
IN THE LITERATURE

Review Essay / The Precinct Confessional

Peter Brooks, Troubling Confessions: Speaking Guilt in Law and Literature
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I Introduction

In *Troubling Confessions*,¹ humanities scholar Peter Brooks gives us a provocative account of confession in law, religion, psychology, and literature. Moving almost effortlessly between these subjects and their rich traditions, Brooks helps us to understand just how embedded confession is in our culture and how this may influence what happens in the station house and the court house. Brooks links and compares various traditions and forms of confessional speech. He may not be the first to undertake this effort,² but he is easily the best. While one might rightly complain about some of Brooks' legal analysis,³ after reading his work, it is almost impossible to think of confession in a narrow, purely legal context. In this respect, Brooks has done us a great service.

A confession has a powerful impact upon a criminal case. Long considered the "queen of proofs" [9], a confession often takes center stage at trial. A confession must be "voluntary" to be admissible,⁴ and even a confession found to be "voluntary" by a judge may be attacked before the trial jury.⁵ Yet voluntariness is a slippery concept, and it is difficult for juries to appreciate why a confession

might be unreliable or false.⁶ The presence of a confession in a case may harm the accused in other ways as well; it often causes police to curtail investigation into other suspects, and it leads judges and even defense counsel to assume the defendant's guilt.⁷ Given the signal importance of confession in criminal law, just how rich ought to be the law's concept of voluntariness? Should courts examine religious and literary traditions in assessing voluntariness? And what tactics do we want our police to employ during an investigation and interrogation?

This essay explores and seeks to build upon some of Brooks' most significant insights into these questions. I focus on one of Brooks' central claims about the impact of religious traditions upon the law. Using materials that guide police and priests, I examine Brooks' hypothesis about religion and the law and note some interesting similarities between the way confessions are obtained in the station house and are heard in the church confessional. I then suggest how the law might permit a broader conception of voluntariness, though I question whether our society is ready to accept such a rich concept.

II Confessional Thought and Legal Voluntariness

Brooks is most insightful when he cross-cuts between confession in law and confession in religion, psychology

and literature. With respect to religious confession, he contends,

What we are today—the entire conception of the self, its relation to its interiority and to others—is largely tributary of the confessional requirement. This is true, I think, even for those whose lives are untouched by the Catholic Church or by religion of any kind: the confessional model is by now

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deeply implicated in our everyday morality. We cannot think of the self, its education, its emergence into adulthood, without recourse to confession and what it implies about the inner life. [101-102]

This is an exceptionally strong claim: the church's confessional model even influences the core thinking of people who are not members of the church or, for that matter, any organized religion. Brooks underscores his assertion by noting the ways that we expect our children and others in society to own up to errors. [2] I suspect, without—I confess—overwhelming evidence, that Brooks is right, that our everyday morality is indeed bound up in the religious model of confession. But I would be even more willing to accept a somewhat narrower claim: that the religious model of confession deeply influences our thinking (and suspects' thinking) about speech to authority figures, such as police officers. I am also inclined to believe that the impact of religion upon confessional thought is likely to be greater than the impact of psychoanalysis or literature. (I am less sure about the impact of television; others have explored some of the ways in which police dramas reflect and portray police interrogation.)⁸ Yet if this is correct, does it matter? Should it matter? Is there room in the law or, more particularly, in the legal concept of voluntariness, to account for the impact of religion upon confessional thought?

Voluntariness is exceedingly difficult to define in law. Brooks devotes a chapter of *Troubling Confessions* to a case study of *Culombe v. Connecticut*, in which Justice Frankfurter struggles for 67 pages and declares that "[t]he notion of voluntariness is itself an amphibian."⁹ [71] "Amphibian" or not, the law adjudicates and judges must decide whether a confession is admissible at trial, as Brooks acknowledges. Legal voluntariness turns on whether a confession was the "product of a rational intellect and a free will"¹⁰ or whether the accused's "will was overborne,"¹¹ taking into account the "totality of the circum-

stances."¹² There is an important limitation. In *Colorado v. Connelly*, which involved a mentally ill man who approached police and confessed, the Supreme Court ruled that a statement cannot be deemed legally involuntary unless there is an element of "police overreaching" or "police conduct causally related to the confession."¹³ Indeed, the Court held in another case that the admissibility of a confession "turns as much on whether the techniques for extracting the statements . . . are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne."¹⁴ Brooks ends *Troubling Confessions* with *Connelly* and laments the apparent demise of a voluntariness test that focuses primarily on free will. [170] Brooks argues that confession "is deeply intricately with our sense of the self, its interiority, its capacity for introspection, self-knowledge, self-evaluation," and he calls for greater scrutiny of such a laden concept. [171] But "totality of the circumstances" is itself pretty broad. One might build upon *Troubling Confessions* and explore the extent to which the "totality of the circumstances" standard still permits a richer, more informed understanding of the nature of confession to enter the courtroom.

To further this adventure, it is important to understand more about the interplay between suspect and police, parishioner and priest. Transcripts of individual police interrogations afford useful examples; however, law enforcement training materials provide a better overview. It may be more difficult to discern religious practices. The seal of confession absolutely protects confessional speech against disclosure [83], and so we cannot obtain accounts of actual religious confessions. Some historical materials and current church documents, however, reveal ancient practices and establish the contours of the present-day religious model of confession.

III Station House and Religious Confessionals

Modern-day police are skilled in the art of interrogation. By 1966, when *Miranda v. Arizona* was announced, Chief Justice Warren was able to say that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."¹⁵ As Brooks notes, Warren used police interrogation manuals to full advantage in *Miranda*, concluding that these tactics render custodial interrogation inherently coercive. [12-14] One of the manuals cited by the Court was the first edition of Fred Inbau's and John

Reid's classic, *Criminal Interrogation and Confessions*. *Miranda* represents the Court's best effort to afford suspects the ability to exercise free choice in the stationhouse, that is, to make an informed decision whether to choose speech or silence. If, however, the Court thought that *Miranda*'s procedures would curtail some of the practices described in the manuals, the case must be deemed a failure. The introduction to the second edition of Inbau and Reid's book, published immediately after *Miranda*, provides:

As we interpret the June, 1966, five to four decision of the Supreme Court of the United States in *Miranda v. Arizona*, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel.¹⁶

The book is now in its fourth edition, with additional authors.¹⁷ It is the most influential interrogation training manual in the United States. The Reid interrogation model is also taught by private companies that offer seminars on interrogation throughout the country.¹⁸

Under the Reid model, officers may "interview" witnesses and suspects to gather information. An "interview" is non-accusatory. Once officers are reasonably certain of a suspect's guilt, they may conduct an "interrogation." An "interrogation" is accusatory.¹⁹ The keys to interrogation are making a suspect believe that there is no point in denying guilt and, at the same time, providing the suspect with an affirmative reason to speak with police. Criminologist Richard Leo describes police interrogation as a confidence game. "The essence of the con . . . lies in convincing the suspect that he and the interrogator share a common interest, that their relationship is a symbiotic rather than an adversarial one."²⁰ Prosecutor Laurie Magid writes that "[e]ffective interrogations necessarily depend upon a single but significant lie—the 'Big Lie.' The Big Lie is that it is somehow in the suspect's best interest to confess. In reality, making an uncounseled confession to an officer is rarely in a suspect's best interest."²¹ Journalist David Simon, who spent a year with Baltimore homicide detectives, sums it up this way: "The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation." [42]

Perpetrating the Big Lie takes some work. Before starting the questioning, the interrogator should assemble props. The investigator should prepare an evidence folder "or a simulation of one." The officer can then refer to it during the interrogation "to lead the suspect to believe that the folder contains information and material of incriminating significance, even though, in fact, the file may contain nothing but blank sheets of paper."²² This tactic has a long pedigree. In his account of the inquisition of the Middle Ages, historian Henry Charles Lea notes that "the inquisitor is advised during the examination to turn over the pages of evidence as though referring to it, and then boldly inform the prisoner that he is not telling the truth, for it is thus and thus; or to pick up a paper and pretend to read from it whatever is necessary

to deceive him."²³ Props assembled, the modern interrogation may begin.

The Reid model reduces interrogation to nine distinct steps. The first step is "direct, positive confrontation" with the accused.²⁴ The message is that guilt is certain and there is no point in offering a denial. Part of this step includes the "transition statement." Here the investigator "must provide a perceived benefit to the suspect for telling the truth."²⁵ This gets tricky because a statement will likely be ruled involuntary and inadmissible if it is induced by an *express* promise of leniency. Thus, a "transition statement" might, for example, be a comment that the officer needs to know *why* the crime was committed, implying that the reason may make a difference. The officer might suggest that "[t]he reason why someone did something is often much more important than what he did"²⁶ though, in truth, the reason may not matter at all. The next step is to develop a theme, such as one designed to sympathize with a suspect—perhaps by suggesting that the act was understandable—or to reduce the suspect's feeling of guilt by minimizing the moral seriousness of the offense.²⁷ The third step is to handle the suspect's expected denials.²⁸ From there, the interrogator is told how to overcome the suspect's objections or weak explanations, keep the suspect's attention, handle the person's expected passive mood, and then present alternative questions to the suspect. The "alternative questions" offer two descriptions about some aspect of the crime; one choice may appear more socially or morally acceptable, but both choices are incriminating.²⁹ After that, the suspect relates details of the crime and finishes by reducing the confession to writing.³⁰

Perpetrating the Big Lie takes some work.

