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DEMOCRATIC RESTRAINTS UPON THE POLICE

(Comments upon *The Courts, the Police, and the Rest of Us*,
by Professor Herbert L. Packer)

FRED E. INBAU*

To place the subject of democratic restraints upon the police in its proper perspective, I would like to start out by suggesting that much of today's concern about the police stems from a confusion in the minds of many persons with respect to two different functions of the police. One function is the traditional one of the prevention and detection of conventional crimes and the apprehension of conventional criminals; the other is the role that the police have played, or rather been forced to play, in the controversy over the civil rights of minority groups.

Suggestive of this confusion is the fact that in recent years there have been considerably fewer instances of physical abuses of criminal suspects, and less intrusions upon their constitutional rights and privileges than ever before. For instance, the so-called 3rd degree is a rare occurrence today; thirty, twenty, or even ten years ago it was fairly commonplace. And today the police are being better selected and far better trained than in the earlier years. If this be so—and it is so—then why are the police being subjected to more and more restrictions in the performance of their duties with respect to the conventional type of crime and criminals? Why are their judicial "handcuffs" being squeezed tighter and tighter?

The primary reason, in my opinion, is the public identification of the police as the ones to blame and hold responsible for the plight of minority groups and the abuses of minority groups. The policeman is the uniformed symbol of all of these social ills. He has come to represent a menace in the way of a better life for the socially deprived.

Any thoughtful reflection will produce a realization that the police did not produce our slums or our Negro and Puerto Rican ghettos; nor did the police dream up the ideas of segregation and discrimination. Nevertheless, there exists a more or less unconscious identification of the police as the architects of it all. I suggest to you that even down

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South this architectural responsibility cannot be fairly placed upon the police. To be sure, they have served as the implements of some of the social wrongs and oppressions, but they were not the creators of any of them. I will also suggest to you that even the so-called "red-neck" Southern sheriff with his cattle-prod was not acting in a dictatorial capacity; he was actually serving his community in the manner in which the community wanted to be served. His exercise of the power of suppression was not assumed; it was conferred upon him, tacitly, if not explicitly. In fixing primary blame, therefore, place it where it belongs—upon the community at large.

In the development of this attitude, whereby the policeman is the symbol of suppression and abuses of minority groups, and in seeking to curb his power, or even to render him harmless in that respect, the fact has been overlooked that we must depend upon these same policemen to protect us from the criminal element in our midst. For that we need his skill, his courage—and *the legal powers of his office*.

Once we recognize that the police are not the creators of our social ills with respect to minority groups, and once we realize that we can advance the cause of civil rights without emasculating the police, we can then make a better judgment as to what restraints should be imposed upon them in the exercise of their conventional police responsibilities and functions.

Another, though unrelated factor, that has clouded the thinking of many persons—including some judges, lawyers and law professors—is the impression many people receive when they hear about the reversal of a criminal case, and particularly one reversed by the Supreme Court, on the announced basis of "police misconduct". The assumption is that the police must have violated the law or the Constitution itself. To be sure this has occurred in some of the cases, as when coercive methods have been used to obtain a confession, but much of what the public has been hearing about today does not involve that kind of conduct at all. To the contrary, a number of the most publicized

cases have centered about police practices and procedures that were legally permissible at the time they were employed but condemned later on as improper. The public itself is seldom made aware of this, so down again goes the image of the policeman.

The famous *Escobedo* case itself furnishes the best example of the point I am trying to make.¹ What the police did to Escobedo, and what 5 of the 9 Justices found objectionable, had been labeled as permissible in two of the Court's own decisions rendered only 6 years before the *Escobedo* decision. In *Escobedo*, the majority of the Court nullified a confession obtained after the police had refused to permit Escobedo's lawyer to confer with him. But at the time of Escobedo's interrogation the police were acting in accordance with the law as the Supreme Court had said it was in *Crooker v. California*² and *Cicenia v. La Gay*,³ both of which were decided by a closely divided court, just as was *Escobedo*.

Incidentally, in addition to a reliance upon the *Crooker* and *Cicenia* cases, the police interrogators of Escobedo could have fortified themselves with the clear and explicit language of the sixth amendment which provides as follows: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense". There is not one word in the Constitution or in any of its amendments to the effect that a suspect has the right to counsel in the police station.

