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## Book Reviews

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## Book Reviews

THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941. By Richard D. Younger. Providence, Rhode Island: American History Research Center, Brown University Press, 1963. Pp. 263. \$6.00.

Richard D. Younger, according to the dust jacket of his book, has been, since 1954, a member of the history department of the University of Houston, Texas. Professor Younger is also a most facile author. I confess beginning his short and highly readable study of the grand inquest with some prejudice, having authored a critical article some few years ago on the subject.<sup>1</sup> The first notation I made for this review reads: "Chapter 1. *The Grand Jury*—A 4-page summary-history of the origins of the system. More by implication than by direction, seems to decry fading away of system."

As I have said, Professor Younger is a most facile author: He succeeded in at least shaking my faith in my own rectitude, until the second, more thoughtful reading.

The approach in *The People's Panel* is historical. The factual development is almost entirely upon chronological lines. The sketch of a fascinating canvas is lined across the pages. For example, "In 1655, jurors objected that the Town of Plymouth had no standards of measure and that the Town of Marshfield did not maintain stocks and a whipping post."<sup>2</sup> And, "In 1825, a Tennessee jury boldly indicted the state court of appeals 'from the chief justice to the bailiff' for encroaching upon the office of the clerk of the old court of appeals."<sup>3</sup> And, "In 1850, the grand inquest of Grayson County, Virginia, charged Jarvis C. Bacon, a local minister, with holding that masters had no property right in their slaves. The indictment resulted from a sermon that Bacon had preached from the New Testament text, 'Ye are the salt of the earth.'"<sup>4</sup>

There are many more examples. They are interest-catching, interest-holding. But they constitute only sketches. The brush-strokes are largely missing, for while Professor Younger tells what the grand juries did, he rarely relates what happened to these unusual indictments on trial. I found these omissions made reading too often frustrating.<sup>5</sup>

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1. *The Grand Jury: Past-Present-No Future*, 24 Mo. L. Rev. 318 (June, 1959).

2. P. 8.

3. P. 78.

4. Pp. 94-5.

5. Part of this is perhaps attributable to the fact that over half the work, Chapters 2, 5, 6, 7, 9, 10, and 13, are largely reprints from earlier-published magazine articles. Professor Younger would have done well to enlarge these more thoroughly, even at the expense of complete rewrites.

It may seem picayune, but it should be noted that printing errors abound, particularly in Chapters 7, 8, and 9, hardly worthy of a university press. "Otherwise" for "otherwise,"<sup>6</sup> "indicated," for "indicted,"<sup>7</sup> "rated" for "berated,"<sup>8</sup> "country" for "county,"<sup>9</sup> and "requested" for "requested"<sup>10</sup> are examples. Worse, the next to the last line of page 130 is a repetition of the third line above it, and the correct line is omitted.

At the outset of Chapter 15, *Essay on the Sources*, Professor Younger observes, "Material on the grand jury in the United States is widely scattered and often difficult to locate."<sup>11</sup> To this, Amen. A remarkable research project has been accomplished in this work if it is taken only as a source book, via footnotes and this final chapter, to original materials. If the historical approach had been carried to its desirable end, if the treatment had been enlarged to cite not only the indictments but the results more frequently, *The People's Panel* would be more than merely interesting; it would be valuable. (I wonder, however, why Professor Younger in 1963 chose to limit his study to the period ending 22 years earlier, in 1941.) But the study has more serious limitations.

First, it is not purely historical; it is heavily editorial, a vehicle plumping for a return to more far-reaching use of the grand jury. This appears by the title itself. It also appears in many statements such as this:

The grand jury enables the American people to act for themselves rather than have an official act for them. It is the one institution that combines the necessary measure of disinterestedness with sufficient authority to investigate effectively malfeasance and corruption in public office. Today, as in the past, it is the one body that can effectively handle the complaints of individual citizens, whether the grievances be against their fellow citizens or against their government.

