Journal of Criminal Law and Criminology

Volume 57 | Issue 3 Article 1

1967

Courts, the Police, and the Rest of Us

Herbert L. Packer

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 57, No. 3

Printed in U.S.A.

THE COURTS, THE POLICE, AND THE REST OF US

HERBERT L. PACKER*

We stand today at a moment of comparative pause and quiet in the kinetic and turbulent development of the relation between the courts and the police in this country. This moment is symbolized by two events or, more accurately, non-events. The five post-*Escobedo* cases which will, at least for the near term, plot the course of the landmark decision have been briefed and argued in the Supreme Court but still await decision.[1] Significant proposals for legislative resolution of a host of vexing questions about police practices have been submitted by the draftsmen of the American Law Institute's Model Code of Pre-Arraignment Procedure but have not yet been acted upon by that august body.[2]

This moment of repose will not last. The cases will be decided in one or possibly more of the several ways open. The American Law Institute will place its seal of approval on some or all or none of the proposals laid before it. And life will go on. But in this rare moment of repose, fleeting as it is, there is an opportunity to reflect on where we are and to consider some of the long-run implications of the situation in which the agencies of the criminal process today find themselves. It is that opportunity which, with your indulgence, I want to avail myself of today. I also ask your indulgence, which I suspect will be readily forthcoming, for not inflicting upon you yet another detailed analysis of the Court's decisions or of the A.L.I. proposals.

Let me start by eschewing specific prediction but at the same time engaging in some generalized forecast. The Supreme Court will probably not overrule *Escobedo*,[3] by which I mean nothing more than that they are not likely to hold, now or in the foreseeable future, that a suspect in police custody who wants to talk to his retained lawyer who is at that moment in the station house trying to talk to him can be interrogated until his request is complied with. Nor on the other hand, do I think the Court will hold, now or in the near future, that a lawyer must be supplied to every person in police custody before he can be interrogated.

I will go further. A confession will in the future probably be excludable if the Court finds that it was obtained after arrest, in the police station, and without a warning to the arrestee that he is not required to speak, that anything he says may be used as evidence, and that a lawyer, a relative or a friend may have access to him upon his request. Many police agencies, including the F.B.I., adhere to this practice, the A.L.I.'s Draft Code requires it, and I will make bold to assert that, if *Escobedo* means anything, it means that.

One final prediction, and I will have done with this hazardous game. In those jurisdictions where, as the District of Columbia now appears to be about to do,[4] a legal aid or public defender agency arranges to have counsel made readily available on a round-the-clock basis to indigent arrestees who request this service, a police officer who fails to divulge this fact to an arrestee, or who refuses to accede to the request when made, and who insists on interrogating despite this failure or refusal, is playing with fire. A confession so obtained will probably be held to be excludible.

It will be asked whether law enforcement can live with this state of affairs. It will be asserted that it cannot. I do not propose to enter into this controversy, except to note that for the first time we are now beginning to get some data, however fragmentary, on the role that confessions play in the criminal process. Justice Sobel's study of 1000 indictments in New York[5] and the Detroit police department's study of the effect of warnings to arrestees[6] represent a welcome beginning to the long and arduous process of substituting facts for surmise and prejudice in evaluating the role of confessions in the criminal process.

The confessions problem is, as I have said, only

* Professor of Law, Stanford University.

[1] The cases were decided in a consolidated opinion, Miranda v. Arizona, 86 S.Ct. 1602 (1966) after this paper had been delivered and set in type.

[2] AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tentative Draft No. 1, March 1, 1966).

[3] Escobedo v. Illinois, 378 U.S. 478 (1964).

[4] See N.Y. Times, Feb. 14, 1966, p. 20.

[5] N.Y. Law Journal, Nov. 22, 1965, p. 1.

[6] The study is described in N.Y. Times, Feb. 28, p. 18. It is summarized in a letter dated Dec. 17, 1965 from Vincent W. Piersante of the Detroit Police Department to Prof. Jerold Israel of the University of Michigan Law School.

one among many issues that occupy us today. Five years ago all the talk at meetings such as this one was about the effect of *Mapp* v. *Ohio*[7] on police search and arrest practices. Five years before that, it was the *Mallory*[8] rule. Since *Mapp* we have had in rapid succession a series of decisions—*Gideon*,[9] *Douglas*,[10] *Malloy*,[11] *Griffin*,[12] to mention only a few—that promise profoundly to influence law enforcement practices at the police and prosecutorial level. It is a mistake to look at each of these in isolation and to argue about them as if they were separate and discrete phenomena. They are not. They represent a trend which needs to be identified and analyzed as such. Let us consider what this trend is, what forces have shaped it, what it portends for the future, and what kind of response to it should be forthcoming from the agencies of law enforcement.