There are several significant parallels between this model of police interrogation and religious confession. The most important is that both are based on the belief that there is a reward for speech. Through the transition statement, the development of a theme, and the presentation of alternative questions, officers attempt to deceive the suspect into believing that he or she will be better off talking to police. Similarly, as Brooks explains, religious confession is both speech and act. There is a "constative aspect (the sin or guilt to which one confesses)" as well as

a "performative aspect," the action performed by the statement "I confess." [21] The performative aspect is an affirmative request for absolution, something that a priest (but not a police officer) may provide. Both models of confession, then, seek to imbue an affirmative reason for full and open speech. Some other parallels emerge as we examine how priests hear confessions.

While the professional police force is a relatively recent creation, clergy have heard confessions for centuries. Penance has always been part of the Church, though it was initially a public act.³¹ In 1215, the Fourth Lateran Council decreed that private confessions should be made yearly to a parish priest. [93]³² The Council understood that people then (as now) might be reluctant to talk about sins and crimes, their most private thoughts and acts. Thus, the Council also determined that "[t]he priest shall be discerning and prudent, so that like a skilled doctor he may pour wine and oil over the wounds of the injured one. Let him carefully inquire about the circumstances of both the sinner and the sin, so that he may prudently discern what sort of advice he ought to give and what remedy to apply...."³³

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Priests, just like modern-day police interrogators, needed some guidance in getting their parishioners to open up to them. Historian Thomas Tentler has reviewed the genre of early manuals or *summas* for confessors. Beginning with the *Summa confessorum* of Raymond of Peñafort (compiled between 1220 and 1245), a steady stream of books gave priests practical guidance on those difficult discussions. One widely distributed volume by Andreas de Escobar, *Interrogations and Teaching by Which a Priest Ought to Question His Penitent*, went through at least forty-eight printings in the fifteenth century.³⁴ Another popular volume, *On the Art of Hearing Confessions*, was written by well-known theologian Jean Gerson (1363-1429).³⁵ Tentler notes that some manuals and *summas* "tell the confessor to encourage the penitent to make a good confession." The confessor, according to one author, "should tell him that God already knows his sins and that the more openly he confesses, the more fully he will be pardoned and the more the confessor will esteem him."³⁶ This instruction, if

given to a confessant, is somewhat similar to the Reid model's attempt to show that it is futile to deny guilt and that there is indeed a benefit to confession.

The details of the ancient manuals are revealing, both because they underscore that confession results in absolution and because they contain some tactics that parallel current police techniques. Confessors, Gerson wrote, must take special care to prepare

in exceptional sins of the flesh, in which it is known by experience that those guilty of such matters scarcely ever tell them in confession, unless they are encouraged by the most attentive artfulness, questioned and finally taken captive in them. Certainly it is necessary that the confessor have the spiritual art of the midwife in order to bring forth such a pernicious serpent, entangled and virulent in the soul that has conceived it.³⁷

Gerson advises that confessors should "be careful not to be harsh, melancholic, and rigid from the beginning. If he does so, he will soon close the mouth of the terrified sinner."³⁸ Perhaps similar to the Reid model's shift from "interview" to "interrogation," after eliciting the contours of the sins, "[t]he confessor is to make accusation and harshly blame them for the enormity of their sins. . . . But he must be careful that the one confessing cannot again flee into denying what he has already admitted."³⁹ In the investigation of sins, particularly sexual sins,

the confessor should go ahead first at a slow pace, concentrating on general matters and those that seem to imply no guilt or only a slight one. For if the sinner wants to lie and flee, he is often taken captive through those things that happen naturally to everyone, or in which the opposite is only rarely found.⁴⁰

Taking a confessant "captive" by obtaining an admission to some form of everyday conduct is akin to the way in which a partial first admission during a police interrogation serves as the "breakthrough" or "beachhead" that leads to a full statement. [146-150]

Modern-day church materials confirm Brooks' main point about the speech/act of religious confession: there is a reward for speech. The *Rites of the Catholic Church* provide that the sacrament of penance has four parts: contrition, confession, act of penance, and absolution.⁴¹ The "Rite for Reconciliation of Individual Penitents" includes the priest's express statement, "I absolve you from your sins."⁴² The *Rites* include, as an appendix, a list of questions that the confessant may ask herself before seeking confession. The very first paragraph includes a question—"Do I sincerely want to be set free from sin . . . ?"⁴³—that asks about the penitent's attitude towards the sacrament of penance, but which underscores the link

between confession and absolution. The duty of a priest is clear when a penitent makes a genuine confession. Canon Law provides that "absolution is to be neither refused nor deferred."⁴⁴ Thus, the confessant knows that no matter how difficult the conversation, at the end of the day there will be absolution.

We might also ask how priests are presently trained to hear confessions. The *Rites of the Catholic Church* state that the priest "[i]f necessary . . . helps the penitent to make an integral confession and gives him suitable counsel."⁴⁵ The seal of confession, however, makes pastoral training somewhat challenging. Medical students learn techniques under the supervision of medical faculty and residents. Many law students represent their first real clients under the careful watch of faculty in law school clinics. A seminary student might practice hearing confession in a simulation course but he cannot, for example, hear an actual confession under the supervision of someone more experienced, nor may two priests discuss a particular problem that arose during a confession. A few books provide guidance, but no manual is in wide use. No treatise has achieved the pre-eminence of Fred Inbau's tome on police interrogation. The few volumes that I examined promote much gentler techniques than police interrogation manuals or, for that matter, Gerson's early writings for the church. In contrast to police interrogation, the penitent and not the confessor takes the lead in religious confession. One author urges confessors to ask questions simply to find out what is needed in order to minister to the confessant.⁴⁶ In framing questions, the confessor should not accuse or insult; rather he should ask open-ended questions that still respect the confessant's privacy and leave him or her freedom to determine how to answer.⁴⁷ Another author writes that "the response of the priest is inspired by the desire to enable the penitent to express as

authentically as possible his or her personal awareness of sin. Therefore, the response of the priest is hospitably respectful and understanding, and does not moralize or embarrass, harangue, or shame the penitent."⁴⁸

These materials tell us that Brooks is clearly right in describing the speech/act of religious confession. The *Rites of the Catholic Church* show how confession and absolution are two integral parts of the rite of penance, and one could not go to confession without expecting that absolution would follow. For their part, police interrogators seek to deceive suspects into believing that it is in their own best interests to speak. The expectation of a reward is, then, essential to both models of confession. There is at least one other parallel. Police interrogators often try to float a more understandable or less morally culpable version of the offense. Some variant of this technique appears to have been a part of religious confession for centuries. Gerson counseled going slowly at first, being careful not to be harsh, for fear that one will "close the mouth of the terrified sinner." Recent tracts advise against accusing, insulting, moralizing or embarrassing the confessant. This may be no more than good common sense, common sense that has prevailed for five hundred years: people will be more willing to open up if they are received sympathetically and are not demeaned or ridiculed. But it is an interesting point.

Finally, none of this is to suggest that the parallel between police interrogation and religious confession is perfect. Although both operate on the theory that speech will be rewarded, law enforcement and religious confessors have different goals, and the confessions are used in different ways. Religious confessions remain private; those made to police do not. But it is also important to keep in mind that not all of these differences may be apparent and appreciated by a suspect in police custody.

IV Confessional Thought and Legal Voluntariness, Revisited

It would be interesting to study the efficacy of police interrogation techniques among people of different religious backgrounds, controlling for race, income and other factors. Even without such a study, however, we ought still to ask how the similarities between police interrogation and religious confession fit with our working hypothesis. Do they *prove* the claim that the religious model of confession deeply influences society's (and suspects') thinking about speech to authority figures, such as police officers? I believe that, even if direct proof is lacking, these

observations strongly *support* the hypothesis. A skeptic might argue that the two models of confession have developed wholly independently, and that is indeed possible. One might also contend that a secular society has created a limited role for religion, thus greatly diminishing the influence of religious confession. Nevertheless, unless the hypothesis is true, it is difficult to comprehend just why so many suspects can be convinced to give a confession to police. Physical force is no longer common in the police station. Officers must avoid making express

promises of leniency. Furthermore, the questioning occurs after a suspect is given her *Miranda* warnings; she is expressly told that any statements may be used against her and that officers are not necessarily safeguarding her own best interests. If successful interrogation depends upon deceiving a suspect into believing that a confession is somehow beneficial, surely that deception will be more effective if it resonates with a baseline societal understanding that links confession with forgiveness and mercy. (And the deception will be even more fruitful if a suspect recognizes some tactic, such as suggesting a less morally culpable explanation, that is familiar from a non-threatening context). One might thus contend that whether or not it is intentionally designed to take advantage of religious confession practices, the Reid model has proved successful because it operates in a society in which many are hard-wired to associate confession with absolution, meaning forgiveness and mercy.

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If this "hard-wiring" hypothesis is true, it may also help explain the research results of Saul Kassin, a psychologist who has studied various interrogation tactics. In one important experiment, Kassin and a colleague tested subjects' reactions to interrogation transcripts that included "minimization" and "maximization" strategies. In the "minimization" condition, the officer offered the suspect an excuse or moral justification for the crime; in the "maximization" condition, the officer used scare tactics, such as exaggerating the strength of the evidence and the seriousness of the offense. They found that "minimization communicated leniency expectations as effectively as did an explicit promise."⁴⁹ One might assume that experimental subjects (or suspects) could readily distinguish hard and soft interrogation tactics. But if the research subjects have been conditioned to believe that confession is always rewarded, they would be more inclined to interpret a detective's statements that encourage a confession as containing some promise of leniency or reward. It would be interesting to test this "hard-wiring" hypothesis by using research subjects with different reli-

gious backgrounds, though it is also worth noting that one need not be raised in the Catholic faith to be familiar with religious confession or to associate confession with relief or reward.