The most significant aspects of the grand jury are its democratic control and its local character. Governmental power has to a large extent replaced other threats to liberty in the United States. The increasing centralization of governmental authority and the growth of a huge bureaucracy in no way responsible to the people have made it vitally necessary to preserve the grand jury. In some instances it is the only possible means of checking on political appointees or preventing illegal compulsion at the hands of zealous law enforcement officials. . . . They [grand juries] remain potentially the strongest weapon against big government and the threat of 'statism.'<sup>12</sup>

Some of the foregoing is obviously questionable. It is, moreover, at odds with the findings of the National Committee on Law Observance and Enforcement in its Report on Prosecution:

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6. P. 61.
  7. Pp. 97 and 126.
  8. P. 100.
  9. P. 127.
  10. P. 137.
  11. P. 247.
  12. Pp. 245-46.

Every prosecutor knows, and every intelligent person who has ever served on a grand jury knows, the prosecuting officer almost invariably dominates the grand jury. . . . The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice. . . . If the State's attorney wished to prosecute [the innocent citizen], he could easily obtain an indictment from a grand jury which he dominates.<sup>13</sup>

Second, Professor Younger is not a lawyer, and appears hostile to both lawyers and courts. On several occasions he expresses disdain in typical newspaper journalese, for example: ". . . the Missouri Supreme Court freed him on a technicality."<sup>14</sup> In Chapter 4, *The New Nation*, he points out: "In 1783, a South Carolina grand jury complained that most people were at a loss to explain the fee system used by attorneys. The jurors recognized that 'the employment of lawyers in our courts of justice is a grievance that at present seems necessary,' but they urged passage of a law strictly regulating legal fees."<sup>15</sup> These are only examples of a general tenor in this regard.

Third, the conclusions reached in the work, even the bases for them, are suspect. I was surprised to find a professional historian relying on secondary sources, especially when primary sources are readily available. In Chapter 9, *Tradition and Reform, 1865-1917*, Professor Younger states categorically: "In 1900, citizens of Missouri overwhelmingly approved amendments relinquishing grand jury duties to district attorneys."<sup>16</sup> The foregoing is not given as a quote, but as the author's own statement. For authority he cites: "Walter F. Dodd, *The Revision and Amendment of State Constitutions* (Baltimore, 1910), 322."<sup>17</sup> This is clearly ancient documentation, a secondary source easily checked in any library. It is erroneous and should not have been relied upon. Although there is evidence that briefly in the post-Civil War period there were district courts in Missouri, there have never been district attorneys. The proper title is and has ever been prosecuting attorney or, in St. Louis, circuit attorney.

In the Constitution of 1820, Article XIII, § 14 provided that no person could be proceeded against criminally for an indictable offense, by information. This provision obtained until the Constitution of 1875 was amended on November 16, 1900, so that Article II, § 12 reads, "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, . . ."<sup>18</sup> At the same time, a new section was inserted in Article II, which provided in part:

Sec. 28. . . . Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or true bill: *Provided*,

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13. National Committee on Law Observance and Enforcement, *Report on Prosecution*, 124-26 (1931).

14. P. 194.

15. P. 42.

16. P. 153.

17. P. 153, note 55.

18. See Laws 1899, p. 382; Laws 1905, p. 314.

*however*, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have the power to investigate and return indictments for all character and grades of crime.<sup>19</sup>

Furthermore, the Revised Statutes of Missouri of 1909 has an entire article on the grand jury, its duties and powers.<sup>20</sup> Obviously then, Professor Younger and his authority are both wrong, and the error is compounded by his index reference: "Missouri, . . . *abolition* of grand jury in, 153; . . ." <sup>21</sup> (Emphasis added.) Grand juries have never been abolished in Missouri nor their powers relinquished nor were they supplanted by district attorneys. Noting this multiple error, one wonders how many others, not so readily apparent, are in the book.

Professor Younger dwells long and lovingly upon the grand jury as a vigilance committee or as an arm thereof. "The grand jury," he notes, "served as an agency of law and order in the West, . . ." <sup>22</sup> This is hardly justification for the modern grand jury, and vigilantes are largely historical curiosities.

It is to be regretted that the vast quantity of material discovered or gathered by Professor Younger was not more painstakingly verified, more objectively discussed, more thoroughly reported, and more validly digested. Had these standards been met, a truly masterful presentation, perhaps twice as long but certainly twice as interesting, would have resulted.