As I have elaborated elsewhere,[13] the kind of criminal process that we have is profoundly affected by a series of competing value choices which, consciously or unconsciously, serve to resolve tensions that arise in the system. These values represent polar extremes which, in real life, are subject to almost infinite modulation and compromise. But the extremes can be identified. The choice, basically, is between what I have termed the Crime Control and the Due Process models. The Crime Control model sees the efficient, expeditious and reliable screening and disposition of persons suspected of crime as the central value to be served by the criminal process. The Due Process model sees that function as limited by and subordinate to the maintenance of the dignity and autonomy of the individual. The Crime Control model is administrative and managerial; the Due Process model is adversary and judicial. The Crime Control model may be analogized to an assembly line, the Due Process model to an obstacle course.

What we have at work today is a situation in which the criminal process as it actually operates in the large majority of cases probably approximates fairly closely the dictates of the Crime Control model. The real-world criminal process tends to be far more administrative and managerial than it does adversary and judicial. Yet, the officially prescribed norms for the criminal process, as laid down primarily by the Supreme Court, are rapidly providing a view that looks more and more like the Due Process model. This development, with which everyone here is intimately familiar, has been in the direction of "judicializing" each stage of the criminal process, of enhancing the capacity of the accused to challenge the operation of the process, and of equalizing the capacity of all persons to avail themselves of the opportunity for challenge so created.

The nature of the trend is obvious enough. What has brought it about and how durable is it? A definitive answer to this question would comprehend a large slice of the history of our times, but I should like to venture a few tentative and speculative observations on the point. Let us start with the Supreme Court itself. To some extent, the Court's decisions are not simply evidence of the trend but are in themselves a contributor to it. Typically, the Court's intervention in any given phase of the criminal process has started with a highly particularistic decision dealing on a narrow basis with the facts of a particularly flagrant or shocking case brought before it. That was true of the first right to counsel case, *Powell* v. *Alabama*,[14] and it was true also of the first confession case, *Brown* v. *Mississippi*.[15] The confession cases are particularly instructive on this issue. For approximately twenty years following *Brown* v. *Mississippi*, a number of confession cases came before the court. As the standards it sought to lay down emerged, they placed great emphasis on the "special circumstances" of the cases. A given confession was deemed involuntary because of the defendant's personal characteristics—illiterate, of low intelligence, immature, a member of a disadvantaged minority group—or because of coercive forces at work in the interrogation process, or because of some combination of these factors. In those decisions, the Court tried, among other things, to influence police behavior by dealing, in its traditional way, with the facts of the specific case before it. But the gap between aspiration and reality proved too great to bridge in the Court's traditional way. And so, the movement has been to ever increasing generality of statement: from *this* confession was coerced for the following particularistic reasons unique to this case, to *all* confessions are bad when they are obtained from an arrestee who has not

[7] 367 U.S. 643 (1961).
[8] Mallory v. United States, 354 U.S. 449 (1957).
[9] Gideon v. Wainwright, 372 U.S. 335 (1963).
[10] Douglas v. California, 372 U.S. 353 (1963).
[11] Malloy v. Hogan, 378 U.S. 1 (1964).
[12] Griffin v. California, 380 U.S. 609 (1965).
[13] Packer, *Two Models of the Criminal Process*, 118 U. PA. L. REV. 1-68 (1964).
[14] 287 U.S. 45 (1932).
[15] 297 U.S. 278 (1936).

been promptly brought before a magistrate, as in the famous *Mallory* rule announced for the federal criminal courts in 1957. *Escobedo* may perhaps turn out to mark the beginning of a similar line of generalized development for the state courts.

The great criminal procedure decisions of the last few years can all be regarded as exemplifying this movement toward increasingly generalized statement, sparked by the court's despair over the prospect of significantly affecting police practices through its more traditional activity. The court has sensed a law-making vacuum into which, rightly or wrongly, it has seen itself as having to rush. *Mapp* v. *Ohio*, in extending the exclusionary rule on unreasonable searches and seizures to the state courts, was explicitly based on the proposition that no other presently available means of control held out any hope for deterring police disregard for the dictates of the Fourth Amendment (which had been held applicable to the states in *Wolf* v. *Colorado*,[16] in 1949). *Gideon* v. *Wainwright* substituted a blanket rule on right to counsel explicitly because the earlier case-by-case approach of *Betts* v. *Brady*[17] had failed to bring about universal compliance with what the court perceived as needed reform in the provision of counsel to indigent defendants.