A court considering whether a statement is involuntary may, of course, look at the "totality of the circumstances." A confession will be ruled involuntary if a suspect's will was overborne by an express promise of leniency or physical force. Yet judges have been quite uncharitable in accounting for implied promises during an interrogation, such as when police manage to suggest that a confession may lead to a lesser punishment or to some non-criminal outcome such as psychiatric commitment. A well-known example is *Miller v. Fenton*, where officers told Frank Miller that the person who committed a brutal killing had "a problem" but not "a criminal mind." "They don't need punishment. They need help, good medical help," said police.⁵⁰ Miller eventually confessed, after which he collapsed and was carted off to a medical center.⁵¹ A split panel of the Third Circuit found the confession voluntary, ruling that the officer's statements to Miller were not assurances of leniency but were, instead, simply "a means of convincing Miller that [the officer] was sympathetic."⁵² The dissenting judge savaged the majority for its characterization of the officer's statements and for its suggestion that these tactics had no effect on Miller.⁵³ He accused the court of distorting the record and misstating the law to avoid granting relief to the perpetrator of a horrid offense.⁵⁴

While the majority in *Miller* seemed unable to appreciate the full impact of the officer's statements, it was not *obligated* to view them so narrowly. By helping us see the problem of confession in a broader, non-legalistic context, Brooks may assist courts to understand better the power of officers' statements during interrogation, and to assess more accurately the nature and quality of the police tactics. Had the *Miller* majority, for example, perceived that the defendant was raised in a society that inevitably associated confession with forgiveness and mercy, the judges might have viewed the officer's comments about treatment and non-criminality as more likely to induce a confession. Or at least they could have. The "totality of the circumstances" certainly may include an analysis of the statements made by police in light of the background and cultural understandings of the accused and her society. There is room within existing law to educate judges and juries about confessional thought, either through legal briefs or the introduction of expert testimony.

Finally, and this is a much smaller point, there are recurring instances of officers making religious references

or expressly drawing upon religious beliefs during interrogations. One well-known example is found in *Brewer v. Williams*, where a detective addressed a lay suspect, Robert Williams, as "Reverend," discussed religious beliefs, and suggested that Williams provide the location of a young girl's body so that she could be given a "Christian burial."⁵⁵ To the extent that these tactics seek to capitalize

upon an accused's religious beliefs, a full understanding of the influence of religious confession or, perhaps, the introduction of expert evidence about religious practices, can help a judge assess the specific impact of these tactics and whether the suspect's will has been overborne due to improper police questioning.

V Qualms and Conclusion

In various parts of *Troubling Confessions*, Brooks points to conflicts in the legal doctrines bound up with confession law, as well as to our own ambiguous views of the role of confession. The law assumes human moral agency. Yet there is "no analytic consensus" on what we want agency to be, nor is such consensus likely "given the profoundly divergent views of human nature and polity activated in criminal justice. . . . There is notably little public debate about the normative status we choose to confer on suspects before the law." [85] Criminal processes are "largely exercised on the poor, the uneducated, the culturally unassimilated . . . who don't match well to Enlightenment concepts of autonomous agency." Brooks finds adhering to the concept of the overborne will almost be "fastidious to the point of refusal of reality." Having made these observations, Brooks admits to an inability "to provide an exit from the impasses of thinking . . . evoked here—except to say that they tend to show that we don't really know what we think of confessions or what we want them to be and to do . . ." [86] Brooks is right on target here and, in the end, this is what proves most troubling about *Troubling Confessions*. Where is the door in this hall of mirrors?

After travelling with Brooks through law, religion, psychology and literature, we may never again think of confession in a narrow, purely legal context. But we will need a renewed and sustained effort to reach consensus about the role of confession in law if we ever hope to find our way out of this analytical box. In another paper, I have argued that the *Miranda* debate is not susceptible to an empirical resolution because whether one supports *Miranda's* rules largely depends upon the extent that one cherishes the values of individual autonomy and retaining the primarily adversarial character of our criminal justice system.⁵⁶ Different people have different tastes for these values. We have the same problem here. The voluntariness determination is a hybrid; courts must assess whether the accused's will was overborne and whether police techniques were acceptable in light of our

criminal justice system's fundamental principles. Brooks has illuminated what was murky or even invisible before. Building on his insights, I have suggested that there is room within the totality of the circumstances test to account for the influence of the religious model of confession. That may be, but allowing a court to consider the influence of religion still leaves us short of a shared understanding of the proper function of police interrogation or of what law enforcement tactics society should tolerate. Indeed, debates continue to rage about the appropriate use of deception during police interrogation, and the different positions seem entrenched and unbridgeable.⁵⁷ *Miller v. Fenton* demonstrates just how much leeway judges are inclined to give police when reining in officers requires a court to suppress a confession or overturn a conviction. In the end, Brooks may just give us a new set of unresolved questions: Are we comfortable with officers taking advantage of an accused's religious beliefs to secure a confession? Do we think that police interrogation modeled in part on religious confession is more or less likely to induce a false confession?

Further, if Brooks is really right that our everyday morality is bound up in the religious model of confession, reaching some consensus on answers to these questions may be even harder, for there is a disconnect between the law's protections and society's expectations about confessional conduct. *Troubling Confessions* opens with the spectacle of William Jefferson Clinton. As Clinton sank into the Monica morass, many—including the editors of the venerable *New York Times*—called upon him to confess that he had lied under oath. [1] Confession, Brooks writes, "is the precondition of the end to ostracism, reentry into one's desired place in the human community. To refuse confession is to be obdurate, hard of heart, resistant to amendment." [2] The law, of course, affords the privilege against self-incrimination. Thus, Clinton could not be compelled to admit that he had committed the crime of perjury. He tried to satisfy the public's demands while taking advantage of constitutional safeguards, bringing

together clergy and assuming the role of penitent while cautiously avoiding statements that could be construed as legal admissions of guilt. [167] This course of action was deeply unsatisfying to many and did not end until the eve of the Bush presidency when Clinton and Independent Counsel Robert Ray struck a deal. Ray declined to prosecute Clinton and Clinton, freed from the possibility of criminal liability, publicly acknowledged that he knowingly gave "evasive and misleading answers" to questions about his relationship with Monica Lewinsky.⁵⁸ The law may afford the privilege against self-incrimination, but that does not always mean that society will

respect and look neutrally upon its assertion. In much the same vein, as all criminal trial lawyers know, jurors might—as an intellectual matter—agree that the accused enjoys the presumption of innocence and has the right not to testify at trial. Yet—as an emotional matter—those same jurors nevertheless want to hear the defendant tell her own story. Jurors cannot fathom why an accused with a defense might be reluctant to take the stand.

None of this is to sell Brooks short. His efforts and insights bring us closer to resolving the problem of the precinct confessional. But by illuminating the problem so well, he also shows us how far we still have to go.

NOTES

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1 P. BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000). [Subsequent references to Brooks' book appear in square brackets in the text of this essay.]

2 See, e.g., O. J. ROGGE, *WHY MEN CONFESS* (1975).

3 See Thomas, *What's Troubling About Troubling Confessions*, THE JURIST BOOKS-ON-LAW (Sept. 2000) <<http://jurist.law.pitt.edu/lawbooks/revsep00.htm>> (noting a number of errors and omissions in legal analysis).

4 See *Brown v. Mississippi*, 297 U.S. 278 (1936).

5 See *Crane v. Kentucky*, 476 U.S. 683 (1986).

6 For an interesting experiment in which the presense of a confession—even a coerced confession—increased conviction rates, see Kassin & Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27 (1997).

7 See Leo & Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, at 440-41, 478, 494 (1998).

8 See, e.g., Bades & Beermann, *Lawyering Up*, 2 GREEN BAG 2d 5 (1998).

9 *Culombe v. Connecticut*, 367 U.S. 568, 604-05 (1961).

10 *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960).

11 *Reck v. Pate*, 367 U.S. 433, 440 (1961).

12 *Fikes v. Alabama*, 352 U.S. 191, 197 (1957).

13 479 U.S. 157, 163-64 (1986).

14 *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

15 *Miranda v. Arizona*, 384 U.S. 436, 448 (1966). There are exceptions. See J. CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE*

(2000) (describing torture allegedly committed by Chicago Police Commander Jon Burge).

16 F.E. INBAU & J.E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (2d ed. 1967).

17 See F.INBAU, J.E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed. 2001) [hereinafter cited as F. INBAU, 4th ed.].

18 Perhaps the most prominent company is Reid and Associates, based in Chicago. Visit the Reid and Associates website (<http://www.reid.com>) for a description of courses and the date of a seminar near you. Reid and Associates teach the "Reid Technique," and the website advertises that "[i]f it doesn't say the 'Reid Technique®' . . . it's not John Reid and Associates!" A competitor, Wicklander-Zulawski and Associates, Inc., teaches the "Reid Method." Wicklander-Zulawski's training schedule is also on the web at <http://www.w-z.com>.

19 F. INBAU, 4th ed., *supra* note 17, at 5-8.

20 Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, at 266 (1996).

21 Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, at 1198 (2001).

22 F. INBAU, 4th ed., *supra* note 17, at 217.

23 H.C. LEA, *THE INQUISITION OF THE MIDDLE AGES: ITS ORGANIZATION AND OPERATION* 112 (1954).

24 F. INBAU, 4th ed., *supra* note 17, at 218.

25 *Id.* at 223.

