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TO POLICE THE JUDGES—NOT JUST JUDGE THE POLICE

(Comments upon *Reflections of a State Reviewing Court Judge Upon the Supreme Court Mandates in Criminal Cases*,
by Judge Charles S. Desmond)

DAVID W. CRAIG*

The broad meaning of the verb "to police" is to establish or keep order,¹ and thus it is used in many applications, from the minor sense of tidying up a military compound to the major concept of preserving peace among nations.

In the title of this paper, the verb is used to call for a more orderly discipline as a framework for the constitutional labors of our hard-pressed judiciary.

Judge Desmond, outstanding among the great judges with a balanced concern for criminal law procedure, has presented a statement which reflects the current judicial emphasis upon policing the police. Unquestionably sympathetic with the problems of the law enforcement community, his "prime point" nevertheless is a plea for "better training and counsel" for the "police forces of America".² His immediate program is the "modernizing" and "educating" of our police.³ There is, however, much evidence that the response to his plea is now well under way. Federal, state and major city law enforcement agencies—the ones which embrace the preponderance of the problems—for some years now have been feverishly engaged in improvement of personnel and tools.⁴

In contrast to the frequency of the call to police the police, little has been said or done about the need for modernizing the judicial decisional process at the juncture where crime and justice meet, or about the possibility of training the judiciary itself for its highest function—whether that function be labeled, according to opinion, as interpretation or lawmaking.

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¹ Webster's Third New Int'l. Dict., 1754 (1961).

² *Supra* p. 301.

³ *Id.* at p. 304.

⁴ INT'L ASSOC. OF CHIEFS OF POLICE: YEAR BOOK 1964.

During the recent period in which the court-announced doctrines concerning criminal procedure have expanded exponentially—a period dated, according to some views,⁵ from *Griffin v. Illinois*⁶—the specific-controversy ken and the precedent-bounded technique of American jurisprudence, in and out of scattered statutory channels, has shown itself to be slow, uncertain and inadequate to provide law enforcement men with the "counsel" which Judge Desmond desires them to have.

The shakiness of opinions of narrowly-divided appellate courts is a factor which itself has frustrated certainty in the legal area where certainty and, indeed, simplicity is most needed. That shakiness has been confirmed by the frequency with which dissenting doctrines have become the core of subsequent majority opinions.⁷

A young behavioral science has developed for the purpose of analyzing and quantifying judicial decision-making. A leading work in that field, containing a compilation of studies of the group behavior of the Supreme Court of the United States, states:

Our immediate concern is with the socio-psychological dimension of the formal decision-making behavior of this small, political (in the public-policy-consequences sense) elite group. . . .⁸

Those studies use "bloc analysis" and "game analysis" and finally "scalogram analysis"⁹ to seek a procedure for "Predicting Supreme Court Decisions Mathematically."¹⁰

It must be admitted, of course, that the esoteric specialist can always, through microscopic focus,

⁵ Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 6 (1965).

⁶ 351 U.S. 12 (1956).

⁷ Cf. *Crooker v. California*, 357 U.S. 433 (1958); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁸ SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 11 (1959).

⁹ *Id.* at xv, xvi.

¹⁰ *Id.* at 316.

bring complexity into view where the workaday sight shows manageable simplicity. Yet, when the policeman, or even his legal advisor, takes a workaday look at the judicial interpretation patterns, unmanageable complexity is seen. Currently the Pittsburgh Police Bureau has 22 supervisors enrolled in an evening course in "Advanced Criminal Law for Policemen", provided for the law enforcement agencies of our area by the Institute of Local Government of the University of Pittsburgh. The best efforts of the professorial staff, which includes a former state attorney general and an experienced public defender, are hard put to systematize the series of decisions of state courts, the Supreme Court and the Third Circuit Court of Appeals, to any degree likely to provide the working police officer with guides for his conduct in street and stationhouse.

At present it is commonplace to hear police administrators wonder aloud, and sometimes bitterly, how the policeman can be instructed to make a search or arrest decision correctly within a few seconds, or plan a lawful and effective investigative course within a few hours when, weighing like factors, the mightiest judges and most scholarly lawyers deliberate for months and then differ widely among themselves.

If we grant, as we must, that the policeman is part of our machinery of justice, why should his alternative actions be any less settled than the methods for administering a decedent's estate, or for preparing a contested divorce or negligence case?