THEODORE M. KRANITZ\*

LEGAL AND ACCOUNTING HANDBOOK OF FEDERAL TAX FRAUD. By Robert Milton Schmidt. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963. Pp. x, 646. \$25.00.

In his 1963 book consisting of 633 pages on fraud, Dr. Schmidt has ably assembled his experience in the Office of the Chief Counsel of the Internal Revenue Service and the Tax Division of the Department of Justice, plus many hours of research.

Fraud cases, both civil and criminal, have proliferated in recent years which leads to the conclusion that more taxpayers are evading their just taxes. Government convictions for criminal fraud have been highly successful, largely due to the policy of only prosecuting flagrant and readily proven cases. The same is true to a lesser degree in the case of civil fraud.

Resort to the criminal sanctions does not preclude resort to the additions to the tax for civil penalties. . . . Each recent year has shown an in-

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19. *Id.* The constitutional history of grand juries in Missouri is briefly developed in Kranitz, *supra* note 1, at 321-25.

20. Ch. 37, Art. VII RSMo (1909).

21. P. 258.

22. P. 72.

\*Member of the Missouri Bar.

creased application of the criminal and civil sanctions for tax frauds committed against the Federal revenue. There was a time when these sanctions were applied primarily, if not exclusively, against gangsters, racketeers, and corrupt politicians. These sanctions are currently applied to persons in all walks of life deriving their income from business, capital, farming, the professions, and other sources.<sup>1</sup>

In short, not only did gangster Tony Accardo feel the sting of criminal prosecution for claiming depreciation on an automobile used in a business when it was not so used,<sup>2</sup> but the former dean of a famous law school and White House confidant appeared in the press recently as subject to criminal prosecution for having overlooked filing income tax returns for five consecutive years involving several hundred thousand dollars of income. Some years back, a former president of the New York Stock Exchange and a judge of a circuit court of appeals went to jail for criminal fraud. This is as it should be, since there is not one criterion of punishment for Al Capone and his ilk and another for civic and social leaders. However, the increased tempo of fraud prosecutions makes it imperative that tax fraud be studied and surrounded with safeguards to protect the rights of all taxpayers. This is especially true since "attorneys, accountants, judges, and juries are dealing with the ever intangible concept of unreported income which is often proved primarily, if not exclusively, by circumstantial evidence."<sup>3</sup>

In criminal fraud cases, the Government, of course, has the burden of proving the commission of the crime beyond a reasonable doubt, and the purpose of prosecution is punishment of the offender. On the other hand, the 50% civil fraud addition to tax is remedial in character and designed to reimburse the Government for the expense of investigation. An acquittal in the criminal case will not bar the imposition of the civil penalties, and vice-versa, since the difference in the degree of the burden of proof precludes application of the doctrine of *res judicata*.

Many people consider tax evasion as a crime devoid of moral turpitude, since the crime is *malum prohibitum* and not *malum in se*. Dr. Schmidt asserts, and it is apparently so, that many taxpayers practice fraud in varying degrees every year.<sup>4</sup> Most derelictions are minor, involving failure to report interest and dividends, padding deductions, etc., as contrasted with elaborate evasion schemes involving fictitious book entries, or double sets of books, fictitious losses, and other comparable machinations. However, minor or major, such evasion involves an intent to cheat on taxes, i.e., tax fraud.

Within the Internal Revenue Service and among tax practitioners there is a difference of opinion as to whether immunity from prosecution for a voluntary disclosure is salutary in curbing tax fraud. Until 1952, a taxpayer who was not being currently examined could make a clean breast of his derelictions and avoid criminal prosecution; not so now. A hapless taxpayer, caught in the meshes of his

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1. P. vi.

2. *U.S. v. Accardo*, 298 F.2d 133 (7th Cir. 1962).

3. P. vi.

4. P. 7.

sins, must often continue his illicit machinations or throw himself on the mercy of an understanding Internal Revenue Service official, or perhaps one not so understanding.

