended to limit both violations and remedies.

THE NEW CONSENSUS

American constitutional law is in fact little different from the common law, for its life has not been the logic that Professor Graglia espouses, but rather experience, the felt necessities of the time, and prevalent moral and political theories. At any time of change in the constitutional order, the old movement is likely to lurch on for awhile as its opponents form the new consensus and, more importantly, try to discover the errors of the preceding movement that led it into disfavor.

BUILDING THE NEW CONSENSUS

Representing an ascending movement's challenge to the desegregation efforts of the previous 20-odd years, Graglia must carry the burden of building the new consensus and pointing out past errors. In this he is only marginally successful. Pressing hard the thesis that

17. Id. §401(b), 42 U.S.C. §2000c(b) (1970); cf. id. §407(a), 42 U.S.C. §2000c-6(a) (no federal officer or court may order busing to remedy racial imbalance).
19. See L. GRAGLIA, supra note 3, at 49-52. The misreading of the statute by liberals and courts was not stimulated simply by their desire to achieve their social goals. Undoubtedly, they also sought to avoid the historically intractable constitutional issue whether Congress may limit the federal courts' jurisdiction with regard to constitutional violations and remedies. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 6 HARV. L. REV. 1362 (1953); Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 GEO. L.J. 839 (1976). See generally P. BATOR, P. Mishkin, D. Shapiro, H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 309-76 (2d ed. 1973). The desire to avoid resolution of this issue apparently affects conservatives and moderates as well as liberals. See Drummond v. Acree, 409 U.S. 122S, 1229 (Powell, Circuit Justice, 1972) (congressionally mandated stay pending appeal of district court orders requiring transportation of students to achieve racial balance does not require stay of district court order under any other desegregation plan).
curative efforts which focus on race, especially preference-granting programs, are just as race-conscious and discriminatory as segregation itself, Graglia lends his support to others who already have begun to build this new consensus.\(^1\)

For the most part, however, Graglia fails to resolve the practical and philosophical anomalies that result from his argument that the Constitution is colorblind. In judging whether a party has discriminated on the basis of race, judges, juries, and society must focus their attention on the racial issue; inherent in color blindness is some degree of color consciousness. If they detect a constitutional violation, the question of relief further turns their attention to race. And should it not be that way? Should Congress and the courts blind themselves to the fact that the problems of black people are among society's greatest and that the fourteenth amendment obviously was passed to remedy the suffering of blacks?\(^2\)

The practical anomalies are no less great. Few of us, I would guess, are willing to return to the days when courts entered mere prohibitory decrees,\(^3\) which were so unenforceable that in reality discrimination continued. Fewer still would accept the proposition that the equal protection clause prohibits congressional attempts at compensatory problem solving. Even the Burger Court has used the rational basis test in approving the use of sex as a factor in providing tax relief to women retirees because women historically have suffered discrimination.\(^4\) Should not the Court also, therefore, approve the use of race as a factor in providing relief to blacks who have suffered even graver discrimination? In the remedial context, to forbid focusing on race effectively prevents Congress, courts, and state


\(^{22}\) See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67-72 (1873) (fourteenth amendment designed to alleviate the legal disabilities and curtailment of rights of blacks after emancipation).


legislatures from dealing with one of the greatest problems in America today—discrimination against blacks.

Were Professor Graglia to dig deeper, I suspect he would find popular dissatisfaction with race-conscious relief efforts to be founded not so much upon a rejection of all efforts to aid blacks, as upon a suspicion that many such efforts are arbitrary in their goals or work to remedy a nonexistent problem. This suggests that the new consensus should not be based upon color blindness, but upon restricting color consciousness to those situations in which it will cure black problems that have been proved to exist.

PROBLEMS OF THE EXISTING ORDER

Just as Professor Graglia has erred in identifying the new consensus that is a predicate to a new constitutional order, he also has misidentified the problems of the existing order that led to the dissatisfaction. Disaster By Decree focuses upon two mistakes of the past, the change from deSEGregation decrees to integration decrees and the move from decrees affecting only the South to those also reaching the North.