26 *Id.* at 225.

27 See *id.* at 232-302.

28 See *id.* at 303-30.

29 See *id.* at 330-65.

30 See *id.* at 365-97.

31 See H.C. LEA, 1 *A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH*, 21 (1968).

32 Lateran IV, canon 21, *reprinted in* 1 DECREE OF THE ECUMENICAL COUNCILS, 245 (N. Tanner, ed. 1990) ("All the faithful of either sex . . . should individually confess all their sins in a faithful manner to their own priest at least once a year." Further, "if anyone presumes to reveal a sin disclosed to him in confession, we decree that he is not only to be deposed from his priestly office but also to be confined to a strict monastery to do perpetual penance.")

33 *Id.*

34 See T.N. TENTLER, SIN AND CONFESSION ON THE EVE OF THE REFORMATION 31-41 (1977).

35 See *On the Art of Hearing Confessions*, *reprinted in* JEAN GERSON: EARLY WORKS 365-77, 460 n.1 (B. McGuire, trans. 1998).

36 T. N. TENTLER, *supra* note 34, at 84-85.

37 *Id.* at 367.

38 *Id.* at 369.

39 *Id.* at 370.

40 *Id.* at 371. Tentler reports an application of this technique in a treatise attributed to Gerson, *On the Confession of Masturbation*. The treatise is remarkable for its frankness and guile. Gerson counsels priests to ask penitents whether they recall having an erection when they were young, ten or twelve years old. If they deny it, they are convicted of a lie, because it is common knowledge that this happens to young boys, and the penitent will be so told. If they admit it, then the confessor is advised to say,

Friend, wasn't that thing indecent? . . . What did you do, therefore, so that it wouldn't stand erect? And let this be said with a tranquil visage, so that it will appear that what has been asked about is not dishonorable or something to be kept quiet, but rather as a remedy against the alleged awkwardness of the aforementioned erection (*id.* at 91-92).

Offering an innocent explanation or at least one that appears less morally culpable, and doing so with a "tranquil" face, is exactly the sort of "theme" suggested by Inbau, Reid *et al.* five hundred years after Gerson. Once the confessant accepts Gerson's theme, however, the confessor is off to the races, asking how and for how long the confessant touched himself, and so forth. See *id.* at 92.

41 *Rite of Penance*, 1 THE RITES OF THE CATHOLIC CHURCH, 528-30 (1990). ("Sacrament of Penance and Its Parts.")

42 *Id.* at 547. ("Prayer of the Penitent and Absolution.")

43 *Id.* at 625. ("Form of Examination of Conscience.")

44 Canon 980, *reprinted in* NEW COMMENTARY ON THE CODE OF CANON LAW 1160 (2000) (J. Beal, J. Coriden, & T. Green, eds.). See also G. KELLY, THE GOOD CONFESSOR 55 (1951) (the confessor must make two essential judgments: "whether there is sufficient matter for absolution, and whether the penitent is properly disposed.")

45 *Rite of Penance*, *supra* note 41, at 546. ("Confession of Sins and Acceptance of Satisfaction.")

46 See K. STASIAK, A CONFESSOR'S HANDBOOK 14, 19-21 (1999).

47 See *id.* at 50-53.

48 R.M. GULA, TO WALK TOGETHER AGAIN: THE SACRAMENT OF RECONCILIATION 253 (1983).

49 See Kassin & McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, at 236-37, 241 (1991).

50 *Miller v. Fenton*, 796 F.2d 598, 633-34 (3d Cir. 1986).

51 See *id.* at 625.

52 *Id.* at 609.

53 See *id.* at 616, 622, 625-26 (Gibbons, J., dissenting).

54 See *id.* at 628.

55 See *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977).

56 See Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, at 170-77 (1998).

57 Compare, e.g., Grano, *Selling The Idea to Tell The Truth: The Professional Interrogator and Modern Confession Law*, 84 MICH. L. REV. 662 (1986), Magid, *supra* note 21, with Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 U. CONN. L. REV. 425 (1996), and White, *Miranda's Failure to Restrain Pernicious Police Practices*, 99 MICH. L. REV. 1211 (2001).

58 See *Transition in Washington; Correspondence and Agreed Order in the Settlement of Clinton's Case*, N.Y. TIMES, Jan. 20, 2001, A20.

Review Essay / The "P" Word: Profiling

David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work*
New York: The New Press, 2002, xi + 276 pp.

FEDWA MALTI-DOUGLAS

There are times when certain words become so politically charged that they become difficult to use and, when used, almost lose their referent. One example will suffice. Jesse Jackson, in the *Washington Times* as recently as July 2002, was quoted as saying: "there is a pattern of African-Americans being beaten by the militia and killed by the militia." He then adds: "Unarmed citizens being beaten and killed by the militia is an act of terrorism."¹ When the Reverend Jackson was interviewed by Mike Barnicle on *Hardball* on July 23, 2002, he used the same terms.² A word like "militia" calls up the exact opposite of a police force and I certainly cannot hear it without thinking about a book such as *The Turner Diaries* which was said to be the inspiration behind Timothy McVeigh's Oklahoma bombing.³

In Reverend Jackson's example, if the police force is turned into "the militia" and the beating and killing of "unarmed citizens" into "terrorism," what are we to do with something like the attacks of September 11, 2001 that killed over three thousand people? Do we need to create a new category for super-terrorism? What happened to words like police brutality, for is that not what the Reverend Jackson is speaking about? Instead, the phrase "police brutality" is replaced by the new *word-du-jour*, terrorism, a term that, as it is inflated to cover more and more phenomena, loses meaning.

The stigma attached to specific words has become a recurring issue in contemporary America. Many words in our English language have accrued such a stigma, a

negative pull sometimes so powerful that one dares not even allude to these words. I would argue that the word "profiling" is becoming such a term. Most recently, Congresswoman Cynthia McKinney of Georgia defended herself against the charge that she had accepted money from donors with controversial Middle Eastern ties by declaring that she did not "racially profile" her contributors.⁴ As one moves effortlessly from the words "profile" to "profiling" and from there just as effortlessly once again to "racial profiling" or "ethnic profiling," one has made, perhaps in a totally innocent manner, jumps that are not only linguistic but also cultural, philosophical, and legal.

Racial profiling, of course, must be understood in the context of America's history of racial oppression, which includes slavery, lynching, and segregation. The terrorist attacks of September 11, 2001 also brought the issue of profiling into the limelight, as it became clear early on that the nineteen hijackers responsible for the killing of thousands of Americans were all Muslims and all from the Middle East (indeed, all Arabs). This has added an explosive element to an already unstable mixture—international conflict becomes intertwined with domestic discord—making any examination of profiling inherently controversial.

Let us allow David A. Harris to provide us with a definition of a profile:

A profile is simply a set of characteristics—physical, behavioral, or psychological. In *criminal profiling*, law enforcement personnel use characteristics associated with either a particular crime or group of crimes to develop a profile of someone likely to engage in illicit behavior. [16]⁵

Although Harris's book bears the publication date of 2002, it predates September 11, 2001. This gives the reader the strange sense that the book is at once timely and yet

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out of date. The French writer, Gérard Genette, invites us to consider the importance of extra-textual materials that surround a narrative, such as a book's title and its cover.⁶ Harris's book sports the title: *Profiles in Injustice: Why Racial Profiling Cannot Work*. Most American readers, when encountering *Profiles in Injustice*, would immediately think of *Profiles in Courage*, by John F. Kennedy, or the more recent *Profiles in Courage for Our Time*, edited by Caroline Kennedy.⁷ The two Kennedy books offer biographies of prominent historical individuals whose lives can serve as edifying models to readers.

Profiles in Injustice taps into this Kennedy construction, turning it upside down. The reader initially embarking on Harris's work might well think that she will be meeting Kennedy-type biographies of victims of the justice system. The subtitle of Harris's work clarifies the issue while adding to the narrative significance of the title: *Why Racial Profiling Cannot Work*. Now the reader understands that those "profiles" were not Kennedy-inspired biographies but point rather to the issue of "racial profiling." Yet Harris writes as if faced with a doubting Thomas: the second half of his subtitle hammers the reader with its message. *Why Racial Profiling Cannot Work* is a declarative statement that shuts the door to alternative arguments and leaves no room for doubt, no space for other possibilities. It would seem then that the practice of "racial profiling" is doomed before the first page of the book. "Cannot" has the implication of finality, unlike words such as "does not." An equally powerful message could have been sent had Harris's subtitle read, for example, "Why Racial Profiling Does Not Work." The "Cannot" slams the gate on any future possibility that the category that we most-unscientifically call "race" (actually, membership in a historically-created social group) could ever be a useful component when creating a profile.

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Now to the book's cover. That Harris is predominantly concerned with traffic stops is confirmed by the jacket illustration that depicts a driver's side car mirror on a road with its white divider visible and with an equally visible green landscape on the side and end of that road.

The title *Profiles in Injustice* is written on a large green sign, with the subtitle in a smaller blue sign. The green and blue signs emulate highway signs, with even an arrow pointing in a downward direction. Instead of indicating an exit, however, the arrow signals toward the vehicle of which we see a large left side mirror. The side mirror reflects part of an African-American face behind which looms the top of a white police car with its red lights. The driver's eye looks directly at the holder of the book at the same time that it spots the police vehicle reflected in the mirror. An element of apprehension in the driver's gaze leads us to assume that this driver will soon be stopped by the police car following him. Thus, potentially driving off into freedom with the green landscape sharply contrasts with the red menace of the police car. Nor is the image of an African-American coincidental: it brings to mind the by now famous phrase, Driving While Black (with its variant, Driving While Brown), echoing Driving While Intoxicated.