If he makes the mistake of confessing to his accountant, there is no privileged communication and the accountant can be put on the stand and made to tell all. However, if he confesses to his attorney, the communication is privileged. Dr. Schmidt believes that the previous policy should be reinstated and given statutory sanction. It would give the repentant evader a chance to "get off the hook" with only civil sanctions and would result in the collection of considerable revenue now lost. The same reasons do not obtain for reinstating the policy of not prosecuting for tax violations where standing trial would endanger the taxpayer's life or sanity, which was also abandoned in 1952. In 1953, the Treasury Department adopted a policy covering small tax fraud cases, "peanut" prosecutions, where evidence of guilt was conclusive, as a deterrent to others similarly tempted to cheat, but the Government has encountered difficulties in the prosecution of small tax fraud cases because of sympathy of juries for the small offender. Perhaps the jurors have been small offenders themselves.

Dr. Schmidt, in discussing criminal offenses, distinguishes between felonies and misdemeanors based upon the degree of willfulness as defined in *Murdock v. U.S.*,<sup>5</sup> where the Supreme Court recited a variety of definitions of willfulness in judicial decisions, the most common being "with a bad purpose or without ground for believing that one's act is lawful, or with a careless disregard whether one has the right to so act."<sup>6</sup> This definition is misleading in that it does not differentiate between the type of willfulness involved in felony and misdemeanor cases.

Section 7206(2) of the Internal Revenue Code (1954) (the advisor's statute) makes it a felony for any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation of any materially false or fraudulent returns, affidavits, claims, or other documents in connection with any matters arising under the internal revenue laws. This crime does not involve the taxpayer as a party to the fraud, but is aimed at the advisors who prepare returns, claims for refund, etc. It presumably punished the street corner tax specialist who signed returns as a preparer in disappearing ink when he arbitrarily took large, fanciful deductions. Government chemists restored the signature by the use of reappearing ink chemicals and the "expert" went to jail.

Because the attorney-client privilege is denied accountant-client disclosures, the accountant may be forced to testify against his client. For that reason, it is necessary for a taxpayer to "come clean" with his attorney, but steadfastly be reticent in conversations with his accountant. Generally, Government accountants attempt to prove fraud by an unreported increase in net worth, so the taxpayer needs an accountant familiar with the subject to counteract incorrect Government net worth computations. The accountant may serve as an expert witness on ac-

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5. 290 U.S. 389 (1933).

6. P. 47.

counting matters involved in a fraud trial. In *U.S. v. Brodson*,<sup>7</sup> a district court dismissed an indictment on the grounds that the initiation of a criminal prosecution for tax evasion during the pendency of a jeopardy assessment and tax liens which tied up the taxpayer's assets would violate his right to a fair trial and deprive him of due process of law because of his inability to obtain accounting services necessary for the defense of a complicated net worth case. However, the Court of Appeals, Seventh Circuit, reversed<sup>8</sup> because the dismissal of the indictment was premature since the facts were then unascertainable. Dr. Schmidt predicts that "The Supreme Court will doubtless be called upon to decide the significant and recurring problem of whether an accountant is a necessary adjunct to a properly conducted defense in a criminal tax prosecution."<sup>9</sup>

All in all, Dr. Schmidt has pulled together a tremendous amount of learning and experience in the area of tax fraud and has done it remarkably well with copious footnotes. It is up-to-date and must reading for attorneys and accountants who specialize in tax matters.

STUART E. WHITE\*

ONE MAN'S STAND FOR FREEDOM: OPINIONS AND LECTURES OF MR. JUSTICE HUGO BLACK. Edited by Irving Dilliard. New York: Alfred A. Knopf, 1963. Pp. xxii, 504. \$7.50.

*One Man's Stand for Freedom* is a collection of seventy-six opinions by Mr. Justice Black which spans his first quarter century of service with the Supreme Court. Of the many tributes extended in behalf of this most libertarian Justice, there is none more authentic and compelling than his own work product exhibited through the pages of this book.

From the first opinion in *Johnson v. Zerbst*,<sup>1</sup> to the last in *Meredith v. Fair*,<sup>2</sup> Mr. Justice Black identifies the enduring public order with the immediate protection even of the disorderly. His work properly commends him to all those who emphasize the emancipating aspects of the Constitution.