As it often is with persons who undertake a detailed study of one phenomenon, Professor Graglia has a tendency to think that many decisions and decisionmaking techniques are peculiar to the one phenomenon studied. He limits his field of vision to the historical sequence of topics within that one area of study, without considering the wider changes in law or society. When Professor Graglia correctly focuses on Green v. County School Board as the turning point in court desegregation decrees, because it judged desegregation efforts

25. The most persuasive part of Disaster by Decree, for example, suggests that many metropolitan desegregation decrees encounter implementation problems because of serious doubt that the school district was guilty of discrimination to begin with. See L. Graglia, supra note 3, at 161-76 (Denver); id. at 204-15 (Detroit). Similarly, affirmative action programs sometimes may be directed at unsubstantiated claims of inequality or be imposed in an arbitrary manner that attempts to make no correlation between the underlying discrimination and the remedy imposed. See Flanagan v. President & Directors of Georgetown College, Civ. No. 75-1500, at 4 n.7, 7 (D.D.C. July 28, 1976) (under affirmative action program to increase minority enrollment, nonminority student with estimated greater financial need received one-fifth of scholarship amount awarded several minority students).

26. The Court, for example, might use the compelling state interest test, which requires showing of a substantial state interest and a narrowly drawn remedy. Assuming that curing past discrimination is a substantial state interest, the Court might nevertheless require that the remedy be drawn narrowly as to duration and be proportional to the discrimination. See Comment, supra note 6, at 131-41; cf. Kahn v. Shevin, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting) (state tax exemption granted solely on basis of gender status, like classifications based upon race, alienage, and national origin, must be subjected to close scrutiny).

by numerical results rather than by intentions, he sees the opinion as a sinister new technique designed specifically to promote school integration. Nothing could be further from the truth: the concern in Green over results—the actual numbers of black students in desegregated schools—reflects the use of a decisionmaking technique suggested in the 1880's, developed in jury discrimination litigation since the 1930's, and widely used in a variety of factual circumstances over the last 20 years.

This decisionmaking technique is the statistical prima facie case. It calls for the court to compare the actual percentage of participation of blacks with the statistically determined percentage that one would expect absent discrimination, usually a random sample. Any significant discrepancy between actual and neutrally projected participation raises the rebuttable presumption that racial discrimination led to the discrepancy. From this beginning it was a short and logical step for the Court in the 1960's to begin to use statistics not simply to judge whether there initially had been a constitutional violation, but to judge whether any discrimination was continuing under court-mandated relief.

Because the statistical prima facie case is the core of judicial concern with numerical results, it is not surprising that in the last

28. Id. at 439.
30. See, e.g., Norris v. Alabama, 294 U.S. 587, 591 (1935) (that no black in memory had served on any jury prima facie evidence of denial of equal protection); Pierre v. Louisiana, 306 U.S. 354, 360 (1939) (total exclusion of blacks from jury service not due to their failure to possess statutory qualifications); Smith v. Texas, 311 U.S. 128, 129 (1940) (statistics on grand jury membership showed discrimination in selection); Patton v. Mississippi, 323 U.S. 458, 468 (1947) (uncontradicted showing that no black had served on jury in 50 years despite presence of qualified blacks on registration list); Whitus v. Georgia, 385 U.S. 545, 548 (1967) (45 percent of county population black, yet within memory no black had served on jury; prima facie case established).
32. See Fessler & Haar, Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441, 450 (1971) (to confront a prima facie case of discrimination documented by plaintiff's statistical evidence, defendant must either refute that statistical showing or establish an alternative explanation of disparity); Comment, supra note 6, at 131-35.
33. See Louisiana v. United States, 380 U.S. 145, 147-54 (1965) (historical review of discrimination in voter registration); Turner v. Fouche, 396 U.S. 346, 349-51 (1970) (jury case). In Turner the plaintiffs prevailed on the merits by showing a statistical disparity between blacks eligible for jury service and blacks actually called. Id. at 352. The district court ordered essentially prohibitory relief, but when the reconstituted jury rolls showed a continuing underrepresentation of blacks, the Supreme Court held that this statistical discrepancy indicated that discrimination was continuing under the district court's decree and that the district court thereafter should have instituted more effective relief. Id. at 359.
half-decade conservatives of more incisive vision than Professor Graglia have worked steadily to erode this decisionmaking technique. First criticized and rejected by Justice Rehnquist in his opinion for the Court in Jefferson v. Hackney, the device suffered great, though presently indeterminate, injury when the Court last term decided Washington v. Davis. In short, while Professor Graglia turns his Roto-Rooter on quotas, others with a fine scalpel have begun to excise the fat from the underlying technique that fostered quotas.