Moves of this sort by the Supreme Court are, in my view, moves of desperation. Nobody else is exerting control over the law enforcement process, so the justices think that they must. But they can do so, in state cases at any rate, only in the discharge of their duty to construe the Constitution in cases that come before them. And so, the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept: the rules become "constitutionalized." The Bill of Rights becomes, as Judge Henry Friendly's gibe has it, a code of criminal procedure.[18]

It is easy enough to poke holes in, not to say fun at, this development. But what it represents is an increased consciousness that our criminal process in its everyday functioning does not live up to minimum standards of fairness or, for that matter, of efficiency. That increased consciousness comes from a number of sources, of which I shall mention only two.

Perhaps the most powerful propellant of the trend toward the Due Process Model has been provided by the Negro's struggle for his civil rights and the response to that struggle by law enforcement in the Southern states—as well, it needs to be said, by law enforcement in some Northern cities. What we have seen in the South is the perversion of the criminal process into an instrument of official oppression. The discretion which, we are reminded so often, is essential to the healthy operation of law enforcement agencies has been repeatedly abused in the South: by police, by prosecutors, by judges and juries. Police brutality, dragnet arrests, discriminatory official conduct may be debatable issues in the cities of the North; but they have been demonstrated beyond doubt in the streets of Selma and Bogalusa and a dozen other Southern communities. Powers of arrest and prosecution have been repeatedly and flagrantly abused in the interest of maintaining an illegal, not to say unconstitutional, social system. We have had many reminders from abroad that law enforcement may be used for evil as well as for beneficent purposes; but the experience in the South during the last decade has driven home the lesson that law enforcement unchecked by law is tyrannous.

I do not wish to be understood as suggesting that the imputation of the abuses that I have mentioned to law enforcement generally is rational or fair. I simply suggest that it has taken place. As Walter Arm, former Deputy Police Commissioner of New York in charge of community relations, recently observed: "Never before have public expressions of confidence in police been so meager."[19] He added that the status of New York's police has suffered because "the New York patrolman was automatically equated with the 'red-necked sheriff'; and the New York department was criticized for the use of police dogs and fire-hoses in the South, although no such measures were ever employed—or thought of—in our city."[20]

As we all know, the Negro's plight is also, and at least as importantly, a problem of urban poverty in the large cities of the North and West. Our heightened national consciousness about the problems of urban poverty likewise contributes to and sustains the trend in the direction of the Due Process Model. The urban Negro's plight is joined to

[16] 338 U.S. 25 (1949).
[17] 316 U.S. 455 (1942).
[18] See Friendly, *The Bill of Rights As A Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).
[19] N.Y. Times, Feb. 4, 1966, p. 38.
[20] *Ibid.*

that of the Puerto Rican, the Mexican-American, and other submerged groups. Law enforcement may not be a cause of social injustice, but it must reckon with the consequences of social injustice. It is broadly recognized that the urban poor, and particularly those who belong to minority groups, provide most of the raw material for the criminal process. As the idea develops and is promoted by governmental programs that the legal rights of the poor require special attention, politically and economically muscular pressure for reforms in the criminal process continues to make itself felt.

It is far from clear that this powerful trend is going to continue at anything like the velocity that it has exhibited in the past few years. I suspect that any sharp accentuation of the Viet Nam war, to mention only the most obvious factor, will tend to slow down the rate of change in the criminal process. However, the trend may well be in its broad outlines irreversible, if for no other reason than that once the problems have become visible, it is unlikely that the national sense of injustice (to borrow Edmond Cahn's phrase),[21] whether manifested by the Supreme Court or by other agencies of government, will be easily turned off. Making whatever allowances one ought to make for consolidation or swings of the pendulum, it would still represent the worst kind of wishful thinking for law enforcement people to believe that they can persuade those who need to be persuaded that all is for the best in this best of possible worlds.

If I am right about the nature of the present trend (of which there seems little doubt) and about its durability (about which there may be more), the question arises: how should law enforcement officials adapt themselves to the drastically changed legal environment in which they must henceforth operate? By "law enforcement officials" I mean primarily those who have executive or supervisory responsibility over the rank and file members of police departments, ranging from commissioners and chief inspectors down through the ranks to desk sergeants. Although I define the term that broadly, I will admit that my remarks are directed mainly to the men at the top, for reasons which I think will become clear as I proceed.