Perhaps our legal institutions have not flatly failed to meet the need for more clarity in criminal procedure in our urban, industrialized, interdependent society, but they have definitely fallen behind in the formulation of implemental standards, doubtless in view of the accelerated flood of recent judicial doctrine.

THE MODERNIZATION AND TRAINING OF JUDGES

To cast a glance backward at some solutions long passed by, it is remarkable that, despite admirable reform in judicial administration and judicial selection in decades past, there has been little improvement in the form and clarity of appellate opinions and, aside from the Restatements of the American Law Institute, little other attempt to systematize the judge-made body of law.

Hardly anyone has asked why appellate opinions must continue to follow the discursive format of

centuries, without being subject to some disciplines of uniformity—structural or verbal—to permit them to be dealt with more feasibly.

Agencies involved in doing legal research by electronic data processing methods, such as the Health Law Center of the University of Pittsburgh, have found that statutory materials lend themselves more readily to computer handling than do judicial opinions.¹¹ In working with the statutes of Pennsylvania and the ordinances of the City of Pittsburgh, all now placed on tape, we have found verbatim methods of electronic searching to be quite workable. Even though the disciplines of statutory drafting have developed slowly and with varied success, the writers of statutes have apparently evidenced some subjection to the disciplines of communication, whereas the writers of judicial opinions, concurrences and dissents have, for the most part, given little thought to such disciplines.

The professionalization—and therefore the training—of judges, as such, needs to be mentioned. Except as the appellate-materials method of teaching has bestowed on all law school graduates some useful habits of issue analysis and decisional process, we have had very little training of judges to be judges.

The National College of State Trial Judges, held each summer at the University of Colorado, is an excellent step, but only a beginning and only for trial judges. A similar approach toward the training of appellate judges is needed, on a broad scale, to develop courts with uniform competency to communicate judicial doctrine in more usable form.

Being a judge, appellate or otherwise, is a very different function from that of being a lawyer, as the judicial training processes of Continental countries have long recognized. Experience as a practicing advocate may be a prerequisite to being a judge, but it is not adequate training for the post.

Notice of this lack should not be construed as mere irritation at the occasional appellate opinion which is rambling or vague or a stump-speech, nor should it by any means be considered a criticism of the evident ability and dedication of the vast majority of our judiciary. Individual judges have been in the forefront of many moves to systematize the law, both in statutory form and

¹¹ Horty, *Report to the Ford Foundation, 1963-1965*, mimeo, on file University of Pittsburgh Health Law Center.

after it is handed down from the bench; the impressive rosters of judges at judicial conferences, serving in the efforts of the American Law Institute and the American Judicature Society and, indeed, in this very Conference, testify to the concern and responsibility of most members of the bench. But the fact remains that the final output of the appellate courts, the precedent-making opinions, are amorphous in form, variable in content, difficult to synchronize and, of course, confined by the worthy limitations of the case-and-controversy principle.

The struggles of this Conference and its predecessors to interweave judicial constitutional interpretation into a seamless or at least sturdy fabric could have been eased by judges trained and courts disciplined to issue decisions of comparable tenor.

Some methods of better judicial communication have been suggested and some are in existence. Although the verbal systematization of legal concepts proposed by Kocurek¹² and others has gained little favor, the usefully uniform terminology of the Restatements is with us, to be used well by some courts and ignored by others.

We have the basic knowledge to modernize appellate decisional processes—the communication techniques and the computer hardware to assume the menial burdens of legal research. The personnel development and operational development necessary to use them are overdue.

Thus, we in the field of law enforcement must respond even more earnestly to Judge Desmond's call for the training of law officers and the modernization of law enforcement agencies. But, with considerable concern, we can hand back a similar challenge to the courts, to move toward specialized training of their personnel, modernization of their machinery (much of which has admittedly occurred), and streamlining of their decisional products.

CODIFICATION

Codification of legal doctrine by statute—and by court rules, where broad procedural rule-making power has been conferred upon the courts—is a well-known way of systematizing uncertain

interpretative patterns previously embodied in an irregular series of court decisions.