Not only does Professor Graglia err as to the decisionmaking techniques that led to much popular dissatisfaction with school desegregation decrees, he also errs in his identification of the sociopolitical roots of that dissatisfaction. He follows the conventional wisdom that integration became unpopular when courts began to enforce school desegregation principles outside the South. Few can argue with the conventional view in the sense that as, of course, desegregation decrees affected greater numbers of people, dissatisfaction grew. An equally strong case, however, can be made for the thesis that the shift in desegregation, not from south to north and west, but from rural areas to cities, caused the present dissatisfaction with desegregation decrees. Proponents of this thesis would argue that reliance on numerical results, the Court’s chosen enforcement technique, works well in rural areas where a few schools serve an area with little or no segregation in housing. In such areas one would expect almost total school integration absent purposeful official segregation, and thus courts properly may focus on numerical results as an acceptable technique for judging compliance with the equal protection clause.

Urban areas, whether southern, northern, or western, present a different situation, for larger cities usually have a great number of

35. 96 S. Ct. 2040, 2051 (1976) (disproportionate impact of police recruitment procedures did not warrant finding of discrimination). Although confusing and sometimes unilluminating in its discussion of the statistical prima facie case, the Court’s opinion apparently retains the test, but simply finds that the inference of discrimination, in this case, had been adequately rebutted. See id. Even this reading suggests, however, that the technique’s utility will be seriously diminished if lower courts routinely determine that the plaintiff’s case has been rebutted. Cf. Hawkins v. Town of Shaw, 303 F. Supp. 1162, 1167-69 (N.D. Miss. 1969), rev’d, 437 F.2d 1286 (5th Cir. 1971), aff’d en banc, 461 F.2d 1171 (5th Cir. 1972) (lower court dismissal reversed because plaintiffs presented prima facie statistical case of racial discrimination).
36. See Washington v. Davis, 96 S. Ct. 2040, 2047-51 (1976) (disproportionate impact is not irrelevant, but neither is it incontrovertible proof of discrimination). The only serious fat inheres in judicial and administrative use of the statistical prima facie case and quotas without regard for the practical drawbacks of the technique and the constitutional limits of quotas themselves. See Comment, supra note 6, at 136-41.
schools and substantial housing segregation. In the urban setting, therefore, one would not expect a great deal of integration even absent discriminatory official action; consequently, focusing on overall numerical balancing of races in each school as a remedy for school segregation carries with it an air of unreality. That unreality, however, is not a western or northern phenomenon, but an urban one, and the Court’s recent ruling in *Pasadena City Board of Education v. Spangler*, prohibiting year-by-year adjustment of racial composition of schools because of demographic changes resulting from normal migration patterns, undoubtedly will be repeated in other urban cases throughout the nation.

**CONCLUSION**

*Disaster by Decree* to a great extent is a book which time is passing by. Professor Graglia detected the Court’s shift from decrees remedying officially imposed segregation to those remedying all segregation. To the extent that the recent *Spangler* decision refocuses judicial attention upon the extent of official misconduct, Graglia’s criticism of the Warren Court has drawn the Burger Court’s endorsement.