My point is that the police interrogators did not deprive Danny Escobedo of any constitutional rights as they existed at that time. But I will hazard a guess that if the public at large were polled as to whether the decision was based upon the Court's finding that the police had violated Escobedo's constitutional rights at the time of the interrogation practically every one of them would say "yes". They might also be under the impression that Escobedo had been physically abused, or threatened, or offered promises of leniency.

May I call your attention to another illustration of how the public acquires an unfavorable impression of the police from their learning about the reversal of a criminal case because of "police misconduct".

Much consideration is being given today to the matter of whether a criminal suspect is entitled to be warned of his self-incrimination privilege at

the beginning of a police interrogation. If and when the Supreme Court reverses a case because the police had not warned the defendant of his self-incrimination privilege—and I have no doubt that this will occur—the impression the public will receive is that the police have goofed again. What will not be realized—and not even by many judges, lawyers and law professors—is that the highest courts of over thirty states have consistently held that it is unnecessary for the police to issue such a warning.⁴ A similar conclusion was reached by the Supreme Court itself many years ago.⁵ Only recently have a few state reviewing courts held the warning to be necessary, and they have done so upon the assumption that the *Escobedo* opinion requires it, or that the Supreme Court will ultimately hold the warning to be a constitutional requirement.⁶

The point I want to make is that in those states which have not overruled their earlier decisions (that a warning is not necessary) the police cannot fairly be charged with violating the constitutional right of criminal suspects just because the Supreme Court says later on that the warning must be given.

Now I should like to address myself to the issue as to the ways and means for checking the police, and also as to who should have a hand in the process.

In some of my earlier speeches and writings I have expressed the view that it is not the constitutional function of the Supreme Court to police the police. But even if this responsibility were rightfully within the power of the Court, the objective is unachievable, largely because the Court is not equipped with the knowledge, skill, or the ways and means for policing the police. Much of what the Court has been doing or attempting to do should be left to the legislative and executive branches of government.

To effectively "police the police," you must tell the police what to do, as well as tell them what not to do. They must be given some guidelines. What

⁴ See cases collected in INBAU & REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 162 (1962).

⁵ *Ibid.* 163.

⁶ For example, *People v. Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965); *State v. Neely*, 239 Ore. 487, 398 P. 2d 482 (1965). Other state appellate courts, despite *Escobedo*, have continued to follow their earlier precedents: *People v. Hartgraves*, 31 Ill. 2d 375, 202 N.E. 2d 33 (1964), cert. den. 380 U.S. 961; *People v. Gunner*, 15 N.Y. 2d 226, 205 N.E. 2d 852 (1965).

[The Court has since held, in its June 13th 5-4 decision in *Miranda v. Arizona*, 86 Sup. Ct. 1602 (1966), that the warning is now a constitutional requirement.]

¹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

² 357 U.S. 433 (1958).

³ 357 U.S. 504 (1958).

guidelines have they received from the Supreme Court?

In a case decided some years ago, *Trupiano v. United States*,⁷ the Supreme Court held that if the police have the time in which to obtain a search warrant and they fail to do so, the evidence they seize, even pursuant to an otherwise reasonable search, is inadmissible in court. Two years later, in *United States v. Rabinowitz*,⁸ the Court overruled the earlier case, holding that even though time permitted, a failure to obtain a search warrant would not nullify the validity of evidence obtained from an otherwise reasonable search. Eleven years thereafter, in *Chapman v. United States*,⁹ the Court in effect overruled the second case and favored the first one, although the Court's language is somewhat ambiguous. In Justice Clark's dissent in this last case he had this to say:

Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since overruled. . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the well springs of democracy—law and order—into a slough of frustration. It turns crime detection into a game of 'cops and robbers'. We hear much these days of an increasing crime rate and breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.¹⁰

Another outstanding example of the Court's vacillation was mentioned earlier: the overruling, in the 1964 *Escobedo* decision, of two 1958 decisions of *Crooker v. California* and *Cicenia v. La Gay*.¹¹ Complicating matters, of course, insofar as the police are concerned, is the fact that *Escobedo* was a 5-4 decision, as was the *Crooker* case. *Cicenia* was 5-3, with one Justice abstaining; otherwise it, too, would have been 5-4.

