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## THE SUPREME COURT AND THE POLICE: A POLICE VIEWPOINT

VINCENT L. BRODERICK\*

### THE POLICE FUNCTION IN A DEMOCRATIC SOCIETY

Basic to this discussion is a consideration of the function of the police department in our society. It maintains law and social order, certainly. But the maintenance of law and social order is not an end in itself. It is a means by which it becomes possible for each of us, as individuals, to enjoy the individual liberties which are ours not only by constitutional mandate, but as children of God. A climate of law and social order is necessary if each of us is to live and study and work in peace. It is necessary to prevent the exercise of liberty by some—liberty gone haywire—to infringe upon the liberties of others. Ours is not a perfect society, and the very existence of liberty, particularly in our large urban complexes, depends upon the maintenance, by a vigorous, alert, competent police force, of a climate which will sustain it.

To do this job effectively, a police force, through each of its members, must be alert to the scope and nature of its responsibilities. The police officer is the servant of the public. His shield, his gun, his authority have been given to him in trust. He must be aware of his obligation to respect the individual human dignity of each member of the public. He has a right to expect such respect himself. He must understand the problems of the community he serves; he must have an awareness of the vexations, the frustrations, the deprivations which beset its citizens. He must perform his function fairly and impartially, without reference to the race, the national origin or the religious beliefs of the people whom he serves. If he has prejudices, he must be trained so to do his job that his prejudices do not influence his official actions. Above all, he must constantly remember that the ultimate end of the police function is not only the maintenance of a climate of law and social order, but also the exercise of liberty by every citizen within that climate.

When a police officer is authorized to take restrictive action, it is for the purpose of protecting society—of protecting the liberties of all—from the license of the few. And his authority to take re-

strictive action goes no further than the wayward activities of the few require.

In our society we have always been jealous of any attempt to restrict liberty. Police officers must recognize, and indeed should share in, this jealousy.

### THE PROBLEM OF CRIME

We in law enforcement, and many others throughout the land, are greatly concerned with a rising pattern of violent crime—crime which has grown at a rate far greater than that of our population. Some of this rise in crime is statistical, and is attributable to more comprehensive crime reporting; some also may be attributable to the presence of more police on the streets. It is possible that some portion of the rise has been occasioned by the fact that our youthful population has become proportionately larger than formerly.

A major contributing factor to the rise in crime has been the development in our urban centers of pockets of poverty and discrimination, where vast numbers of people are crowded together in ghetto areas, deprived of their individuality, bereft of their dignity, inadequately educated, ill-housed, with few employment opportunities, no future, no hope.

Violent crime in our society cannot be prevented by the efforts of municipal law enforcement alone. Since much of this crime stems from social and economic ills, those social and economic ills must be cured if a crime prevention program is to be successful. Improved police patrol can prevent much of the violent crime which occurs on the streets. It cannot reach those crimes of violence—and this includes the great volume of such crimes—which take place off the street, in family contexts or between acquaintances.

For too long our society has sought the solution for its crime problem exclusively in the area of improving and expanding its police services. Certainly we should seek constantly to improve our police services: it does seem to me that in expanding indefinitely our police forces we shall serve no useful purpose. The law of diminishing returns will come into play; the point of no further returns will soon be reached; and the problems stemming from the disorientation of a substantial portion of

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our population, with no stake in our society, will still be with us.

In the anti-crime effort a major commitment must be made—a commitment far beyond any that has been made to date—in the socio-economic field. Active pursuit of pervasive anti-poverty programs, embracing adequate housing, broad social services, comprehensive educational and employment training, and the expansion of employment opportunities is required to provide a broad attack on major root causes of crime—an attack which the police themselves are powerless to mount.

Recognition of the relatively limited nature of municipal law enforcement's role in the total crime picture provides, in my judgment, a necessary perspective for consideration of the effect of recent Supreme Court decisions upon crime prevention. "Unshackling" the police, if they have indeed been "shackled", will not begin to solve the problem.

#### THE SUPREME COURT AND THE ADMINISTRATION OF JUSTICE

The Supreme Court has articulated, in recent years and in various contexts, its concern for the rights of the individual when confronted with lawful authority. It has been suggested, by many concerned with the rise in crime, that the Court does not manifest a comparable concern for the corporate community—for the due administration of justice.

The Court's concern for the individual has manifested itself in, among other things, the extension to local law enforcement of the exclusionary rules with respect to unauthorized search and seizure (*Mapp v. Ohio*<sup>1</sup>); the extension to the states of the principle that an accused is entitled to counsel (*Gideon v. Wainwright*<sup>2</sup>); and a suggestion that the right to counsel extends to pre-judicial proceedings (*Escobedo v. Illinois*<sup>3</sup>).