Yet Graglia may have won the battle over school desegregation, but lost the larger war over affirmative action, quotas, and other race-conscious relief. He never saw the importance of statistics in proving constitutional violations or prescribing relief. Unscathed by his book, and not yet destroyed by the Burger Court, statistics remain a critical concern for courts, and their use in such areas as employment and college admissions, in which the demographic changes that undo school desegregation decrees will have little impact, provides the backbone of legitimacy for racial quotas.

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40. Id. at 2704. The decision by Justice Rehnquist represents a victory for principles stated in his earlier dissent in *Keyes v. School District No. 1*, see 413 U.S. 189, 256 (1973) (Rehnquist, J., dissenting) (to require affirmative racial mixing beyond neutrally drawn boundary lines is different from requiring that a genuinely dual system be disestablished).

41. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971) (dictum) (once racial discrimination through official action is eliminated, neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of racial composition of schools).

42. 96 S. Ct. at 2704-05.

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Justice by Consent\textsuperscript{1} purports to illustrate the workings of the plea bargaining system in the United States in a manner comprehensible to nonexperts.\textsuperscript{2} It is a book about doing justice, in which the authors, Professors Rosett and Cressey, characterize the legal system as depending upon the interaction of discretion and justice, an interaction that, in their view, all too often breaks down. The authors indict the existing system as being arbitrary and capricious because it coerces defendants into pleading guilty. They illustrate this indictment by following a hypothetical case from arrest through guilty plea. Unfortunately, because there is simply no such thing as a typical case, the authors' portrait, accurate only in part, ultimately misleads the reader.

The book begins by contrasting the idealized portrait of the courthouse, painted by the mass media, with justice as it works in the real world. This picture is indeed dim: empty and silent courtrooms filled, not with judges presiding over trials, but with prosecutors and defense attorneys bureaucratically processing cases with a chilling detachment. Tactics, rather than justice, dominate. The system favors the hardened, repeat offender and reserves its harshness for the weakest and least powerful.\textsuperscript{3}

Into this portrait, Rosett and Cressey introduce the fictitious criminal defendant, Peter Randolph.\textsuperscript{4} The authors suggest that Peter Randolph's case is typical in terms of both process and outcome. One of the problems with this technique is that it pools disparate procedures into a composite average. For example, the authors note that "[i]n many jurisdictions well over one half of all felony arrests are likely to be screened out very early in the process and either dismissed outright or filed as less serious misdemeanor charges."\textsuperscript{5} Although this is indeed the case in many jurisdictions, many others screen out far fewer felony cases, both in terms of those dismissed and those prosecuted as misdemeanors.\textsuperscript{6} The same problem comes up when Rosett and Cressey

2. Id. at v.
3. Id. at 1-5.
4. Id. at 8.
5. Id. at 14.
discuss judicial participation in plea negotiation. Although in many jurisdictions judges do little more than ratify agreements between prosecutors and defense attorneys, in others they actively participate in the negotiation process, occasionally dominating both the tone and the outcome of the proceeding. The authors' representation of a single case as "typical" brings to mind the man who, with his head in the refrigerator and his feet in the stove, said that on the average he felt pretty good.

The authors correctly suggest that in order for the guilty plea to be made in a knowing fashion it must follow counsel by a competent attorney who understands the case and has discussed it thoroughly with his client. Given the complexities of the legal system, they reluctantly conclude that many guilty pleas result from uncounseled decisions by defendants. The authors add that "[m]any guilty pleas submitted in American courts are not free acts of the accused; they are gained by psychological coercion through the threat of severe punishment." This, the reader is told, is a result of a system designed to induce the guilty plea.

Rosett and Cressey find that the quality of counsel available to most indigent defendants is so low that they seriously doubt whether many pleas are made knowingly. Implicit in this statement is the belief that court-appointed attorneys and public defenders are generally less effective than privately retained counsel. Empirical evidence refutes such a categorical statement. One recent study has shown:

Clients of private attorneys are much more likely to make bail, more likely to plead guilty, less likely to demand a jury trial, and more likely to receive a felony sentence upon conviction than clients of public defenders and court appointed attorneys. Court appointed attorneys are more likely to seek a jury trial, and more likely to have their defendants acquitted. The public defender, although less

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8. A. ROSETT & D. CRESSEY, supra note 1, at 27.