This turning on and off of the spout of constitutionality by a one-judge margin must inevitably dull the non-lawyer policeman's respect for the word "constitutional". To him it cannot be so sacrosanct if at a given time it means one thing and six years later it means something else. It is difficult for him to appreciate that this change can be effected by a one man change of viewpoint. We lawyers are equipped to understand these phenomena, but it is not easily accepted by non-lawyer policemen.

Further complicating matters, not only for policemen but also for police training school law instructors—and even for prosecutors, defense counsel and judges—is the ambiguous language in the Court's opinions. Consider the confusion that was created by Justice Goldberg's language in *Escobedo*. The supreme courts of California and Oregon and some other states have interpreted it to require a warning of the right to remain silent and of the right to counsel; in Illinois and New Jersey and certain other states it has been given a different interpretation.¹² Moreover, in New Jersey the federal Circuit Court of Appeals held contrary to the New Jersey Supreme Court—a situation that impelled Justice Weintraub of that Court to send out a "pastoral letter" to all the state judges advising them to follow the decision of his court rather than that of the federal circuit court.¹³

If lawyers and judges can be that confused, pity the poor policeman who is told to be guided by what the Supreme Court says.

Even within the Supreme Court of the United States itself, the Justices seem to be confusing each other. Don't take my word for this; listen, if you will, to what some of the Justices themselves had to say in the 1961 case of *Columbe v. Connecticut*,¹⁴ a case involving the question of the test to be applied in determining confession admissibility. The majority opinion laid down this test:

The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least a three-phased process. First, there is the business of finding the crude historical facts, the external, 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative

⁷ 334 U.S. 699 (1948).

⁸ 339 U.S. 56 (1950).

⁹ 365 U.S. 610 (1961).

¹⁰ *Ibid.* p. 622.

¹¹ *Supra* notes 2 and 3.

¹² *Supra* note 6.

¹³ *United States ex rel Russo v. New Jersey*, 351 F.2d 429 (3rd Cir. 1965). As regards the "pastoral letter", see *New York Times*, Dec. 11, 1965, p. 1, col. 1.

¹⁴ 367 U.S. 568 (1961).

recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.¹⁵

Chief Justice Warren castigated the writer of the majority opinion for this attempt at a general "clarification" of the test of admissibility. He said:

The opinion was unquestionably written with the intention of clarifying these problems and of establishing a set of principles which could be easily applied in any coerced-confession situation. However, it is doubtful that such will be the result, for while three members of the Court agree to the general principles enunciated by the opinion, they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion. This being true, it cannot be assumed that the lower courts and law enforcement agencies will receive better guidance from the treatise for which this case seems to have provided a vehicle. On an abstract level, I find myself in agreement with some portions of the opinion and in disagreement with other portions. However, I would prefer not to write on many of the difficult questions which the opinion discusses until the facts of a particular case make such writing necessary.¹⁶

Do you wonder why some of us are of the view that the Supreme Court is not the agency or group to tell the police what they can and cannot do? If the views of the Justices cannot be stated any more clearly than they were in the *Columbe* case from which these quotes came, the opinions might just as well be written in Latin.

In my opinion, a much more suitable agency of government for providing the police with legal guidelines is the legislative branch. In fact, much of what some courts have been writing in the past few years, and particularly the Supreme Court, has been judicial legislation. And when constitutional justifications have been invoked, the particular constitutional provisions relied upon have sometimes been twisted far out of shape in order that the court could impose its own conscience upon the police and the public as well.

¹⁵ *Ibid.* p. 603.

¹⁶ *Ibid.* p. 635.

Workable guidelines are beyond the capacity of the courts to formulate or administer. This is especially true of the Supreme Court. The judiciary also has enough to keep itself fully occupied at the task of providing procedures to insure fair criminal trials and to protect the innocent from criminal convictions. The courts should focus their attention upon such problems as providing defense counsel to those who need it, the discovery rights of the accused and the State, the hazards involved in eye witness identifications and testimony and the safeguards that should be established. The latter always presents the spectre of a conviction of the innocent. These are the real and true functions and responsibilities of the courts.

Much of the concern, energy, and efforts expended by the judiciary in trying to police the police could be better spent in getting the judicial house itself in order.

In some of this country's municipal and magistrate courts there are more and greater risks to the innocent, more trampling over of basic individual rights, and more affronts to human dignity than you will find in the average police station. Those of you who doubt that should pay a visit to some of these courts and observe the cafeteria style justice that is dispensed in them.