The courts have frequently pointed out that, if legislatures exercised more foresight by adopting statutory codes in anticipation of legal problems, the need for much judicial interpretation would be obviated and uncertainty avoided. In other words, a good argument can be made that the first duty to systematize and, hopefully, to simplify a body of a law lies with the legislatures and not with the courts. However, that argument is easier to support when dealing with applications of common law or interpretations of incomplete statutes than when confronted broadly with constitutional interpretations, as we are today with respect to civil rights in relation to criminal law enforcement. The judicial power of the Supreme Court to nullify statutes and condemn administrative procedures has meant in fact that the Court—aided by ingenious counsel—has been the innovator, in the sense that it has spoken to many constitutional problems not comprehended by statutes because not expected by the legislators.

Thus, whether or not we convict the legislative branch of lacking foresight, the historical fact in the area of police functions is that isolated boundary posts have first been perceived (or erected) and marked by the judiciary; then to the legislative function falls the duty of building continuous fence-lines inside those posts, often trusting that much of the fence-building lies within the judicial posts which have not yet been announced.

This problem of staying within judicial limit-points not yet marked, by interpolation or extrapolation, lies at the core of debate when governments are driven, as we now clearly are, to statutory or court-rule codification in order to provide operating clarity for law enforcement.

Those who sincerely prefer to maximize the accused individual's "rights", privacy, dignity and aplomb, without counting the cost in the loss of society's protection against crime, tend to advocate placing the statutory fence-line well within any possible future judicial limits yet unannounced.

On the other hand, the police officer and his spokesman are duty-bound to call for all individuals to contribute to as much of a tempering of those individual values as is necessary to afford effective protection against crime, which threatens all of society, and particularly the poor, with deprivation of life, as well as of rights and dignity,

¹² KOCOUREK, *JURAL RELATIONS* (1928); KOCOUREK, *INTRODUCTION TO THE SCIENCE OF LAW*, Ch. IV, *Jural Analysis*, 235 (1930). See also HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) and Wigmore, *Terminology of Legal Science*, 28 *HARV. L. REV.* 1 (1914).

in manners far more abrupt and harsh than even the crudest imaginable processes of law enforcement.

We call upon the individual, in the interest of the general welfare, to contribute property in taxation and eminent domain, to contribute time and thought in jury duty, and even to contribute personal safety in the national defense. We cannot expect, then, that there should be no sacrificial demands upon the individual in relation to the detection and apprehension of criminal offenders.¹³

The policeman is concerned because, despite the mobilization in police technique and equipment now going on almost everywhere, the major offense rate is increasing nationally, while the clearance or solution rate is experiencing declines.¹⁴

These issues are at the heart of the debate which now centers upon one of the most comprehensive efforts to bring the clarifying processes of codification to bear upon police procedure, the Model Code of Pre-Arrest Procedure being developed by the deliberative methods of the American Law Institute for potential presentation to governmental units.¹⁵

THE A.L.I. MODEL CODE IN GENERAL

The involvement of the prestigious American Law Institute in proposing a code for police investigation and arrest processes is encouraging. The impressive adoption record of other models proposed by the Institute suggests that the Model Code of Pre-Arrest Procedure—hereinafter called "Model Code"—if adopted by the Institute, will be seriously considered for enactment by many legislatures, and will not lie idle on the shelf.

Commenced in April, 1963, with the aid of a Ford Foundation grant,¹⁶ the Model Code has now reached the printed form of "Tentative Draft No. 1", in which form it was submitted by the Council of the Institute to its members at their May, 1966 meeting; final submission in the form of a Council-approved official draft will have

¹³Inbau, *Law Enforcement, the Courts, and Civil Liberties, CRIMINAL JUSTICE IN OUR TIME* 119 (1965).

¹⁴Federal Bureau of Investigation, *CRIME IN THE UNITED STATES; UNIFORM CRIME REPORTS—1964*, pp. 1, 20, reports a national major crime increase of 13% in 1964 over 1963, and a 1964 clearance rate which dropped 2% below 1963.

¹⁵A MODEL CODE OF PRE-ARREST PROCEDURE; TENTATIVE DRAFT No. 1 (American Law Institute, March 1, 1966)—hereinafter cited as "MODEL CODE".

¹⁶MODEL CODE, IX.

to occur later, before the model is definitely promulgated.

As is customary with the Institute, the major staff work is being performed by law school personnel, with recourse to an advisory committee composed primarily of legal experts, but also including some police administrators, although by no means a preponderance of the latter.¹⁷

The Model Code provisions deserve serious study and earnest comment, particularly at its present stage of first general publication.