9. Id.

10. Id. at 29.

11. Id. at 27.
likely to win either a dismissal or an acquittal for his client, is most likely to avoid a felony sentence upon conviction.\textsuperscript{12} Another study of 1,254 cases in Philadelphia showed that defendants represented by the public defender received lower sentences than those represented by privately retained counsel in four out of six offense categories.\textsuperscript{13}

Moreover, some attorneys the authors would label incompetent are very familiar with the workings of the courthouse and are particularly knowledgeable as to the likely outcome for given cases. Although they might not always be knowledgeable as to the technicalities of the cases on which they work or the elements of specific crimes, they know the “fair market value” of particular offenses.\textsuperscript{14} Although when sentencing is left entirely to judges, “even top notch prosecutors and public defenders are unable to predict the penalties that will be imposed in a given case,”\textsuperscript{15} in most, if not all, jurisdictions a recognizable pattern of judicial sentencing forms the basis for the fair market value of the various offenses.\textsuperscript{16}

The problems of incompetent counsel and coerced guilty pleas exist side by side in the American courtroom. Defendants probably believe that if convicted of the offense with which they have been charged they will receive a higher sentence than if they plead guilty. Information as to sentence is essential if the defendant is to make a knowing plea. The question is to what extent the implied promise of a lighter sentence coerces the guilty plea. In most misdemeanor cases the threat of punishment is not severe, yet defendants commonly plead guilty. Thus, considerations other than the threat of severe punishment—including convenience, acceptance of guilt, and expense—must contribute to the decision. The prevailing theme of the book is that because the sentencing laws provide for severe penalties, criminal justice practitioners seek to do justice by avoiding the harshness of the law through inducing guilty pleas. The authors apparently assume that if the threat

\textsuperscript{12} P. Greenwood, S. Wildhorn, E. Poggio, M. Strumwasser, & P. DeLeon, Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective viii (1973) [hereinafter cited as P. Greenwood]; see id. at 52-55.

\textsuperscript{13} A. Constant, Determination of Sentence in Criminal Cases: The Guilty Plea and Related Factors 29-30 (1971) (unpublished manuscript on file at Institute of Criminal Law & Procedure, Georgetown University Law Center, Washington, D.C.). It should be noted, however, that Constant from his data, cannot attribute the difference solely to type of counsel. Id. at 29.

\textsuperscript{14} The term “fair market value,” often called the “going rate,” refers to the likely sentence imposed in a given type of case.

\textsuperscript{15} A. Rosett & D. Cressey, supra note 1, at 27.

\textsuperscript{16} See President’s Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts 11 (1967) (local attorneys likely familiar with judge’s sentencing pattern); Alschuler, The Prosecutor’s Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 102-03 (1968) (knowledge of judge’s sentencing pattern can facilitate plea bargaining).
of severe punishment were reduced, guilty pleas would be less the result of coercion and less frequent. Such a proposition, to my knowledge, has never been verified empirically.

One also can question the authors’ implicit assumption that defendants who plead guilty always receive lighter sentences than those who go to trial for the same offense. One study found that, at least in cases involving the receipt of stolen goods, the severity of sentence was not related to whether the defendant pleaded guilty; in fact, the average sentence following a guilty plea exceeded that following trial.\textsuperscript{17} Although there is also evidence to support the authors’ hypothesis that those who demand jury trial are punished more harshly,\textsuperscript{18} any categorical statement regarding the direction and degree of sentencing disparity is bound to be misleading. Moreover, no conclusive evidence shows that either judges or juries routinely hand out severe sentences.