It is particularly satisfying to note that Mr. Justice Black ordinarily has not employed the semantics of libertarianism solely to shield or to promote the politi-

7. 136 F.Supp. 158, 48 AFTR 1006 (E.D. Wis. 1955), *rev'd*, 241 F.2d 107, 50 AFTR 1025 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957).

8. *Ibid.*

9. P. 408.

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1. 304 U.S. 458 (1938), (holding that failure to appoint counsel at the trial stage of a federal felony, in the absence of an intelligent waiver, presented a claim under the sixth amendment which could be raised collaterally in a federal habeas corpus proceeding).

2. 83 S.Ct. 10 (1962), (refusing further to postpone admission of a Negro to the University of Mississippi after his admission was ordered by the Fifth Circuit Court of Appeals).



cal left. While he has castigated congressional committees for tormenting alleged subversives with the ordeal of exposure,<sup>3</sup> he has also joined with Mr. Justice Douglas to demand equivalent protection for those suspected of racial discrimination.<sup>4</sup> As he has maintained that the first amendment must not be fenced to close the marketplace of ideas to suspected Communists,<sup>5</sup> neither would he allow that marketplace to be expediently roped off from those who preach racism.<sup>6</sup>

This book is not, however, a number of things which laymen for whom it is primarily intended, might suppose. It is not an accurate reflection of the constitutional law of most of the cases reviewed in Mr. Justice Black's opinions; of the seventy-six opinions presented, forty-two are dissents. It is not even an accurate reflection of the caseload of the Supreme Court; though there has been a marked shift to civil rights and civil liberties in the business of the Court, such issues still account for less than half of the Court's written opinions. Moreover, Mr. Justice Black's opinions are not a particularly good source for aphorisms or maxims from which the after-dinner speaker may hope to cull appropriate verities suitable for civic occasions. His prose will not serve as a liberal's supplement to Bartlett's *Familiar Quotations*, or Seldes *The Great Quotations*. While a number of his opinions concern free speech, rarely will the reader encounter the fetching felicity of expression to rival John Milton:

And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing.<sup>7</sup>

But then, entirely to his credit, Mr. Justice Black does not qualify his occasional eloquence by reading in exceptions for blasphemous, impious, atheistic, libelous, or seditious speech, as Milton did,<sup>8</sup> nor does he omit the right of anonymous publication from freedom of speech, as did Milton.<sup>9</sup> Similarly, Mr. Justice

3. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Braden v. United States*, 365 U.S. 431 (1961). Mr. Justice Black's attitude in these cases it to be contrasted, however, with the description of his own investigative conduct as a Senator in the thirties, at pages 15 and 16 of the principal volume.

4. *Hannah v. Larche*, 363 U.S. 420 (1960).

5. *Scales v. United States*, 367 U.S. 203 (1961); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

6. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

7. *AREOPAGITICA, THE PORTABLE MILTON* 199 (Bush ed. 1961).

8. *Compare id.*, at pp. 8, 155-56, 158, 201 with Mr. Justice Black's views in *Smith v. California*, 361 U.S. 147 (1959); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Roth v. United States*, 354 U.S. 476 (1957); *Beauharnais v. Illinois*, *supra* note 6; pp. 40-1, 471-77 of the principal volume.

9. *Compare Talley v. California*, 362 U.S. 60 (1960) with *MILTON*, *supra* note 7, at 204.

Black frequently quotes from Thomas Jefferson, but seldom does he compose a line of his own to equal the elegance of Jefferson's well-turned phrases:

It is error alone which needs the support of government. Truth can stand by itself.<sup>10</sup>

But, again, unlike Jefferson, Mr. Justice Black has never found it necessary to fortify truth by giving his blessing to a few "wholesome" prosecutions for seditious libel.<sup>11</sup> With very rare exceptions, the opinions of Mr. Justice Black are a compendium of reasons for reaching specific results in concrete cases. The reassurance one gets is therefore not like the evanescent inspiration so characteristic of Fourth-of-July oratory. It is, rather, the reassurance that beleaguered individuals can find *practical* protection, as well as poetry, in the several folds of the Bill of Rights. It is a reassurance which is due in large part to the care and study of a patient, skillful Justice.

