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Kamisar, Inbau & Arnold: Criminal Justice in Our Time

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RECENT BOOKS

CRIMINAL JUSTICE IN OUR TIME. By *Yale Kamisar, Fred E. Inbau,* and *Thurman Arnold.* Edited by *A. E. Dick Howard.* Charlottesville, Virginia: The University Press of Virginia. 1965. Pp. vi, 161. $1.75.

The Magna Carta Commission of Virginia, in commemoration of the 750th anniversary of the Great Charter, has published three essays on contemporary problems of the criminal law, entitled *Criminal Justice in Our Time.* In view of the currently smoldering debates over the United States Supreme Court's recent decisions on the burning issues of arrest, search and seizure, the right to counsel, and the privilege against self-incrimination, one should be entitled to expect from such auspicious sponsorship the publication of scholarly expositions of the strongest constitutional bases for the divergent views expressed. Only one of the essays, that of Professor Yale Kamisar, fulfills that expectation admirably; the other two, by Professor Fred E. Inbau and Judge Thurman Arnold, do not.

In Professor Kamisar's essay, "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure," the Supreme Court's inexorable march toward *Escobedo v. Illinois*[1] is reviewed through an analysis of the Court's previous decisions concerning the requirements of due process, the guarantee of the assistance of counsel, and the privilege against self-incrimination, from *Griffin v. Illinois*[2] to *Malloy v. Hogan,*[3] with critical attention to the rationale of the Justices' opinions. Professor Inbau, on the other hand, in his essay, "Law Enforcement, the Courts, and Individual Civil Liberties," spends little time in analysis of the Supreme Court's decisions, but instead concentrates almost exclusively upon the practical impediments to effective police procedures imposed by those decisions, with specific references to the subjects of police interrogation, arrest and detention, search and seizure, and wiretapping. Judge Arnold's contribution, "The Public Trial as a Symbol of Public Morality," consists of an informal commentary about his own efforts to free Ezra Pound from St. Elizabeth's Hospital, to which the poet, having been found incompetent to stand trial for treason, was confined for thirteen years after World War II, and about the efforts of Judge Arnold's partner, Abe Fortas, on behalf of Monte Durham[4] and Clarence Gideon.[5] His theme is that modern trials are like the morality plays of old, dramatically presenting conflicting moral values of the community, sometimes reflecting those moral

1. 378 U.S. 478 (1964).
2. 351 U.S. 12 (1956).
3. 378 U.S. 1 (1964).
4. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
5. Gideon v. Wainwright, 372 U.S. 335 (1963).

values in the judgments reached and sometimes shaping the community's moral values through the moral imperatives of those judgments.

Judge Arnold's theme received profound and scholarly attention a few years ago from the late Professor Edmond Cahn in his thoughtful and provocative book, *The Moral Decision.*[6] It deserves further careful exploration with reference to the criminal law. While the theme does not receive that kind of attention from Judge Arnold, his comments serve to emphasize Professor Kamisar's utilization of the knowledge that the Supreme Court's constitutional judgments are to a large extent shaped by the Justices' assessment of contemporary community moral values, and Professor Inbau's apparent disregard of those values in his efforts to assess the Court's recent decisions while explicitly rejecting the notion that the Court should attempt to impose its moral judgments upon the work of the police.

If a great debate in the scholarly tradition was expected by the editor, as his prefatory note implies, his expectations have not been realized. They have not, that is, unless he is content to accept what has become characteristic of current public debates—failure of the participants to agree in advance upon the weapons of debate, either scholarly contention or emotive polemic. Professor Kamisar chose the former, while Professor Inbau chose the latter; each consequently suffered only crippling rather than fatal wounds, even, one may assume, in the eyes of the other's supporters. Fortunately, each will live to do battle another day, but it is hoped that they will reach agreement on the weapons of combat before resuming the affray presented in *Criminal Justice in Our Time.*

I find it incredible that Professor Inbau should believe that the Supreme Court majority in *Escobedo v. Illinois* "seemed unperturbed"[7] by the fact that the sixth amendment to the United States Constitution only provides that an accused shall enjoy the right to have the assistance of counsel "in all criminal prosecutions," and that it does not explicitly require counsel before the prosecution technically begins. Apparently forgotten by him is the Court's review in *Escobedo* of its prior decisions in which it had construed the sixth amendment's assistance-of-counsel guarantee as attaching at the time of arraignment, in *Hamilton v. Alabama,*[8] preliminary hearing, in *White v. Maryland,*[9] and indictment, in *Massiah v. United States,*[10] the last of which was decided just one month before *Escobedo.* Apparently forgotten also by Professor Inbau is the Court's rationale in *Escobedo* for construing the right to the assist-