Harris's book itself sends just as dramatic a message. The "profiles in injustice" of the title are extended anecdotes that the author presents before his arguments. There is an African-American attorney, a graduate of Harvard Law School, stopped with his family while driving through Maryland. There is also the case of the judge of Mexican descent stopped by the Border Patrol in Texas. Other cases are also described. As the reader ventures into Harris's book, the use of these concrete examples and real individuals begins to smack less of Kennedy and more of Ronald Reagan. Reagan, as politician, popularized the use of real American families or individuals to illustrate a political point. This device was so successful that it continues to be exploited by politicians of all stripes. This technique is, of course, totally distinct from that of the two Kennedy books in which the profiles in courage are not an *entrée-en-matière* into a specific subject but stand on their own as exemplars.

Harris's profiles are tantalizing little stories that provide the setting for his analysis. These stories, with their heroes who experience different and unpleasant encounters with the police, serve as openings for the author's argument about the failure of the profiling system. Be it discussions of traffic stops on the New Jersey Turnpike designed to catch drug traffickers or discussions of random stops of individuals all over American cities, Harris seeks to persuade his reader that racial profiling is doomed before it starts. His analysis is based largely on the dynamics of the American road, on the American obsession with driving, no matter what the class and no matter what the race of the driver. Although Harris touches

briefly on other forms of discrimination from which minorities suffer—for example, real estate acquisition—the author's passion is primarily drawn to what I might call vehicular racial profiling. Harris clearly outlines for those unfamiliar with the intricacies of traffic stops the differences between a "stop," a "frisk," a "seizure," and so on. More importantly, it becomes obvious from the statistics Harris presents that race plays an important part in traffic stops and the author's overwhelming evidence demonstrates that skin color is a determinant in how often a person gets stopped while driving. Drug trafficking, it would seem, provides a convenient excuse that facilitates stops based on the color of one's skin. I should admit that I have had experience in Los Angeles with this, so on this point Harris was preaching to the choir.

Harris acknowledges, a bit too superficially in my opinion, the FBI profilers whose work has had wide implications in the apprehension of violent criminals. In a section entitled "The Serial-Killer Profile," Harris allots less than a page to the pioneering FBI work of John Douglas and Mark Olshaker. In fact, their book, *The Anatomy of Motive*, makes clear that "mass murderers" are different from "serial murderers and spree killers,"⁸ whereas Harris speaks only of the "serial-killer profile." It is not our task here to validate or invalidate the work of the FBI. What Douglas's and Olshaker's work demonstrates, however, is the complexity of putting together the elements of what constitutes a profile.

Nevertheless, one section of Harris's book stood out for me rather aggressively from the rest of the text. Labeled a "case study," this section precedes the conclusion and is written in a much livelier and more appealing style than other parts of the book. Here, Harris presents cases of successful African-American women who are subjected to outrageous searches by the U.S. Customs Service. As a virtual closure to his book, these examples lead to an almost fairytale-like conclusion in which the Customs Service has changed its ways, in the process undertaking less outrageous searches, and at the same time catching more illegal drug smugglers. All's well that ends well.

The title of Harris's book is not the only element that demonstrates the unflagging fervor of its author. Another example is the title of Chapter One: "Profiles in Injustice: American Life under the Regime of Racial Profiling." [1] What does it mean to say "American Life Under the Regime of Racial Profiling"? One can speak of living under a democratic regime, under a totalitarian regime, under a monarchical regime, even, by extension, under the regime of capitalism or communism, for example. To imply that racial profiling constitutes a "regime" is to endow the

concept with state and legal powers under which one lives. Having lived myself under totalitarian regimes (though, thankfully, not for too long a period), I am uncomfortable with the notion that racial or ethnic profiling (to which I have been subjected as an Arab-American both in the United States and abroad) constitutes a "regime." The more reasonable formulation of Harris's position would be that racial profiling in traffic stops is an important instrument of racism, a term one of whose usages today refers to a global system of discrimination against people of color by whites. Whether one wishes to treat this aspect of the American social system as sufficiently dominant to constitute a "regime" depends, of course, upon perspective.

The more reasonable formulation of Harris's position would be that racial profiling in traffic stops is an important instrument of racism.

One can certainly understand Harris's zeal; and he makes his points aggressively, at times repetitively. But just in case the reader should miss the point, The New Press, the publisher of his book, was kind enough to insert into the volume a card that on one side proclaims "Arrest the Racism"—a clever play on words which makes the police action the illegal activity, the one that needs to be arrested. The reader is also invited to visit the web page of the ACLU and "read about victims of racial profiling and take action by sending a message to Congress." That web page provides "a complaint form where victims of racial profiling are encouraged to 'tell their story.'" The other side of the card sends the reader to the web page <http://www.profilesininjustice.com> that promises articles on profiling, government reports, ways to take action, and so forth.

Nor does Harris flinch from discussing potentially disturbing legal issues. One such involves the prominent African-American law professor and former federal prosecutor, Paul Butler,

who has urged blacks to nullify in drug cases against black defendants. Butler argues that African American jurors should use their power to vote not guilty as a form of political protest and an assertion of black control over the system. Even if the evidence clearly supports the defendant's guilt, Butler says, black jurors should not vote to convict

non-violent black drug defendants because doing so would serve only to apply and uphold an unjust, discriminatory law and legal structure.

Harris interprets this as a symptom "of the damage that racial profiling and its associated tactics have done to the very muscle and bone of the legal system." [123-24] There is no question that Butler's call for nullification is extremely disturbing to anyone concerned with the law or the judicial system. But how much of the fault lies with racial profiling? Even Harris starts to retreat from his own argument when he adds "and its associated tactics." Is not the alienation described in Professor Butler's argument deeply embedded in our entire national history of racial oppression and racial discord? Were we to eliminate racial profiling, would we solve all of America's racial and associated social problems?

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contextualizations.*

Once he leaves the area of racial conflict, Harris is less given to larger cultural contextualizations. He writes:

When we talk about fighting crime in the United States, we often find ourselves using military metaphors, as in the "war on drugs." Racial profiling has played a key role in this war. . . . And as in any war, we must judge the war on drugs and the racial-profiling tactics used in it not only in terms of their supposed successes but also in terms of their costs—the relative effort expended to achieve these successes, along with the resultant casualties and "collateral damage." [93]

For cultural critics, the "military metaphor" that Harris speaks of is not at all unusual. In *Illness as Metaphor*, Susan Sontag examined such military metaphors and their exploitation in the "war" against cancer.⁹ Americans often see their collective struggles, be they against a physical disease or social ills, in military terms. Thus such language is far from peculiar to the "fighting crime" issue that Harris discusses. It is instead much more reflective of some of our deep-seated mental structures or *mentalités*.

Understanding this, the traffic stops or the war on drugs would have to be analyzed as part of a larger and more complex cultural paradigm. And to complicate the paradigm further, what are we to do with a title like

"Drug Czar," used to refer to the highest American government official in charge of the war on drugs? A Czar? Does not this foreign title smack a bit of the theatrical? And where does this title fit within the notion of a military battle that Harris discusses?

Of course, Harris's particular interest lies in road stops, stops that tend to overemphasize the racial element. The case involving vehicular stops on the New Jersey Turnpike, by now legendary, is amply discussed in *Profiles in Injustice*. [53-60] Stopping motorists on the basis of their skin color is fully discredited. Here is Harris again:

Former sheriff Bob Vogel, who first employed profiling as a means of identifying drug couriers on the highways in the 1980s, says that race was never part of his method; it was never a factor. In fact, he says, it would have made no sense for him to focus on either African American or Latinos; the greatest number of "upper-level dealers" that he arrested as a result of his stops were white men. [48]

As the analysis unfolds, however, the reader learns that Sheriff Vogel's work began to be used by the Drug Enforcement Agency in "Operation Pipeline," shifting the focus to "minority racial and ethnic groups." [48]

If one directs the analytical microscope to race alone and does not broaden the base of potential criminal activity, even in the case of drug trafficking, results can be easily skewed. In a Foreword to Darin Fredrickson's and Raymond Siljander's book, *Racial Profiling*, Stephen M. Hennessy notes: "Statistically, more African-Americans will deal in crack cocaine than Whites or Asians. Research also reflects that Whites are more prone to deal in LSD or methamphetamine. The vast majority of serial killers are White."¹⁰ But one does not need to stay in the realm of drugs to discover that the color of one's skin is indeed a tricky matter. To offer one example, in *The Anatomy of Motive*, Douglas and Olshaker discuss what they call at their FBI unit an "assassin personality" when speaking about mass murderers. "Assassin personalities tend to be white male loners with self-esteem problems—no surprises there, since that describes a huge chunk of the violent predator population. More specifically, they tend to be functional paranoids." They then continue by elaborating on the specifics of this last element in the profile.¹¹ Another powerful example is the study by Michael D. Kelleher entitled *Profiling the Lethal Employee*. After a fascinating analysis of the cases of employees who have fatally harmed their coworkers, the profile turns out to have as three of its elements middle age, maleness, and whiteness. Not African-American, not Latino, but white. Here is how the author of that study puts it when

enumerating the possible characteristics of the "lethal employee": "*The ethnicity of the potentially lethal employee will most likely be white.* This is a historical characteristic that, in recent years, may be undergoing a change with the shifting demographics of the American workplace."¹²