In certain respects, Mr. Justice Black might well be miffed at this intended compliment, for it necessarily emphasizes the significance of *his* attitudes in the application of the Constitution. In so doing, it suggests that the Bill of Rights is very much whatever the Justices say it is. This view, of course, Mr. Justice Black has condemned with asperity:

I do not agree that the Constitution leaves freedom of petition, assembly, speech, press, or worship at the mercy of a case-by-case, day-by-day majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather than on the grace of this Court on an individual case basis.<sup>12</sup>

He is certainly not the first Justice to maintain that the Constitution is impersonal, detached, and more stable than the predilections of its ministers, nor is he likely to be the last. There is, for instance, a striking similarity between Mr. Justice Black's view of the ascertainable certitudes of constitutional principles and the ministerial function of the Court, and that of Mr. Justice Roberts' familiar refrain:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.<sup>13</sup>

One feels certain that the clear absolutes which Mr. Justice Black has found in the Constitution are not the same as those discovered by Mr. Justice Roberts. It may be well to remark, however, that the coincidence of their approaches underscores the fact that a simplistic view of the Constitution is no guarantee of

10. JEFFERSON, NOTES ON VIRGINIA, reprinted in SELDES, THE GREAT QUOTATIONS 363 (1960).

11. See LEVY, JEFFERSON AND CIVIL LIBERTIES 56-66 (1963).

12. *Beauharnais v. Illinois*, *supra* note 6, at 274-75.

13. *United States v. Butler*, 297 U.S. 1, 62 (1936).

enlightened results. Precisely for this reason, we may be properly appreciative of Mr. Justice Black's many contributions to civil liberties in the United States, without being deceived that his analytic technique is the sole, or even the best, means of assuring similar results when that technique is applied by other men.

In one of the two lectures reprinted in this volume, for instance, he has advised us "that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"<sup>14</sup> Thus, criminal group libel laws are not within the competence of a state legislature because, for Mr. Justice Black, "the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.'"<sup>15</sup> This does not mean, of course, that literally every utterance is constitutionally immune:

The test is not that all words, writing and other communications are, at all times and under all circumstances, protected from all forms of government restraint. No advocate of the test, so far as this writer is aware, takes this extreme and obviously untenable position.<sup>16</sup>

Rather:

"Absolute" might mean: mandatory. It might, in other words, be a judgment addressed, not to the meaning and scope of the constitutional proposition, but simply to its obligatory character *once that meaning and scope have been determined*.<sup>17</sup> (Emphasis added.)

The "absolute" approach consequently does not sanctify all speech, certainly not criminal solicitations, the false shouting of "fire" in a crowded theater,<sup>18</sup> or other extremely dangerous "speech-acts" where lawless conduct is brigaded with utterances in such a manner that the utterances themselves are "used as an essential and inseparable part of a grave offense against an important public law. . . ."<sup>19</sup> Supposedly, however, it does improve the breadth and depth of constitutional protection, and make the law less subjective, by focusing on the definition of speech to be protected and by holding that if that speech is protected, it is protected in all events. And so, the argument has run from time to time, there will be less judge-made law, more constitutional law, and the law itself will inevitably "bring a broader area of expression within the protection of the first amendment than the other tests do."<sup>20</sup>

14. P. 33.

15. *Beauharnais v. Illinois*, *supra* note 6.

16. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 914 (1963).

17. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 *CALIF. L. REV.* 729, 752 (1963).

18. See Mr. Justice Black's interesting treatment of this most celebrated barb in the principal volume at pp. 477-78. See also MEIKLEJOHN, *POLITICAL FREEDOM* 25, 112-14 (1960).