The police are a sorely-tried group—there is none more so in our society—and I do not propose that their burdens should be increased. Indeed, I would venture to assert that if the mood I am about to suggest were to become prevalent, the burdens devolving upon the police might both appear and be lighter than in the past. My first bit of advice is simply this: calm down. Repeated experience with the procedural innovations thrust upon the criminal process by the Supreme Court has demonstrated, if it has demonstrated anything, that the dire predictions of imminent doom that seem automatically to follow each new departure are, to put it mildly, overstated. Whether they are genuine or simply tactical, these outbursts of emotion do nothing except possibly convince many who are basically sympathetic with the demands of law enforcement that where there's smoke there's fire.

I do not by any means suggest that the police should roll over and play dead. Constructive participation in the current dialogue between the courts and law enforcement is, to paraphrase Holmes, not a duty but only a necessity. "Constructive participation" does not include, in my view, the kind of name-calling to which some law enforcement people seem habitually to resort when things are not going quite as they would like them to.

It is widely recognized that community relations is a major problem facing the police today. But it is often overlooked that the community in question is wider than simply those parts of the population with whom the police come most often in contact. It includes opinion leaders of all sorts, including the country's intellectuals and—a point which seems to me too often ignored—it includes the Supreme Court itself. To anywhere from five to nine members of the Court, depending on how hair-raising the facts of the particular case appear to be, the police are suspect. I do not think that the discretion which all or almost all disinterested observers agree the police must have in close cases will be ungrudgingly afforded so long as the courts—and this is by no means limited to the Supreme Court—remain unconvinced that the police regard the rights of the accused as anything but a nuisance and an impediment.

This attitude toward the police will not be changed by words. It will take deeds. As an instance of what I am talking about, let me refer to the current controversy over civilian participation in the police disciplinary process. In selecting this instance to discuss, I do not mean to suggest that I regard "the" civilian review board as a panacea or as the incarnation of the good, the true and the beautiful. Indeed, the entire controversy has become unreasonably polarized because of the un-

[21] See CAHN, THE SENSE OF INJUSTICE (1949).

substantiated extremes to which both proponents and opponents have gone. More subtly, a good deal of the problem inheres in the reification of the civilian review board, in the notion that there is a "thing" called a "civilian review board" which must be either embraced or rejected in its entirety. Nothing could be further from the truth, and I am surprised that the astute men who direct our police departments have seemingly failed to realize it.

The reason that the civilian review board issue has become such a hot one is precisely because it exposes the nub of the controversy over police practices. As I have suggested elsewhere,[22] the question of just what the rules are by which the police should be made to govern themselves in their phase of the criminal process may be less important than the question of how those rules, whatever they are, are to be enforced. If I may take the liberty of quoting myself:[23]

> "In today's crisis of confidence, the question of sanctions is *the* central question. The main source of hostility to the police among minority groups is the helpless frustration engendered by the certain knowledge that, whatever the police do, there is no way in which they can be called to account for it. . . . No code of police practices that does not provide effective sanctions for police lawlessness can so much as begin the long repair job that will be required to win minority group acceptance of even the most necessary police functions."

I do not think that the police can any longer have it both ways. They cannot enjoy the discretion which it is argued they need and at the same time insulate themselves from effective outside scrutiny of how they exercise that discretion. As long as the criminal process in the courts has to serve as the only effective vehicle for the correction of abuses, through the reversal of convictions, the courts will go on policing the police. It is in the long-run interest of law enforcement to develop viable alternatives.

There can hardly be any disagreement with the following proposition: "A review board procedure serves two basic functions: maintaining discipline within the Department and satisfying citizen complainants. A procedure that satisfactorily performs one function does not necessarily discharge the other."[24] That statement, with which, as I say, it seems difficult to disagree, is the predicate for the recommendation, now historically controversial, by Mayor Lindsay's law enforcement task force that a seven-man review board, consisting of four civilians and three police officers, be set up to supplant the existing three-man police board.

I do not suggest that the task force's precise recommendation on this score should have been accepted without change. Nor do I want to take sides in the acrimonious and in some ways tragic dispute or series of disputes which this recommendation appears to have engendered. I use the New York case simply as an example of the problem.

What I do wish to say is simply this: that a police response in totally negative terms to proposals of this kind seems to me both wrong in principle and strategically foolish. First, for the principle. I do not understand it to be argued that *any* civilian (which means to say, non-police) role in the police disciplinary process is inappropriate. The argument is over the appropriate structure and timing of civilian intervention. Must it inhere purely in the political check that is always available or is there room at the adjudicative level for a civilian voice to be heard? To reject categorically and in advance the idea of *any* civilian participation seems to me to deny that the police are a part of society. Be that as it may, nothing could be more injurious to the notion that the police are responsive to community relations, than the indignant, not to say hysterical root and branch opposition to any and all such proposals.