As almost everyone faced with conducting a deliberative meeting has learned, group discussion can be most productive when attention may be focused upon a draft proposal. Concentrating upon such a proposal could well be more productive than unchanneled debate about the collective meaning of the court decisions alone.

Without attempting to repeat the summary of content which the Model Code draft now contains in its Reporters' Introductory Memorandum,¹⁸ this brief paper can more usefully try to underscore the issues implicit in two of the Code's aspects which possess the greatest importance for the law enforcement officer's functions: (1) investigation prior to arrest, and (2) post-arrest investigation.

INVESTIGATION PRIOR TO ARREST

Of prime interest among the Model Code's provisions dealing with investigation prior to actual arrest are those which govern the stopping of persons, whether as possible witnesses or suspects, for the purpose of investigation. This matter is familiar in terms of the "stop and frisk" statutes,¹⁹ but objective discussion would do best by avoiding that connotative label.

Model Code section 2.02 permits a police officer to stop and detain persons for not more than twenty minutes in two types of situations:

(1) *Stopping of Persons Having Knowledge of Crime.* A law enforcement officer lawfully present in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of

¹⁷MODEL CODE, V-VII. Of the 40 members of the advisory committee, only 8 are law enforcement officials and only 4 of them are police administrators.

¹⁸MODEL CODE, XXI-XXV.

¹⁹DEL. CODE ANN. tit. 11, §1902 (1953); MASS. GEN. LAWS ch. 41, §98 (1958); N.H. REV. STAT ANN. §594: (1953); N.Y. CODE CRIM. PROC. §180-a; R.I. GEN. LAWS ANN. §12-7-1 (1956).

material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

(2) *Stopping of Persons in Suspicious Circumstances.* A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action if reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes.

Other subsections provide: The officer may use non-deadly force to effect such a stop, and he may search the person and his immediate surroundings for dangerous weapons if he reasonably believes that his safety requires it; during the one-third hour allowed, the officer may obtain identification and verify that identification and also whatever account such person may give concerning his presence and conduct.²⁰

To permit this stopping power to be operative in any place in which the officer is "lawfully present", rather than just in public places, is eminently sound. Also commendable is the inclusion of the power to detain witnesses as well as suspects, a facet not included in the present stop-and-frisk statutes but not condemned by case law.²¹

The use of the twenty-minute time limit is debatable, however. Because the time period obviously runs concurrently for all detained persons when a number of witnesses or suspects are involved, a time period suitable for dealing with one may well be unreasonably short when there are many. The "Urgent Necessity" exception in section 9.11, applicable only to the prevention of serious danger or the protection of interests of great magnitude, would not usually be of any help in extending the time in this kind of situation.

A more general statement of the time period should be considered, such as the "brief time" phrase discarded by the Reporters,²² remembering that the spatial limitation of the detention, within a radius "near" the place of stopping, contains a

built-in deterrent to delay, in that police units are not likely to extend unduly a detention which immobilizes them at a place chosen by happenstance.

Another reason for a more flexible time limit is the heavy exclusion-of-evidence sanctions which can result if the minute count is exceeded. Under section 3.05(1) of the Code, if the officer fails to release the person expressly within the time limit, all the rights and protections accorded by the Code to arrested persons then accrue; with an illegal arrest situation thus arising, statements can become inadmissible under section 9.02, an exclusion which can be escalated by section 9.09, a statutory version of the "fruits of the poisonous tree" doctrine. Although section 9.10 provides some leeway, in permitting a court to accept evidence nevertheless when the violation of the Code is minor or excusably erroneous, it does not cure the fundamental arbitrariness of the twenty minute margin.

Other sanctions upon the police officer's conduct will be provided in the form of penalties, according to the Reporters; however they omit any provision for express sanctions to require the witness or suspect to stop or remain,²³ suggesting only that resisting-arrest statutes might be construed to apply. Express sanctions to aid the police officer should be provided in any official adoption of the Code.

Questions involving searches for items other than dangerous weapons, during such detentions, are so broad and important as to deserve fuller treatment than can be afforded here.

Aside from those questions of scope of search, however, these pre-arrest investigations provisions of the Code present an encouraging groundwork, particularly if the time limit problems can be resolved.

INVESTIGATION AFTER ARREST

In a brief review of the Model Code provisions affecting investigatory functions other than searches, the "preliminary screening" described under section 4.04 for persons arrested without a warrant is of special interest.