19. The language is precisely that of Mr. Justice Black in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), holding that peaceful picketing may be enjoined under certain circumstances. A thoughtful effort to define such speech-acts while distinguishing the definitional approach from the Holmsian "clear and present danger" formulation, is made in Emerson, *supra* note 16, at 917 *et seq.*

20. Emerson, *supra* note 16, at 915.

One may doubt that this is nearly so. Indeed, from time to time the Court has deserted the "clear and present" relativity formulated by Holmes and expounded by Chafee,<sup>21</sup> for an alternative absolute of deciding simply whether an utterance was protected, with the result that if it is not within the defined scope of the first amendment, it is entirely unprotected! Thus, in *Roth v. United States*,<sup>22</sup> the Court held that "obscene" utterances, not being among the varieties of speech protected by the first amendment, could be made the subject of federal penal laws *even in the absence of convincing evidence that such utterances injure anyone at all*:

It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais v. People of State of Illinois*, *supra*, 343 U.S. at page 266, 72 S.Ct. at page 735:

"Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."<sup>23</sup>

So, obscenity joined "fighting words" and "group libel" as beyond the defined scope of the first amendment, and men may be imprisoned for such expressions even though no court has determined that any personal or social harm would probably result from such speech.<sup>24</sup>

21. FREE SPEECH IN THE UNITED STATES (2d ed. 1941); THE BLESSINGS OF LIBERTY (1956). This is not to suggest that a clear-and-present-danger test is an exclusive alternative to the definitional approach, or that it by any means guarantees "more satisfactory" results than certain other characterizations. The test is, however, still very much alive. See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Wood v. Georgia*, 370 U.S. 375, (1962); *Kingsley International Pictures Corp. v. Regents*, *supra* note 8. An excellent review of the Holmes' test, together with references to other discussions, is in McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1203-212 (1959).

22. 354 U.S. 476 (1957).

23. *Id.* at 486-87.

24. Since *Roth* and *Alberts*, however, the Court has had sufficient misgivings that virtually no subsequent prosecution for, or restraint of, allegedly obscene material has been affirmed. See, *e.g.*, *Bantum Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Manual Enterprises v. Day*, 370 U.S. 478 (1962); *Marcus v. Property Search Warrants*, 367 U.S. 717 (1961); *Smith v. California*, 361 U.S. 147 (1959); *Kingsley International Pictures Corp. v. Regents*, *supra* note 8.

To set the matter straight, it may be that *Roth* was really the very first time since the twenties that the Court held speech to be unprotected in the absence of evidence that such speech might, under the circumstances, result in some avoidable evil. While there is language in *Beauharnais* that group libel is wholly unprotected, the majority opinion by Mr. Justice Frankfurter nevertheless reviewed the circumstances surrounding the defendant's punishment for distributing a scurrilous leaflet, noted that the leaflet was "calculated to have a powerful emo-

It is no answer to the crushing effect that this approach may have on the first amendment to observe that Mr. Justice Black *himself* has not agreed that *these* varieties of speech are unprotected, for such a response explicitly reads back into matters of constitutional construction the very element of subjectivity which the test allegedly minimizes. Other Justices, reading history not unreasonably, have concluded differently on the scope of various sections of the Constitution, even while we have been told that a special virtue of an absolute, definitional approach is to limit the discretion of the Justices and thus to enhance constitutional protections. As a coldly logical matter, there is no answer to Sidney Hook's demonstration that a definitional approach as such, (*i.e.*, without reference to the sensitivity of the Justice employing it), may facilitate the eradication of free speech as quickly, if not more quickly, than would the standard one of requiring the Court to demonstrate in what manner a given utterance threatened such a grave evil as to warrant its particular avoidance or punishment by trenching upon speech.<sup>25</sup>

A different illustration of the slipperiness of a definitional approach to the Bill of Rights proceeds from one of Mr. Justice Black's own hypotheticals. In attempting to demonstrate the hazards of balancing, he has referred to the fifth amendment's requirement that private property shall not be taken for public use without just compensation. He then brings forth a case in which a section of privately-owned land is desperately needed by the Government in order to defend the nation in time of war, under circumstances where payment for its taking "might bankrupt the nation and render it helpless in its hour of greatest need."<sup>26</sup> He demonstrates that a "reasonable" balancing of comparative interests might well result in a decision holding that, under the circumstances, the property could be taken without adequate compensation—a result he would not himself reach and one which presumably could not be reached if the fifth amendment is regarded as absolute.