The sensible strategy for the police, it seems to me, is not to reject the idea of a civilian review board but rather, to accept it, to domesticate it, to make it their own. There are a number of ways to do this. First, let us consider the question of board composition. There is no *a priori* reason why the administration and disposition of complaints against the police should have to be in the hands exclusively of police or exclusively of outsiders. There is every reason why both should be present. As to who should have a majority, the very question is wrong-headed because it implies that there are two monolithic opposing groups involved—the police and the outside world. Are the police so convinced they are not living up to community standards that they think a majority of outsiders would be solidly

[22] Packer, *Policing the Police: Nine Men Are Not Enough*, New Republic, Sept. 4, 1965, p. 17.
[23] *Id.* at 21.
[24] Report to Mayor-Elect John V. Lindsay by the Law Enforcement Task Force Appointed for the Period of Governmental Transition, p. 15, Dec. 31, 1965.

against them? One among many possible compromises would be to provide for a majority of civilians but to afford some opportunity for police participation in the screening process leading to appointment. My own guess is that it would not make any difference who had a majority on a board of mixed composition.

Second, it makes a great deal of difference whether the board has independent disciplinary powers or simply has a recommending function. Much of the expressed opposition to such boards appears to rest on the view that is is anomalous for outsiders to mete out discipline to the police. Neither the Rochester nor the Philadelphia review structures in fact confers the actual power to impose sanctions on the civilian board. The power is purely a recommending one.[25] And it is worth noting that the Philadelphia board, which is the only one that has had a sustained experience, has clearly not produced results loaded against the police. For example in 1961–62, 108 cases were closed. 96 were settled to the satisfaction of the complainant without hearing or the complaint was withdrawn after investigation. In the 12 cases in which a hearing was held, there was a decision adverse to the policeman in only 6.[26]

Third, there is a variety of devices available to ensure that the all-important investigative function—ascertaining the facts underlying a complaint against the police—does not fall into unfriendly hands. Indeed, the Philadelphia board relied exclusively on the police department for doing its investigative work.[27]

These are simply a few examples of the innumerable nice adjustments that can be made in satisfying the demand for a civilian voice in the disciplinary process while at the same time guarding against excesses of retaliatory zeal. The question is whether this avenue for improving community-police relations is to be blocked off, and those relations worsened, because of the obdurate and massive resistance of the police.

The arguments, if they can be called that, advanced by representatives of police fraternal orders would lose most of whatever potency they have if they were not so warmly supported by high-ranking police executives. Indeed, there is a kind of self-fulfilling prophecy at work here. The rank and file police say that any kind of civilian interference will result in decreased morale. Their superiors support this. As a result, the introduction of civilian participation very likely will cause a serious decrease in morale, at least in the short run. But no disinterested observer will take that kind of self-inflicted injury seriously. If the top echelon of police executives cease to feed the ignorant and hysterical fears expressed at the bottom, the morale problem will solve itself.

The appeal I make is an appeal to enlightened self-interest. It may be objected that there is no reason why the police should yield any ground to their critics. An improved public image alone, it may be said, will not justify such concessions. As one who finds the image of "image" a distasteful one, I am inclined to agree. However, more solid advantages should accrue in the long run. If I am right in supposing that many of the restrictions now imposed on the police arise because of an implicit lack of confidence in the capacity of the police to discipline themselves, it should follow that a demonstrated amelioration of that problem should produce a greater willingness on the part of courts to give the police the discretion which they so constantly assert they need. There is something very anomalous about police protests against both the exclusionary rule and proposals for civilian participation in the police disciplinary process. The exclusionary rule was imposed on the states in *Mapp* precisely because no other sanction for lawless police conduct appeared to be available. If alternative devices are not merely available but are espoused and developed with the active participation of police, it does not seem to me utopian to suggest that the day may come when we do not set a criminal free simply because the constable has blundered, when the exclusionary rule becomes simply one among several devices for controlling the exercise of police discretion. Civilian participation in the disciplinary process is only one, and perhaps a minor, aspect of the evolution of such devices. I have dwelt on it because it is the one currently most pressed, and therefore the one that provides a testing case for the hypothesis that what the police really want is to be free of all external control. Unless the responsible leaders in police administration concern themselves actively with disproving that hypothesis, the courts will continue to see themselves as the only mediators between the police and the rest of us, with results that will continue to be pleasing to no one, least of all to the police.

[25] See Note, *The Administration of Complaints by Civilians Against The Police*, 77 HARV. L. REV. 499, 511–16 (1964).

[26] Police Advisory Board of the City of Philadelphia, *Fourth Annual Report*, Appendix A.

[27] Note, note 25 *supra* at 515.