Rosett and Cressey also discuss the value of discretion as a means of furthering justice and judicial economy. They correctly point out that in many cases the only genuine issue is what the punishment will be, and that this issue legitimately can be settled out of court.\textsuperscript{19} They maintain, however, that not all defendants have equal access to such discretionary proceedings.\textsuperscript{20} This, of course, is not news. Extralegal factors, such as personal relationships between prosecutors and defense attorneys, knowledge of the system, and racist attitudes, have a major impact on sentencing.\textsuperscript{21} These inequities, however, apply no less to cases that go to trial.

The authors’ final attack on sentencing is that “[w]hen the punishments meted out to criminals reflect no sense of the seriousness of their offenses, their past records or even the appropriateness of punishing them, it is time for a change.”\textsuperscript{22} They illustrate this attack by asserting that a man may be sentenced to 10 years for stealing the carcass of a jackass or forging a federal income tax refund check for $2.98.\textsuperscript{23} Yet, the severity of the crime and the record of the defendant

\textsuperscript{17} A. Constant, \textit{supra} note 13, at 21. Constant notes, however, that the range of offenses included within the overall category of receiving stolen goods may detract from the validity of these statistics; there may be a substantial difference in the seriousness of the charges to which defendants pleaded guilty rather than going to trial. \textit{id.} at 24-25.

\textsuperscript{18} See P. Greenwood, \textit{supra} note 12, at 41-44, 118.

\textsuperscript{19} A. Rosett & D. Cressey, \textit{supra} note 1, at 35.

\textsuperscript{20} \textit{id.} at 43.


\textsuperscript{22} A. Rosett & D. Cressey, \textit{supra} note 1, at 44.

\textsuperscript{23} \textit{id.} at 153.
strongly relate to his punishment. The authors’ mistake is in looking only at the sentencing structure. A better guide to how severely the law actually is administered is the punishments that in fact are meted out. The authors do point out the absurdity of having severe maximum sentences that are never imposed or perhaps are used only as hammers to induce guilty pleas. Nevertheless, the guide under which prosecutors and defense attorneys operate is what judges are likely to impose, not what the law states they have the authority to impose.

In one chapter the authors briefly trace the development of discretion in our legal system. With more than a touch of irony they write:

But the social changes of the last century and the growth and professionalization of the criminal justice system that accompanied these changes created new needs for discretion. The very universality of the legal rules demanded discretionary opportunities for interpretations and exceptions. The organizational needs of the professionals inevitably asserted themselves in demands for discretionary power to make the system work. Attempts to narrow this power by stating laws more specifically only produced more rules for the professionals to interpret. Over time, the professionals developed their own group sense of justice, their own values, a subculture distinct and coherent.

Thus, the statutes, rules, and decisions intended to control discretion have prompted the need for even greater discretion. Turning specifically to the Supreme Court cases related to plea bargaining, Rosett and Cressey conclude that “[a]s long as the defendant has a lawyer, the prosecutor does not publicly beat him in the courtroom, and the judge asks the right questions and receives the predictable answers, the arranged guilty plea is now beyond challenge.” For this, the Court is scathingly criticized: “Sadly enough, the Court has not helped Americans to decide whether this informal system of convicting and sentencing is more or less just than the one which implemented the due process concerns of our forefathers.”

Despite this criticism, the authors later implicitly admit that the Court perhaps could have done no more. They conclude their discussion of the judicial role by stating that, regardless of whether the judge actively participates in the plea or merely ratifies that which the

25. A. Rosett & D. Cressey, supra note 1, at 54.
26. Id. at 52.
27. Id. at 64-66.
prosecutors and defense attorneys have agreed upon, if the system is to work, the judge is bound by the bargain. This can make the daily routine of judges stupefying, but Rosett and Cressey do not have a clear alternative. Moreover, the authors once again try to construct a typical judge who handles his daily work in a typical fashion. As noted earlier, although some judges prefer to take a hands off attitude toward the negotiation process, others become actively involved, quizzing both defense attorneys and prosecutors, and in some cases encouraging and actively forcing pleas. Both types of judge inhabit American courthouses; which form predominates is a question to be answered by empirical research.