Perhaps the reason why the courts prefer to police the police rather than attend to the needs of the judicial house itself is the same as that which accounts for the fact that it is much easier, and much more pleasant, for any of us parents to think up ways and means that should be employed in the parental handling of the neighbor's children than it is to correct the faults and control the mischief of our own.

Why do I suggest that the legislature is the better governmental agency for providing guidelines for the police?

In considering any or all phases of police conduct or procedures in the enforcement of the law, a legislature may establish commissions and appoint committees to make studies, and formulate proposals. Hearings could be conducted, during the course of which opposing viewpoints would be presented and evaluated. At such hearings, persons and groups with a broad interest in the subject matter could be heard. Spokesmen for the police interests would be present, along with representatives of citizen organizations, minority groups, and others. These various viewpoints would not be so confined as they are in a court case situation, where ordinarily only counsel for the prosecution and

defense are heard, and then primarily with regard to the case facts and the law applicable to those particular facts. Ultimately a legislative decision would be reached which is based upon considerations of policy and practicality, unaffected by the shocking facts of an isolated case. I believe there would be greater objectivity in such legislative decision making. I also believe it would be more in keeping with the traditions of a democratic form of government than much of the decision making that is now occurring in the Supreme Court, where all too frequently the vote of a single Justice will determine what the police may or may not do in the performance of their duties.

Legislatures could also avail themselves of the efforts of non-legislative groups such as the American Law Institute, or the A.B.A.'s Committee on Minimum Standards of Criminal Justice. The recently drafted proposed Code of Pre-Arrestment Procedure, submitted by the Council of the American Law Institute, represents a far better and more workable set of controls over the police than anything that has thus far emanated from the Supreme Court. All of the American Law Institute's efforts may go for naught, however, if the Supreme Court should decide that there is a constitutional prohibition against the detention and interrogation of a criminal suspect unless he has an attorney at his side.

Incidentally, the proposed Model Code is somewhat of a testimonial to the importance of police interrogations in the investigation of criminal offenses. And this brings me to the next point I wish to make with reference to Professor Packer's paper. He cites a statistical study made by Justice Nathan R. Sobel of Kings County, N.Y. which purports to show that interrogations and confessions are of little significance or value, implying that the police can function effectively without interrogating criminal suspects. But Justice Sobel's interpretation of his statistics is highly invalid. He surveyed 1000 indictments filed in King's County Court during a certain period and found that only in 86 of them did the prosecutor file the prescribed "notice of intention" to use a confession, as required by New York procedure. From this Justice Sobel concluded that "any estimate that confessions were involved in any large percentage of cases or particular cases was a gross exaggeration". What he overlooked, however, and this is pointed out in the commentary to section 5.01 of the proposed Model Code (f.n.6), is that the "notice of intention" is filed only when a case is not disposed

of by a plea of guilty, and that such notices are not filed in cases where the defendant's confession led to other convincing evidence of guilt and the confession's use at the trial was considered to be unnecessary.

Contrast Justice Sobel's statistics with those gathered by the highly respected District Attorney of New York County, Frank S. Hogan. Mr. Hogan has reported that of 100 murderers who were executed in New York between 1943 and 1961, 85 of them had given statements to the police which were significantly helpful in their prosecution. Of the currently pending cases in New York County, involving 91 defendants charged with criminal homicide, incriminating admissions were made by 62 of them. Hogan also reports that 25 of these defendants could not have been indicted had it not been for the confessions they had made to the police.

More and more we are hearing of statistics and conclusions just as invalid as Justice Sobel's. My own feeling is that there are some things we can and should accept without demanding statistical proof, and the necessity for police interrogation is one of them. A reflection upon the types of crimes that confront our metropolitan police today should convince anyone that many such cases cannot be solved by any other means than the interrogation of criminal suspects.¹⁷

Now I should like to get to the matter of civilian review boards as a means of controlling the police. Professor Packer urges the police to accept this concept, for their own interest and welfare as well as for that of the public.

If we were able to assemble, as a review board, a group of civilians who were objective, fair-minded, and also knowledgeable with respect to the police behavior problems perhaps such a board would be a good thing—provided, however, an additional element is added: a firm commitment by the civil rights and civil liberties groups to accept the findings and recommendations of such a board. All these conditions are not likely to be met, and unless they are, I disagree with Professor Packer as to the desirability of this device as a control over the police.