6. CAHN, THE MORAL DECISION (1955).
7. P. 107.
8. 368 U.S. 52 (1957).
9. 373 U.S. 59 (1963).
10. 377 U.S. 201 (1964).

ance of counsel as arising during police interrogation before indictment. The Court stated it in the following words:

> The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . .[11]

Throughout his essay, Professor Inbau demonstrates little regard for our traditional insistence upon official fairness in the preparation and presentation of criminal prosecution—in short, our insistence upon due process, which can be guaranteed effectively to citizens worthy even of Professor Inbau's concern only if extended also to those ultimately found guilty of criminal activity. For example, he excoriates the Supreme Court for its decision in *Escobedo*, not only because in his view the sixth amendment does not compel, or even permit, the Court's holding, but also because the Court required the exclusion of "a voluntary, trustworthy confession"[12] despite the fact that an Illinois jury and, ultimately, the Illinois Supreme Court considered Escobedo's guilt "as having been established beyond a reasonable doubt."[13] Professor Inbau repeatedly castigates the Supreme Court for making the police abandon some of their customary practices by its insistence that constitutionally guaranteed rights be accorded even those suspected of crime. He obviously has far less confidence than the Supreme Court in the ability of our police agencies to perform their functions in accordance with the law. Occasionally, as in his discussion of police wiretapping, he seems to condone official lawlessness so long as it is committed for "laudable purposes"[14]—whatever that may mean. To him, and to others of like view, the advice given by the late Mr. Justice Frankfurter in *McNabb v. United States* might profitably be repeated: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."[15]

Professor Kamisar's essay is a skillful example of the lawyer's

11. 378 U.S. at 488.
12. P. 108.
13. *Ibid.*
14. P. 133.
15. 318 U.S. 332, 347 (1943).

art of utilizing all available data, including what has been said in dissenting and concurring opinions of incumbent Justices, not alone to analyze and rationalize what the Court has done, but also to predict what the Court will do in the future. The process of forecasting what a court will do is tricky business at best, but, as Llewellyn has noted, the "reckonability" of a court's future course can be enhanced by paying attention to other factors than merely what has been held in the past.[16] Professor Kamisar's discussion of *Massiah v. United States* demonstrates, by references to the dissent in *Crooker v. California*[17] and to the concurrences in *Spano v. New York*,[18] the importance to judicial forecasting of dissenting and concurring opinions. In the Chief Justice's dissent in *Crooker*, he stated his belief that the right to counsel arose prior to indictment, during the time a police prisoner was being interrogated after his requests for counsel had been denied; in *Spano*, four other Justices, concurring in the Court's decision, indicated their belief that the right to counsel arose at least when the prisoner was formally charged. Thus, in 1964 it should have been no surprise, as it was to many, when those five Justices, together with Justice Goldberg, held in *Massiah* that the right to counsel attaches at least at the time of indictment.

It seems to me that Professor Kamisar has read with correct understanding the Supreme Court's opinions he discusses, which means only that there is a high degree of correlation between his judgments and my own concerning this aspect of the Court's recent work. He uses his understanding both of what the Court has done and of what it has said as the basis for predicting what the Court will do when confronted again with a case like *Escobedo*, but where the prisoner did not request counsel before confessing. To one whose official duties *rarely* permit him "to outrun the Supreme Court of the United States,"[19] the temptation to join with Professor Kamisar in outrunning the Supreme Court is too heady to resist as a book reviewer. When he predicts that the Supreme Court will hold that *Escobedo* "means *at least* what the Supreme Court of California said it means in *People v. Dorado*,"[20] I think he is right. In *Dorado*, the California Supreme Court said:

> The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the

16. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).
17. 357 U.S. 433 (1958).
18. 360 U.S. 315 (1959).
19. *In re* Apportionment of the Legislature, 372 Mich. 418, 473 (1964) (separate opinion of Adams, J.).
20. P. 80.