That section provides that where a person is arrested without a warrant—and therefore not

²⁰ MODEL CODE, §2.02.

²¹ *Busby v. United States*, 296 F. 2d 328, 331 (9th Cir. 1961), cert. denied, 369 U.S. 876 (1962); *Hargus v. State*, 54 P. 2d 211, 214 (Okla. 1935).

²² MODEL CODE, Commentary to §2.02, p. 101.

²³ MODEL CODE §3.01 (3) contains an indirect sanction to obey an officer's stop order under §2.02, in that failure to comply with an obligation imposed by the Code may be a concurrent factor in determining reasonable cause for arrest, but such non-compliance alone does not justify arrest.

pursuant to a formal charge—there may be a “preliminary screening” to decide as to a formal charge, extending not more than four hours from the time of arrest. In the case of named serious felonies, that period may be extended, depending upon the time of day the arrest was made, up to 14, 16 or 22 hours maximum.

The Code uses the term “screening” to underscore the intent that any such period of detention may be used only to arrive at a decision concerning the charge,²⁴ and not for the purpose of building a case to prove it, although the two purposes necessarily overlap somewhat.

Whatever the time limit, the Code provisions governing the conduct of such screening will insure that the period is a busy one for the police. As soon as the arrested person is brought to the station, the police must, in addition to recording the time of arrival, inform the arrested person about the period of detention, commitment and bail, the absence of obligation to speak, the possible use in evidence of his statements, his privilege to communicate by telephone, the availability of funds for that purpose, the access to be afforded to counsel or relative or friend, and the availability of counsel for indigents, if such is provided. Most of this information is also required to be delivered in printed form.²⁵

Promptly thereafter, telephoning opportunity must be afforded. In addition, throughout the screening period, there must be “reasonable opportunity” to use the telephone upon request.²⁶

The access of counsel—or a relative or friend in lieu of legal counsel—is also broadly afforded. Counsel is to have access by telephone and in person whenever the arrested person requests his presence.²⁷ Indeed, the arrested person must be given “reasonable opportunity from time to time” to consult *in private* with counsel or relative or friend;²⁸ presumably such privacy could be under control sufficient to maintain safety of custody.

These provisions would seem to be more susceptible of abuse by the arrested person and his counsel, relative or friend than by the police. Recorded questioning is permitted in the absence of counsel, but only during the first four hours;²⁹ thereafter any “sustained questioning” in the absence of counsel is prohibited.³⁰ When the identification

procedures and confrontations allowed by section 5.01 are also considered, it is clear that the police will have little opportunity for questioning, with or without counsel, particularly in the case of the experienced criminal.

Again the sanctions are all against the police, particularly through the subsequent exclusion of statements and their fruits, which can occur pursuant to failure to issue the prescribed warnings or failure to permit the prescribed telephoning, access or consultation opportunities.³¹

Although it may not be possible to turn in any direction away from *Mapp v. Ohio*³² and its kin, it is difficult to avoid the conviction that the exclusion sanctions really operate to punish society rather than the police, wherever they operate to deprive society of evidential armament against the criminal.

Another problem arises by the fact that, since the screening is available only for the purpose of arriving at a formal charge, no period of investigation—particularly questioning—appears to be made available where the suspect has been arrested upon a warrant, which issues pursuant to formal charge. In such cases, says the Commentary to the Code, “no period of screening is justified, and the accused should be brought before a magistrate as soon as purely administrative steps in the police station have been completed.”³³ Thus the pre-existence of an arrest warrant prohibits interrogation except, according to section 5.09, by consent with the advice of counsel.

Other investigative procedures may also be prohibited by the Code in the case of a person arrested under warrant, if the comment about “purely administrative steps” is to be read strictly. Lineups and confrontations would seem to be more than “purely administrative” and thus barred. Although the taking of the fingerprints and photographs of the arrested person would seem to be “purely administrative steps”, those matters are listed along with lineups and confrontations as the “Permitted Investigation” under section 5.01, the Note to which suggests that it is confined to the screening of persons arrested without warrant. Clarification of the text or notes as to section 5.01 would be desirable.

The Code’s prohibition against the questioning of persons arrested under a warrant—set forth in

²⁴ MODEL CODE §4.04 (1).

²⁵ MODEL CODE §4.01.