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tional impact on those to whom it was presented," and noted also that alternative means for communicating the same ideas in more temperate language were available to the defendant. These findings are consistent with a determination that under the circumstances, the danger of racial violence resulting from the circulation of the leaflets in question justified post-utterance discipline through a fine of \$200, where the consequential effect on freedom of speech was relatively slight. Either a "clear and present danger" theory or a more general "balancing" theory would thus support the decision.

The other "unprotected speech" case, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) is also defensible on other grounds. The Court appeared satisfied that the face-to-face epithets which the defendant shouted at the traffic officer were "likely to cause a breach of the peace" under the circumstances (*id.* at 573), and referred to *Cantwell v. Connecticut*, 310 U.S. 296 (1940), by way of contrast. The obscenity cases thus appear to stand alone for the theory that certain utterances may be punished directly, even absent a probability that they would result in some evil which government may avoid for its own or others' sakes.

25. HOOK, *THE PARADOXES OF FREEDOM* 39-45 (1962). The point is made equally well, in less passionate terms, by Charles Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S MAGAZINE (Feb. 1961).

26. Pp. 44-45.

Still, the "absolute" approach does require the Court to define the *scope* of the eminent domain provision, just as it requires the Court to define the scope of speech to determine what is, and what is not, "absolutely" protected.<sup>27</sup> And it remains entirely open to the Court to define a "taking," or to define "just compensation," in a manner which sanctions the same practical result as that which Justice Black intends to foreclose. Certain zoning ordinances, for instance, may restrict the use of private property and reduce its resale value even more than a taking with partial compensation, yet there may be no successful constitutional complaint presumably because there has been no "taking" in the technical sense. In *Omnia Commercial Co. v. United States*,<sup>28</sup> the Government requisitioned a steel company's entire production of steel under circumstances not unlike those mentioned in Mr. Justice Black's hypothetical case. The requisition order effectively destroyed an assignee's contractual interest in the steel, but a unanimous Supreme Court determined that no compensation need be paid because the resulting injury was not within the kind of "taking" contemplated by the fifth amendment:

That provision has always been understood as referring only to a direct appropriation. . . .

If, under any power, a contract or other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable.<sup>29</sup>

If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.<sup>30</sup>

"Frustration" and "appropriation" may be different things in the land of words and law, but it is to be doubted whether the bereft plaintiff appreciated the definitional difference under the circumstances, or that he was greatly consoled to have lost by this means, rather than to be told frankly the reason why relief could not be granted. There were such reasons, to be sure, but they were obscured rather than elucidated by the analytic technique of the Court.

Charles Black, Kenneth Karst, Robert McKay, and Wallace Mendelson,<sup>31</sup>

27. Pp. 33-34; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, n. 105; Emerson, *supra* note 16, at 914; MEIKLEJOHN, *supra* note 18, at 112-14.

28. 261 U.S. 502 (1923).

29. *Id.* at 510.

30. *Id.* at 513. An equally apt illustration of the ease with which a "definitional" approach lends itself to the elimination of previously protected constitutional interests is found in the line of cases redefining a "contract" under Article I, § 10. See the discussion and references in STRONG, AMERICAN CONSTITUTIONAL LAW 90-91, 136-40, 508-09 (1950).

31. See Charles Black, *supra* note 25; Karst, *Legislative Facts in Constitutional Litigation*, 1960 THE SUPREME COURT REVIEW 75; McKay, *supra* note 21; Mendelson, *On The Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

among others, have covered these issues of constitutional analysis so very well that it is a little gratuitous to have rehearsed them once again. The point in doing so, however, has not been to renew a principled criticism of Mr. Justice Black or of his approach to certain constitutional issues. The point is, rather, that the increased measure of protection for civil liberties in the United States which currently prevails under the Constitution is a far greater testimonial to Mr. Justice Black's personal effectiveness than his own becoming modesty would acknowledge. While I doubt whether the language of the Constitution or the uneven wisdom of the founding fathers<sup>32</sup> requires the results which Mr. Justice Black supports, they nearly always permit such results and we may be grateful that he has acted on that permission. Mr. Dilliard's book is a most suitable, useful, and compelling reminder of these things.

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32. See, *e.g.*, LEVY, *LEGACY OF SUPPRESSION* (1960).

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