There would be little agitation for civilian review boards if the concern were solely with police behavior in the investigation of the ordinary types of criminal offenses. Some evidence of this is found in the review board experience of Rochester, N.Y.

¹⁷ For illustrations, see *KAMISAR, INBAU & ARNOLD, CRIMINAL JUSTICE IN OUR TIME* 99 (1965).

During the period of a little over one year from the establishment of the Board and the riots of July 1964, the Board received only two official complaints against the police for unnecessary force. As a matter of fact, because of the inactivity of the Board, the city administration was contemplating its abolition. When the riots occurred, and the civil rights groups complained of police brutality as the cause of the riots, the city administration and the police department were able to cite the low incidence of prior complaints of unnecessary force. Thereafter the complaints increased very considerably, and suspicion arose that perhaps the increase was due to the solicitation of some Board members in order to justify the Board's continued existence. It is my understanding that the Rochester police department has in its files a number of sworn depositions of complainants verifying the fact of such solicitations.

The only other city with a police review board at the present time is Philadelphia. What has been the experience there? The Board, consisting of civilians only, has been in existence for approximately 7 years. From October 1958 through January 1965 the Board received 725 complaints. 333 were resolved to the satisfaction of the complainant without conducting hearings. In 38 cases disciplinary action was recommended, in 15 of which there were suspensions up to 30 days, and in 23, official reprimands. In all the remaining cases the Board made no recommendations against the police.

What was the reaction of the civil rights groups regarding the Philadelphia Board? The President of the Philadelphia branch of the NAACP is reported as saying: "It ain't worth a damn!"¹⁸

The feelings and tensions are such throughout the country today that, in my opinion, no police

review board would be acceptable to minority groups generally unless it were composed of a majority of members who are in full sympathy with their demands based upon *their* concept of proper police behavior.¹⁹ The disturbing feature about a compliance with their demands is the fact that some of the top leaders of the civil rights movement have been openly condoning—and even advocating—unlawful conduct in the promotion of the civil rights cause.

I can fully appreciate the concern of the police in not wanting their conduct appraised by persons who subscribe to the notion that a righteous cause justifies the use of unlawful conduct to achieve the desired objective.

In our efforts to preserve individual civil rights and liberties, we cannot abolish the police and other law enforcement agencies and still survive as an orderly society; nor can we impose so many restrictions upon them that they will be practically powerless to prevent crime and apprehend criminals. Our only alternative is to retain our police forces and other law enforcement agencies and try to act directly in improving their quality, their efficiency, and their respect for individual civil rights and liberties. It must be done through a system whereby our police are selected and promoted on a merit basis, properly trained, adequately compensated, internally supervised with respect to abusive and corrupt practices, and permitted to remain substantially free from politically inspired interference. At the hands of policemen within such a system there will be a minimum of abusive practices, regardless of the race, color, creed, or social status of the persons who become involved in processes of the criminal law. Individual rights and civil liberties can survive—and indeed flourish—in such an atmosphere. At the same time there will be the protective security the public needs and deserves.

I want to close with a statement made a short while ago by Commissioner G. B. McClellan of the Royal Canadian Mounted Police.²⁰ It expresses his sentiment as well as mine:

When the policeman exceeds his authority, bring him up short, but when he is doing, as most of them are doing, a tough, thankless and frequently dangerous job for you and for all you hold dear, for God's sake get off his back.

²⁰ An address delivered to the Canadian Club of Toronto, Ontario, on March 29, 1965.

¹⁸ See New York Herald Tribune, Feb. 20, 1966.

¹⁹ Several days after the Northwestern University Conference at which this statement was made, the General Counsel for the National Association for the Advancement of Colored People rejected the civilian police review board plan proposed by Liberal-Republican Mayor Lindsay of New York City. It was said that there were "serious inadequacies" in the plan, even though the New York Civil Liberties Union considered the plan as "not ideal but certainly a giant step forward". The National Director of the Congress of Racial Equality objected to the plan on the ground that the panel that Mayor Lindsay appointed to nominate members of the review board "fails to include representatives from the Harlem and Bedford-Stuyvesant ghettos and civil rights organizations". New York Times, May 4, 1966, and May 5, 1966.