²⁶ MODEL CODE §§4.01 (5), 5.07 (2).

²⁷ MODEL CODE §5.07.

²⁸ *Ibid.*

²⁹ MODEL CODE §§4.04, 4.09, 5.01.

³⁰ MODEL CODE §5.08.

³¹ MODEL CODE §§9.03, 9.05, 9.09.

³² 367 U.S. 643 (1961).

³³ MODEL CODE, Commentary to Article 4, 147. See, in this regard, *Phillips v. State*, 139 N.W. 2d 41 (Wis. 1966); *Abstracts of Recent Cases*, 57 J. CRIM. L., C. & P.S. 178, 183-185 (1966).

section 5.09 as indicated above—except in the unlikely eventuality that legal counsel has advised consent thereto, needs reexamination. This approach rests upon the assumption that an arrest warrant follows a complaint which, in turn, is based upon such full official consideration that it is unnecessary to conduct the “screening” allowed with respect to persons arrested without a warrant. However, such an assumption ignores the fact that a complaint cannot always be based upon independent official investigation, but will many times be based upon the assertions of a complainant who is confused, ill-informed, mistaken or even malicious. Thus the subsequent official screening may well be needed when the arrest is under warrant just as much as when made without a warrant.

Moreover, by virtue of section 3.06 of the Code, the use of a warrant may hinge upon the fact that the arrest is to be made upon private premises or at night, factors which relate not at all to the appropriateness of post-arrest investigation and questioning.

The type of formal base on which the arrest is founded should not make a difference as to the substance of the official pre-commitment investigation. To support the Code’s authorization of “screening” of persons arrested without a warrant, the Commentary to the Code cites the need for “resolving the doubts and confusions which will necessarily accompany many arrests without a warrant.”³⁴ The point is that many doubts and confusions can and do often accompany arrests made pursuant to a warrant. Although the complaint has been lodged, and the police cannot release the arrested person upon their own findings—as they may do under section 4.04(3) where there has been no arrest warrant—police investigation will necessarily produce a fuller case at the time the arrested person is brought before a magistrate, and a fuller case should be to the advantage of the innocent as well as to the disadvantage of the guilty.

The Code distinction between warrant arrests and non-warrant arrests seems to reveal a basic distrust of police objectivity.

Of course, to permit the police to conduct the same investigation, in terms of time and content, of persons arrested upon warrants as is allowed with respect to those arrested without warrants, would necessarily mean an abandonment of the concept that the “screening” is theoretically only

for the purpose of determining the nature of the charge and not to build the quantum of evidence. Yet the “screening” necessarily possesses a purely evidential and case-building or case-eliminating element, as indicated by the Code’s view that it can also lead to the release of the innocent. Moreover, the “screening” power will inevitably be used by any conscientious police unit as an evidence-gathering process; therefore, the Code contains an unintended discrimination in favor of the person whose arrest happens to occur pursuant to a warrant.

The Code draft deserves careful reconsideration toward the end that post-arrest investigation with respect to all arrested persons be frankly allowed.

CONCLUSION

Despite the very thorough and dedicated work of the Model Code developers, it does appear that the Code draft, like many of the court decisions, over-restricts the police through a distrustful refusal to accept the fact that the great preponderance of police officers are, as servants of the public, dedicated to sounder goals than the racking up of convictions against hapless suspects who stray their way. Anyone familiar with the daily work of a professional police organization knows that the investigative officers display considerable objectivity in that they are quick to absolve persons who are victims of unfounded accusation and are slow to jump to conclusions of guilt.

The injustice which society suffers at the hands of unpunished criminals can be, and is, accurately measured in the statistics of crimes not cleared. Any further restriction of police investigative powers can be justified only by a similarly accurate measurement of harm done to the innocent by methods presently accepted. Although such an assessment is admittedly difficult, it is submitted that the burden of proof is upon those who assume that police are to be distrusted. The court decisions which involve abuse of police authority certainly do not constitute a sufficient sampling of the whole picture. Until adequate social science measurement is performed, the admirable and necessary effort to codify the legal restrictions on police work should attempt to formulate restrictions to a basic degree rather than to an ultimate extent.

To be quite blunt, if certainty and simplicity can be achieved only at the cost of rigid and narrow restrictions, that cost may be too great for society to bear.

³⁴ MODEL CODE, 141.