The "shifting demographics" that Kelleher is talking about are not too dissimilar from the notion of "multiple ethnicities" raised by Fredrickson and Siljander in *Racial Profiling*. They note that:

Multiple ethnicities are a factor that is often overlooked when contemplating the issue of profiling and discrimination. Too often there is a tendency to think of people as being Black, Hispanic, White, Asian, etc. However, many people represent more than just one ethnicity. Most people in the U.S. are a combination of two or more nationalities.¹³

In a multi-ethnic and multi-racial twentieth-first century America, this point cannot be overemphasized. Driving While Black (or Driving While Brown) might have to be redefined. In what has been called the "summer of child abductions," the media have recently had a field-day with the issue of profiling: interviewing psychologists, former FBI profilers, and so on. Marta Weber, a forensic psychologist appeared on FOX News on August 10, 2002. She noted that flashers do not become rapists, but that a very large number of rapists were exhibitionists. From where is Dr. Weber's information culled if not from criminal profiling? For Harris, however,

Racial profiling grew out of a law enforcement tactic called criminal profiling. . . . Criminal profiling is designed to help police spot criminals by developing sets of personal and behavioral characteristics associated with particular offenses. . . . When these characteristics include race or ethnicity as a factor in predicting crimes, criminal profiling can become racial profiling. [10-11, emphasis in original]

Profiling can be compared to looking through a kaleidoscope. Turn the kaleidoscope a little and a different image emerges.

Harris is clear in his condemnation. Race and ethnicity have no place in criminal profiling, or indeed any other form of police work, except in the identification of a specific suspect, as in "suspect is a white male in his mid-forties, about two hundred pounds." Profiling can be compared to looking through a kaleidoscope. Turn the kaleidoscope a little and a different image emerges.

Though he wrote before September 11, 2001, Harris was well informed about the issues surrounding the airport profiling of Arab-Americans and Middle Easterners. He sums up the history of this practice in a few passionate pages that ironically form a mirror image to the account published after September 11th in the right-wing *National Review*.¹⁴ The main difference is that indignation is put at the service of opposite political perspectives. Briefly, the story is how in the 1980s and 1990s Arab-Americans received increased attention from security personnel, how they fought against this through the political and legal systems, and how the Computer-Assisted Passenger Profiling System (CAPPS; which Harris has mislabeled) under the Clinton administration eliminated ethnic criteria from the profile when selecting travelers for direct personal scrutiny. For Harris, this is another happy ending. Racial profiling was ended and with it the complaints. Of course, Harris had no way of knowing that September 11th would call all of this back into question. Given his penchant for generalizing from traffic stops, it is not surprising that Harris refers to airport profiling as "airport 'stops'." [141]

As an Arab-American whose passport not only indicates birth in Lebanon but is also decorated with stamps from countries like Iraq, Syria, the United Arab Emirates, Tunisia, and Egypt, I have received my share of extra attention. For many years, I was flying every two weeks and making several international journeys a year. So I have been quite aware of the ebb and flow of security procedures. Indeed, I noted the drop-off in questioning in the late 1990s; and given the situation in the world (though I did not imagine September 11th), I was far from reassured by what seemed to me a relative laxity compared to what I saw in other countries. Hence, also, I did not join a class-action suit in the mid-1980s against American Airlines when asked to do so by a group of Arab-American friends. Why not? The treatment I had received from airport officials in the United States was always polite and has never compared with the intrusiveness of security procedures outside the United States, especially in Arab countries themselves. It was also clear to me that the attention directed toward me was not triggered solely by ethnicity. With a similar set of passport stamps, my blue-eyed American-born husband was asked essentially the same questions I was. I knew that I came from, and was engaged in the scholarly study of, a region in which political violence was both rampant and exportable. This was part of the price of doing business. Security interviews were not at the top of my list of complaints. That space remains reserved for the lack of adequate provi-

sions for handicapped travelers like myself.

But not all Arab-Americans feel the same way. The ACLU, joined by Relman & Associates (a Washington based self-described civil rights firm), filed five civil-rights law suits on behalf of the American-Arab Anti-Discrimination Committee and "five men who were ejected from flights" on June 4, 2002.¹⁵ I was contacted by CNN the same day the suits were filed so that I could comment on the cases on *American Morning* with Paula Zahn on June 5, 2002. Unfortunately, I could not accept. But I monitored the news closely and watched one of the plaintiffs appear on a television interview the day the cases were filed to explain that he was being discriminated against, in his words, "because of the color of my skin."

This phrase jumped out at me. In modern times, those who call themselves Arabs come in a variety of colors, from moderately fair (with hair to match) to very dark. The gentleman in question was no more swarthy than Frank Sinatra and did not look much more Middle Eastern either. My own guess is that what had called him to the attention of airline officials was more likely his name or his accent. But, ironically, by making his case one of skin color this individual was doing his best to assimilate to distinctively American obsessions.

I do not underestimate, however, the sincerity of the plaintiffs. Who among us wishes to be reduced to a profile? We imagine police mug shots in which criminals are pictured, in one shot with their face facing the viewer and in another shot with their face in profile. It all suggests the nineteenth-century pseudo-sciences of phrenology and physiognomy, favored by many criminologists of the time. Who of us wishes to have his or her facial features and skin color determine a character trait or a type of personality? Of course, this whole bogus theory of physical determinism was carried to its furthest extreme by the linked phenomena of anti-semitism and Nazism in the twentieth century. Who can forget those horrific visions of the Nazi regime and its anthropometric analyses of faces to determine racial and thus social status?¹⁶

The frightening results that come from mixing behavior and features emerges forcefully in the words of the right-wing French polemicist, Léon Daudet, about Captain Alfred Dreyfus on his return from Devil's Island. He "no longer has a skin color. He is of the color traitor. . . . We all understood this by his act, by his appearance, by his face."¹⁷

If all this were not enough, America is an individualistic society (I would say the most individualistic on the earth) with a natural aversion to treating people as members of groups. And yet after September 11th, a genuine

swell of popular feeling emerged in favor of airport profiling of Middle Easterners. One of the best ways to see these feelings is in the anonymous digital messages we pass back and forth through emails and fax machines, which are our true folklore. On April 8, 2002, I received an email that consisted of seven multiple-choice questions. Each one referred to a specific attack (on the U.S. embassies in Kenya and Tanzania in 1998, on the World Trade Center in 1993, on Pam Am Flight 103, and so on). The last question, however, will exemplify the tone of the email:

On 9/11/01, four airliners were hijacked and the WTC was destroyed by:

- (a) Bugs Bunny, Wil E. Coyote, Daffy Duck, and Elmer Fudd;
- (b) The US Supreme Court;
- (c) Barney; or
- (d) Muslim male extremists mostly between the ages of 17 and 40.

The equally absurd choices in the other questions were all balanced against the same choice (d): "Muslim male extremists mostly between the ages of 17 and 40." In addition to its frequently hilarious send-ups of aspects of American society (a favorite was: "cheese-crazed tourists from Wisconsin"), this political email seeks to make what it considers a commonsense argument in favor of airport profiling on the basis of Middle Eastern origin. A similar argument was made by the outspokenly liberal and generally hilarious comedian and writer, Al Franken, interviewed by Tim Russert on CNBC on Sunday, July 28, 2002. Franken said that if it had been nineteen Jewish comedians who had hijacked those airplanes on 9/11 and he was approached at an airport and told, "Mr. Franken, you're a Jewish comedian. We have to talk to you," he would reply: "Go ahead. Look up my butt—and Seinfeld's too."

Both jokes make the same argument: since all the 9/11 hijackers came from a specific group, we should give members of that group special scrutiny. Or, is Harris right—are airport "stops" simply an extension of a failed racist system of traffic stops? Actually, the situation is more complicated than either approach would suggest. The biggest difference between drug-war traffic stops on the New Jersey Turnpike and airport profiling is that the first is based upon a putative sociology, the second is not. Racial profiling for an unknown criminal, whatever the ethnicity suggested by the profile, is based upon a sociological assumption about the frequency of that crime among the population in question. That assumption may be a myth, or it may be based upon data that were skewed by their process of collection. It is easy to see how racism

could influence such a profiling process, as apparently happened in the drug-war profiling.

The post-9/11 situation is, however, rather different. And this is not just a question of the seriousness of the crimes perpetrated. War has been formally declared against us by an organization called al-Qaeda (the declaration of war is on the web). This is neither social myth nor racist fantasy. It is a political reality. Al-Qaeda is a formally (not just sociologically) Muslim organization that declares itself to be fighting for its vision of Islam and against what it perceives to be the enemies of Islam. This is not to say that other forms of terrorism, linked to other international or domestic discontents, may not emerge. After all, we had Timothy McVeigh in the middle of the al-Qaeda run-up of the 1990s. Hence, general precautions need to be maintained. But, in view of what it has already been able to accomplish, al-Qaeda is a far more serious threat. When trying to identify possible al-Qaeda agents, it is perfectly obvious that certain groups are far more likely to harbor such members than others. As al-Qaeda expands its recruitments, profiles will have to be adjusted. And, if intelligence were to emerge tomorrow that al-Qaeda had effected an alliance with the Tamil Tigers or the Basque terrorists of the ETA, it might be appropriate to look more closely at people from those parts of the world as well. The fundamental question is not whether it is appropriate to treat Arabs, or Muslims, or Middle Easterners differently but rather whether, based on the best available intelligence, one can introduce ethnic categories into screening profiles. And this is a subset of a larger question of how limited security resources are going to be used: will they be spread out over the entire population or targeted at groups considered high risk.