> defendant whose sophistication or status had fortuitously prompted him to make it. . . .
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> Escobedo also holds that the accused has the right not to incriminate himself and to remain silent, and that, if any self-incriminatory statements are to be admissible, he must waive that right. Such waiver presupposes knowledge of the right to remain silent; in the absence of evidence of such knowledge, the waiver requires a warning to the accused of that right. . . . [O]bviously, defendant could not waive the right to remain silent unless he knew of that right. . . . .
>
> We cannot say here that because defendant did not speak the words of a request for counsel we need not apply the United States Supreme Court decisions; the constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself. We cannot compress a constitutional right, expressed by the United States Supreme Court, into the shape of a frozen formalism.[21]

Nor can the rationale of the Court's decisions in *Douglas v. California*[22] and *Gideon v. Wainwright*[23] be overlooked in assessing the ultimate scope of *Escobedo* when the Supreme Court is presented with a case in which counsel is not furnished to an indigent prisoner who responds to police interrogation with a confession. Taking into consideration *Douglas* and *Gideon*, on what basis can it be said that the right extended to Danny Escobedo will not, or should not, be extended to an indigent? And, in view of *Carnley v. Cochran*,[24] why should the indigent's right to the assistance of counsel depend upon his request? It is apparent that Professor Kamisar believes, as do I, that the Supreme Court will someday grant to indigent prisoners the same right to the assistance of counsel that it said Danny Escobedo enjoyed, without conditioning that right upon a request. However, like the able scholar he is, Professor Kamisar adds a *caveat* which should be underscored:

> *Gideon*, *Griffin*, and *Douglas* only raised indigent defendants to a point their more affluent brethren had long since reached; by the time these trial and appellate advantages were extended to all defendants the right of the financially capable to enjoy them was no longer questioned. In the wake of *Escobedo*, however, the "equality norm" exerts pressure to provide all suspects with the rights a Danny Escobedo may enjoy at a time when there is much confusion over what these rights are and more controversy over what they ought to be. On this occasion, the

21. 42 Cal. Rptr. 169, 177-78, 181, 398 P.2d 361, 369-71, 373 (1965).
22. 372 U.S. 353 (1963).
23. 372 U.S. 335 (1963).
24. 369 U.S. 506 (1962).

impact of the equality norm is being brought to bear on a process whose contours have yet to be shaped for the rich man.[25]

While I need not disguise my resentment at those who, like Professor Inbau, suggest that the supporters of the United States Supreme Court's recent decisions in the field of criminal law are dedicated to the destruction of our police forces and other law enforcement agencies, I can agree with at least one truism articulated by Professor Inbau in *Criminal Justice in Our Time.* It concerns a subject which those of us who proclaim our constant concern for the quality of justice infrequently contemplate and even less frequently do anything about—the quality of the personnel, training, and equipment with which our police agencies are expected not only to enforce the laws, but to do so lawfully. Apparently it is evident even to him, as it is to me, that some improvement in the quality and effectiveness of police operations can be attained from "proper selection of personnel, proper training, adequate compensation, promotions on a merit basis, competent internal supervision against abusive practices, and an absence of politically inspired interference regarding their operations and functions."[26] However, until those of our officials entrusted with the awesome responsibility of administering our police agencies succeed in eradicating official lawlessness, as some already have begun to do, the courts must continue to insist upon strict police compliance with law and fair procedures, in order to safeguard against perversion of the judicial process into what Judge Arnold calls the mere "trappings of justice."[27] Our citizens are entitled to demand no less from police administrators and from the courts. We will fulfill that demand without disruption of our established institutions, law enforcement and judicial, only if those engaged in destructive, unwarranted, and emotional attacks upon the courts contribute their intellectual skills to the task of combating contemporary crime and its causes without violating our own Great Charter of Liberties. Chief Judge David Bazelon, of the Court of Appeals for the District of Columbia Circuit, stated the perennial challenge—the *real* challenge:

So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill-educated to defend themselves. Can we expect to induce a spirit of respect for law in the people who constitute our crime problem by treating them as beyond the pale of the Constitution? Though the direct effect of restricting constitutional guarantees would at first be limited to these people, indirectly and even-

25. P. 93.
26. P. 135.
27. P. 141.

tually we should all be affected. Initially the tentacles of incipient totalitarianism seize only the scapegoats of society, but over time they may weaken the moral fibre of society to the point where none of us will remain secure.

Our attitude toward crime reflects our view of the value of the individual in society. In our deepest democratic and national commitments, we are a society of individuals. It is for the protection of individuals and of society that one who is accused of crime is deemed innocent until proved guilty and is afforded all the substantive and procedural legal safeguards. In protecting him, we protect ourselves. In a sense the entire system of criminal jurisprudence is "symbolic," since every part of it stands for something more than itself, namely, the preservation of the worth of each individual in a society of individuals. If we are to be true to our heritage at the same time that we struggle with the problems which beset us, we must deter not only crime, but also the debasement of the individual.[28]

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28. Bazelon, *Law, Morality, and Civil Liberties,* 12 U.C.L.A.L. REV. 13, 28 (1964).