Turning from judges, the authors discuss the discretionary role of the prosecutor and more generally the values and beliefs that characterize the entire courthouse scene. Rosett and Cressey suggest that prosecutors, rather than seeking whatever punishment is possible in a given offense, attempt to seek a fair and appropriate degree of punishment for a given set of cases. What is not said, however, is that prosecutors approach this quest for justice from quite divergent perspectives. Some seem to believe that “half a loaf is better than none” and so seek to have a large number of defendants plead and be convicted, albeit with moderate sentences; others will let minor infractions pass while concentrating time and effort on convicting and punishing more serious offenders. Each is a conception of justice; each is different.

The authors also turn their attention to the public defender and his role in doing justice. They attempt to depict the life of a public defender and the conflicts and the conditions under which he operates. The public defender’s office is regarded by legislatures as a necessary evil and therefore almost invariably is funded inadequately. Office policies are concerned more with efficiency and administrative necessity than with full representation of clients. The vignette is not pleasant; the relationship between the public defender and district attorney is cooperative rather than adversarial.

The major complaint the authors have with the normal functioning of the public defender’s office is the coercive element they perceive in public defenders’ urging indigent defendants to plead guilty: “[t]he organization neither defends nor counsels; it processes.” Thus, the

28. Id. at 82.
29. Id. at 83.
30. See note 7 supra and accompanying text.
31. A. ROSETT & D. CRESSEY, supra note 1, at 92.
32. Id. at 118.
33. Id. at 118-35.
34. Id. at 139.
public defender's office functions as a form of "structural coercion" for inducing uninformed guilty pleas from indigent clients; the client's only real option is the certainty of a guilty plea versus the uncertainty of trial. "A client presented with such a choice is likely to plead guilty. However, he does not necessarily do so because he thinks the plea is in his best interest. He does not know what his best interest is." The picture painted is less than complete. Although public defenders do operate under handicaps, like high caseloads and insufficient clerical help, they often have difficulty in talking their clients out of pleading guilty. Moreover, not all public defender offices are as overloaded or as homogeneous as the authors would have us believe.

Having examined various participants in the criminal justice system, the authors next analyze the interaction of acquiescence and severity in the system. Stated briefly, they posit that the criminal justice system's insistence on acquiescence by defendants and the statutory severity of punishments encourage guilty pleas. Acquiescence morally justifies what we do to and with defendants. Severity enables the system to function.

The last chapter confronts the weighty problem of how the system might be changed, particularly if it is to be made less coercive. The writers are dubious of recommendations either to eliminate discretion or to abolish plea bargaining. They also are less than enthusiastic about an approach that would make the system more just through technical refinements and judicialization of the process. They state cogently that "it is time to recognize that problems of justice cannot be solved merely by imposing an adversary system model on every facet of the criminal justice system."

The authors finally do present several recommendations for initiating changes in the plea bargaining process. These recommendations focus primarily on reducing the tendency of the bureaucracy to treat people routinely, bringing the courthouse into a closer political relationship
with its community and reducing the severity of punishment. Rosett's and Cressey's solution for lowering the crime rate lies in giving everyone a greater stake in conformity, an unoriginal notion that has been explicated more fully elsewhere. This stake in conformity and a corresponding lessening of the severity of punishment, according to this theory, would enhance the defendant's acceptance of responsibility for his crime and, therefore, presumably place him on the track toward being a better citizen. Unfortunately, the authors' conviction does not eliminate, or for that matter even reduce, the conjectural nature of their supposition.

The issues addressed in *Justice by Consent* are important and are at the heart of the concept of justice. Unfortunately, the authors' assertions and depictions are incomplete. At worst they misleadingly attempt to typify a highly heterogeneous system. Thus, the book does little to further knowledge regarding plea bargaining in particular or the criminal justice system in general. It is readable, but its content is light.

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41. A. Rosett & D. Cressey, *supra* note 1, at 172.
42. *Id.* at 179.

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