When trying to identify possible al-Qaeda agents, it is perfectly obvious that certain groups are far more likely to harbor such members than others.

I favor some mixture of the two. But there are significant and legitimate counter-arguments. The first addresses any discrimination between law-abiding individuals. When the CAPPS system was first developed, some ob-

jected that it unfairly penalized those who bought one-way tickets or paid by cash—a group that might turn out to be those of modest means. Such an argument would make any system of security profiling illegal, even one that excluded any reference to ethnicity or national origin. This is the argument that seems to me to have the greatest intellectual force. It pits the right of the individual to equal treatment against the security concerns of the community.

A second argument suggests that it is licit to discriminate among law-abiding travelers, as long as nothing that resembles race or ethnicity goes into the mix. This type of selective discrimination rests on two propositions: that race or ethnicity are, given our history, exceptionally dangerous categories with which law enforcement officials cannot be trusted; and/or that discrimination on the basis of race or ethnicity is specifically prohibited in our legislation and/or in the U.S. Constitution. The main problem with this case against ethnic profiling is that it is rarely followed through consistently. Those who insist most vocally that race or ethnicity is an inherently poisonous category and must be eliminated from public policy are, at the same time, often supporters of affirmative action on the basis of race, ethnicity, gender, or other categories. On the other side, among conservatives, there is a major campaign to eliminate affirmative action, using as its principal argument the inherent iniquity of any classification by race. Yet many of these same conservatives are supporters of an airport security profile that includes a Middle Eastern connection, even against the stated policy of the Bush administration.

Confronting these positions leads one to the suspicion that all too often support for or hostility to a particular policy are determined less by fidelity to a principle than by an assessment of which groups stand to gain or lose. Furthermore, even if one takes the position that the use of ethnic criteria in airport profiling (and, hence, unequal treatment based at least partly on ethnicity) is permissible, Middle Easterners or others may still have valid legal claims if their treatment is particularly egregious, unnecessary, and/or in violation of the airlines' own rules. Whether or not to seek legal remedies remains a question of personal and political choice.

No matter how one decides on these controversial issues, one thing seems clear: our post-9/11 world brings with it a special set of challenges. But our responses to these challenges are always entangled in the obsessions and conflicts of our history.

NOTES

1 See B. O'Reilly, "Jesse Jackson Goes Over the Line," *Wed.*, July 24, 2002 <<http://www.foxnews.com>>.

2 <<http://www.msnbc.com/news/MSNBCTRANSSCRIPTSMAINFront.asp>>. The transcript for that date is no longer available on the web page.

3 See A. MACDONALD, *THE TURNER DIARIES* (1978, 1980). Or, if one wishes to tackle the issue on a lighter note, one could refer to the recent book by J. RONSON, *THEM: ADVENTURES WITH EXTREMISTS* 63-106, *esp.* at 82 (2002).

4 The story received a great deal of publicity. See, as one example, the transcript of *Hardball* for Aug. 14, 2002 <<http://www.msnbc.com/news/751547.asp?0si=&cp1=1>>.

5 D.A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002) (emphasis in original). [All bracketed page numbers in the text refer to this work.]

6 G. GENETTE, *SEUILS* (1987).

7 J.F. KENNEDY, *PROFILES IN COURAGE* (2000); *PROFILES IN COURAGE FOR OUR TIME* (C. Kennedy ed. 2002).

8 J. DOUGLAS & M. OLSHAKER, *THE ANATOMY OF MOTIVE* 8 (1999). See also J. DOUGLAS & M. OLSHAKER, *MIND HUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT* (1995).

9 S. SONTAG, *ILLNESS AS METAPHOR* (1978).

10 Hennessy, *Foreword* to D.D. FREDRICKSON & R. P. SILJANDER, *RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION* xi (2002).

11 J. DOUGLAS & M. OLSHAKER, *THE ANATOMY OF MOTIVE*, *supra* note 8, at 274 ff.

12 M.D. KELLEHER, *PROFILING THE LETHAL EMPLOYEE: CASE STUDIES OF VIOLENCE IN THE WORKPLACE* 10 (1997) (emphasis in original).

13 D.D. FREDRICKSON & R.P. SILJANDER, *RACIAL PROFILING*, *supra* note 10, at 85.

14 Lowry, *Where's Waleed? The Case for Profiling*, *NAT'L REVIEW*, Jan. 28, 2002, at 32-35.

15 ACLU, *ADC and Relman Law Firm Sue Four Major Airlines Over Discrimination Against Passengers* <<http://www.aclu.org/features/f060402a.html>>. The site includes legal and other data on the cases.

16 J.-J. COURTINE & C. HAROCHE, *HISTOIRE DU VISAGE: EXPRIMER ET TAIRE SES ÉMOTIONS XVIIe-DÉBUT XIXe SIÈCLE* (1988); A. GRYNBERG, *LA SHOAH: L'IMPOSSIBLE OUBLI* 57 (1995).

17 P. BIRNBAUM, *L'AFFAIRE DREYFUS: LA RÉPUBLIQUE EN PÉRIL* 49 (2002).

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change of vital health information among state agencies and between other jurisdictions.

Current statutes also do not facilitate surveillance and may even prevent monitoring. For example, many states do not require timely reporting for Category A agents of bioterrorism. At the same time, states do not require, and may actually prohibit, public health agencies from monitoring data held by hospitals, managed care organizations, and pharmacies. All of these powers are vital to prevent or to react to a bioterrorism event.

Extant laws usually do provide powers over property and persons, but their scope is limited and inconsistent. There are numerous circumstances that might require management of property in a public health emergency—for example, shortages of vaccines, medicines, hospital beds, or facilities for disposal of corpses. It may even be necessary to close facilities or destroy property that is contaminated or dangerous. There similarly may be a need to exercise powers over individuals to avert a significant threat to the public's health. Vaccination, testing, physical examination, treatment, isolation, and quarantine each may help contain the spread of communicable diseases.

The Model State Emergency Health Powers Act

The Model Act is structured to reflect five basic public health functions to be facilitated by law: preparedness, surveillance, management of property, protection of persons, and public information and communication.¹ The preparedness and surveillance functions take effect immediately upon passage of the Model Act. However, the compulsory powers over property and persons take effect only once the Governor has declared a "Public Health Emergency," defined to include only the most serious threats to the public's health.

The Act facilitates systematic planning for a public health emergency, including coordination of services; procurement of vaccines and pharmaceuticals; housing, feeding, and caring for affected popula-

tions (with respect for their physical, cultural, and social needs); and vaccination and treatment of individuals. The Act provides authority for surveillance of health threats and the power to follow a developing public health emergency. For example, the Act requires prompt reporting by health care providers, pharmacists, veterinarians, and laboratories. MSEHPA also provides for the exchange of relevant data among lead agencies such as public health, emergency management, and public safety.

MSEHPA provides comprehensive powers to manage property and protect persons in order to safeguard the public's health and security. Public health authorities may close, decontaminate, or procure facilities and materials to respond to a public health emergency, safely dispose of infectious waste, and obtain and deploy health care supplies. Similarly, the Model Act permits public health authorities the following powers to examine or test as necessary to diagnose or treat illness; to vaccinate or treat in order to prevent or ameliorate an infectious disease; and to isolate or quarantine to prevent or limit the transmission of a contagious disease.

Finally, MSEHPA provides for a set of post-declaration powers and duties to ensure appropriate public information and communication. The public health authority must provide to the public information regarding the emergency, including protective measures to be taken and information regarding access to mental health support. One of the lessons learned from the anthrax outbreak was that government messages to the public were confusing and lacked authenticity.

A Defense of the Model Act

There have been several specific objections to the Model Act. Detractors argue the following points: *federalism*—federal, not state, law is implicated in a health crisis; *emergency declarations*—the scope of a "public health emergency" is overly broad; *abuse of power*—governors and public health officials will act without sufficient justification; *personal libertarianism*—compulsory powers over non-adherent individuals are rarely, or never, necessary; *economic libertarianism*—regu-

lation of businesses is unfair and counterproductive; and *safeguards of persons and property*—there are inadequate procedural and substantive protections for individuals and businesses.

Federalism. Critics argue that acts of terrorism are inherently federal matters, and so there is no need for expansion of state public health powers. It is certainly true that federal authority is important in responding to catastrophic public health events. Bioterrorism may trigger national security concerns, require investigation of federal offenses, and affect large geographic regions. However, the assertion of federal jurisdiction does not obviate the need for adequate state power. States and localities have been the primary bulwark of public health in America. From a constitutional perspective, states exercise plenary "police powers" for the public's health and security. States and localities probably would be the first to detect and respond to a health emergency and would have a key role throughout. This requires states to have effective, modern statutory powers that enable them to work alongside federal agencies.

Declaration of a Public Health Emergency. Critics express concern that the Model Act could be triggered too easily, creating a threat to civil liberties. Community-based organizations object to the idea that a governor might declare a public health emergency for an endemic disease such as HIV/AIDS or influenza, but the Act specifically prohibits this. Civil libertarians express concerns that a governor could declare an emergency for theoretical or low-level risk. However, the drafters of the Act set demanding conditions for a governor's declaration. An emergency may be declared only in the event of bioterrorism or a naturally occurring epidemic that poses a high probability of a large number of deaths or serious disabilities. Indeed, the drafters rejected arguments from high-level government officials to set a lower threshold for an emergency declaration.

Governmental Abuse of Power. Critics argue that governors and public health authorities would abuse their authority and exercise powers without justification. This kind of generalized argument could be used to refute the exercise of

compulsory power in *any* realm because executive branch officials may overreach their authority. However, such general objections have never been a reason to deny government the power to avert threats to health, safety, and security. The answer to such general objections is to introduce into the law careful safeguards to prevent officials from acting outside the scope of their authority. The Model Act builds in effective protections against governmental abuse. It adopts the doctrine of separation of powers, so that no branch wields unchecked authority: (1) the Governor may declare an emergency only under strict criteria and with careful consultation; (2) the legislature, by majority vote, can override the Governor's declaration; and (3) the judiciary can terminate the exercise of power. No law can guarantee that the powers it confers will not be abused. But MSEHPA counterbalances executive power by providing a strong role for the legislature and judiciary.

Personal Libertarianism. Critics suggest that the Model Act should not confer compulsory power at all, strenuously objecting to vaccination, testing, medical treatment, isolation, and quarantine. Commentators reason that services are more important than power; individuals will comply voluntarily; and that tradeoffs between civil rights and public health are not necessary. These arguments are misplaced. First, although the provision of services may be more important than the exercise of power, the state undoubtedly needs a certain amount of authority to prevent individuals from endangering others. It is only common sense, for example, that a person who has been exposed to an infectious disease should be required to undergo testing or medical examination and, if infectious, to be vaccinated, treated, or isolated. Second, although most people will comply willingly because it is in their own interest and/or desirable for the common welfare, not everyone will comply. The weight of history shows that, in relation to epidemics, some people do not act in accordance with public health advice. Finally, although public health and civil liberties may be mutually enhancing in many instances, they sometimes come into conflict. When government acts to

preserve the public's health, it can interfere with personal rights (for example, autonomy, privacy, and liberty). Individuals whose movements pose a significant risk of harm to their communities do not have a "right" to be free of the interference necessary to control the threat. There simply is no basis for this argument in constitutional law, and perhaps little more in political philosophy.

Economic Libertarianism. Businesses complain that MSEHPA interferes with free enterprise. Economic stakeholders including the food, transportation, pharmaceutical, and health care industries have lobbied CLPH faculty and state legislators. These groups argue that under the Act they may have to share data with government, abate nuisances, destroy property, and provide goods and services without their express agreement. But all of these powers have been exercised historically and comply with constitutional and ethical norms. If businesses possess hazardous property (for example, a rug contaminated with smallpox) or engage in unsafe activities (for example, refusal to close a restaurant after possible cases of food-borne illness), government must have the power to destroy the property or abate the nuisance. Those who believe in the unfettered entrepreneur may not agree with health regulations, but they are necessary to ensure that business activities do not endanger the public. Government also must have the power to confiscate private property to use for the public good. In the event of bioterrorism, for example, it may be necessary for government to have adequate supplies of vaccines or pharmaceuticals or to use health care facilities for medical treatment or quarantine. Under the Act, businesses would be compensated if government used the property for a public purpose (a "taking"), but not if it destroyed property or abated a nuisance to avert a health threat. This comports with the extant constitutional jurisprudence of the U.S. Supreme Court. If the government were forced to compensate for all diminution of proprietary interests, it would significantly chill public health regulation.

Safeguards of Persons and Property. The real basis for debate over public health legis-

lation should not be that powers are given, because it is clear that governmental power is sometimes necessary. The better question is whether the powers are hedged with appropriate safeguards. The core of the debate ought to be whether MSEHPA appropriately protects freedoms by providing clear and demanding criteria for the exercise of power and fair procedures for decision making. It is in this context that the attacks on the Act are particularly exasperating because critics rarely suggest that it fails to provide crisp standards and procedural due process. Nor do they effectively compare the safeguards in the Model Act to those in extant public health legislation. Compulsory powers over individuals (for example, testing, physical examination, treatment, and isolation) and businesses (for example, nuisance abatements and seizure or destruction of property) already exist in state public health law. MSEHPA, therefore, does not contain new, radical powers. Most tellingly, the Model Act contains much better safeguards of individual and economic liberty than appear in communicable disease statutes enacted in the early-to-mid-twentieth century. Unlike older statutes, MSEHPA provides clear and objective criteria for the exercise of powers, rigorous procedural due process, respect for religious and cultural differences, and a new set of entitlements for those made subject to compulsory powers (for example, health care, clothing, and humane conditions).

In summary, MSEHPA provides a modern framework for effective identification and response to emerging health threats, while demonstrating respect for individuals and toleration of groups. Indeed, the CLPH agreed to draft the law only because a much more draconian approach might have been taken by the federal government and the states if acting on their own and responding to public fears and misapprehensions.

Rethinking the Public Good

American values at the turn of the twenty-first century could fairly be characterized as individualistic. Until recently there was a distinct orientation toward personal and proprietary freedoms and against a substantial government presence in so-

cial and economic life. The attacks on the World Trade Center and the Pentagon and the anthrax outbreaks reawakened the political community to the importance of public health. Historians will look back and ask whether September 11, 2001, was a fleeting scare with temporary solutions or whether it was a transforming event.

There are good reasons for believing that resource allocations, ethical values, and law should develop to reflect the critical importance of the health, security,

and well-being of the populace. It is not that individual freedoms are unimportant. To the contrary, personal liberty allows people the right of self-determination to make judgments about how to live their lives and pursue their dreams. Without a certain level of health, safety, and security, however, people can neither have well-being nor can they meaningfully exercise their autonomy and participate in social and political life.

My purpose is not to determine which is the more fundamental interest: per-

sonal liberty or health and security. Rather, my purpose is to illustrate that all these interests are important to human flourishing. The Model State Emergency Health Powers Act was designed to defend personal as well as collective interests. But in a country so tied to rights rhetoric on both sides of the political spectrum, any proposal that has the appearance of strengthening governmental authority is bound to travel in tumultuous political waters.

NOTES

[This Commentary is based on: Gostin, *Public Health Law in an Age of Terrorism: Re-thinking Individual Rights and Common Goods*, HEALTH AFF. (forthcoming 2003); Gostin, Sapsin,

Teret, et al, *The Model State Emergency Health Powers Act: Planning and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622-28 (2002). See also,

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1 See <http://www.publichealthlaw.net>.

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BOOK NEWS

**From Social Justice to Criminal Justice:
Poverty and the Administration of Criminal Law**

edited by William C. Heffernan & John Kleinig
John Jay College of Criminal Justice

The economically deprived come into contact with the criminal court system in sorely disproportionate numbers. Should economic deprivation then figure in the administration of criminal law? And if so, how? This collection of original, insightful essays explores the troubling questions and ethical dilemmas inherent in this situation.

Do those living under economic and social hardship have the same social obligations as the more fortunate, or does their hardship in some way exempt them from the formal obligations of civil society? Does their encounter with the criminal justice system itself reflect their vulnerable—or even an ascribed—status? To what extent, if any, should we provide public resources for their passage through the criminal justice system? In different ways, the eleven essays in this collection illustrate not only the ideological diversity that informs debates about these questions, but also the extent to which a consensus might be reached. The essays examine such practical issues as heightened vulnerability, indigent representation, and rotten social background defenses. They also explore whether it is possible and warranted for deprivation to be advanced to be accepted as a claim mitigating criminal liability. Ultimately, they address whether and how the processes of criminal adjudication should be used to advance agendas of social justice.

The contributors, including well-known legal and political philosophers Philip Pettit, George Fletcher, and Jeremy Waldron, draw from a broad ideological spectrum to offer comprehensive coverage of these pressing issues. Making a vital contribution to the normative debate over the social and criminal justice nexus, *From Social Justice to Criminal Justice* will prove provocative reading for students and scholars of philosophy, criminal justice, and criminology.

Contributors: Paul Butler (Law), George Washington University; Judith Lynn Failer (Political Science), Indiana University, Bloomington; George P. Fletcher (Law), Columbia University; William C. Heffernan (Law), John Jay College of Criminal Justice, CUNY; Barbara Hudson (Sociology), University of Central Lancashire; Andrew A. Karmen (Sociology), John Jay College of Criminal Justice, CUNY; John Kleinig (Philosophy), John Jay College of Criminal Justice, CUNY; Loren Lomasky (Philosophy), Bowling Green State University, Ohio; Stephen L. Morse (Law and Psychiatry), University of Pennsylvania; Philip Pettit (Philosophy and Political Theory), Australian National University; Dorothy Roberts (Law), Northwestern University School of Law; Jeremy Waldron (Philosophy and Law), Columbia University.

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BOOK NEWS

DISCRETION, COMMUNITY, AND CORRECTIONAL ETHICS

edited by John Kleinig & Margaret Leland Smith

Some two million Americans are in jail or prison. Except for the occasional exposé, what happens to them is hidden from the rest of us. Is it possible to develop and instill a professional ethic for prison personnel that, in partnership with formal regulatory constraints, will mediate relations among officers, staff, and inmates, or are the failures of imprisonment as an ethically-constrained institution so deeply etched into its structure that no professional ethic is possible?

The contributors to this volume struggle with this central question and its broader and narrower ramifications. Some argue that despite the problems facing the practice of incarceration as punishment, a professional ethic for prison officers and staff can be constructed and implemented. Others, however, despair of imprisonment and even punishment, and reach instead for alternative ways of healing the personal and communal breaches constituted by crime. The result is a provocative contribution to practical and professional ethics.

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