I do not read into the Supreme Court's very real concern for the rights of individuals a lack of concern for the due administration of justice. The Court has, in certain of its opinions within the past year, graphically demonstrated its concern for the administration of justice. We in law enforcement must take note of that concern. For instance, in *Linkletter v. Walker*<sup>4</sup> and *Angelet v. Fay*<sup>5</sup>, the Supreme Court had before it the question of whether or not *Mapp* should be retrospectively

applied—a question left open in the *Mapp* decision. *Griffin v. California*<sup>6</sup>, in which the Supreme Court held that comment by a trial court and prosecutor upon a defendant's failure to take the stand violated his constitutional rights and impelled reversal, also left open the question of retrospective application, and this question was before the Court earlier this year in *Tehan v. Shott*.<sup>7</sup>

The Court decided that both *Mapp* and *Griffin v. California* should be applied only prospectively—in both cases largely because of the adverse impact which contrary decisions would have on the due administration of justice.

Mr. Justice Clark, speaking for the majority in *Linkletter*, noted that *Wolf v. Colorado*<sup>8</sup>, in 1949, had put the states on notice that the fourth amendment applied to state searches and seizures. It also put them on notice that the Supreme Court looked to the states to provide adequate procedures to implement the application of the fourth amendment to state processes. When the states did not, in the Court's view, respond, it extended, through *Mapp*, the exclusionary rule to the states. Mr. Justice Clark pointed out that in determining whether or not *Mapp* should have retrospective application, the Court considered the purposes of the rule, and the effect upon the administration of justice:

In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.<sup>9</sup>

<sup>1</sup> 380 U.S. 609 (1965).

<sup>2</sup> 382 U.S. 406 (1966).

<sup>3</sup> 338 U.S. 25 (1949).

<sup>4</sup> 381 U.S. 618, 637-38 (1965). In the course of the argument before the Court in *Linkletter*, Mr. Justice Harlan requested counsel for the National District Attorneys' Association, which appeared as *amicus curiae*,

<sup>5</sup> 367 U.S. 643 (1961).

<sup>6</sup> 372 U.S. 335 (1963).

<sup>7</sup> 378 U.S. 478 (1964).

<sup>8</sup> 381 U.S. 618 (1965).

<sup>9</sup> 381 U.S. 654 (1965).

Mr. Justice Clark noted that in those areas where newly enunciated constitutional principles had been applied retrospectively<sup>10</sup>, "the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process. Here . . . the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome."<sup>11</sup>

In *Tehan v. Shott*, which arose in the context of the Ohio Blue Sky Laws, the Court considered a statement by the Attorney General of California that retroactive application of *Griffin v. California* would free thousands of prisoners, and it refused so to apply it:

Empirical statistics are not available, but experience suggests that California is not indulging in hyperbole when in its *amicus curiae* brief in this case it tells us that 'Prior to this Court's decision in *Griffin*, literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial, since in many, if not most, instances, witnesses and evidence are no longer available. There is nothing to suggest that what would be true in California would not also be true in Connecticut, Iowa, New Jersey, New Mexico, and Ohio. To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.'<sup>12</sup>

The Supreme Court has been criticized for leaving open the questions of retrospective application of the principles enunciated in such cases as *Mapp* and *Griffin v. California*. But the very pur-

pose of leaving such questions open has been to provide an opportunity for an informed body of opinion to develop, for empirical data to be collected, and for the full consequences of resolution in either direction to be analyzed. Speaking for a majority of the Second Circuit *en banc* in *Angelet v. Fay*,<sup>13</sup> with respect to the question of the retroactivity of *Mapp*, Judge Harold R. Medina suggested that it was reasonable "to assume that the Court was fully aware of the difficulty of the question and preferred to decide it only after there had been an interval in which courts and legal scholars might have ample time to weigh the pros and cons".

What lesson do we draw from the approach of the Court in *Linkletter* and in *Tehan v. Shott*? We learn that the Supreme Court is determined that the rights of the individual will be protected, but it wishes to mandate that protection without jeopardizing the public weal and the due administration of justice. It recognizes, in short, that the Constitution is intended not only to protect individual rights but also to protect the rights of society.

#### MAPP AND ESCOBEDO

*Mapp* and *Escobedo* have been upsetting decision so far as the immediate problems of municipal law enforcement are concerned, but for very different reasons.

*Mapp* prescribes, for application to the states, a "simple" method of enforcing the constitutional prohibition against unreasonable searches and seizures: exclusion. Exclusion is a disciplinary device. It has been characterized by Judge Learned Hand in another context as "the only practical way of enforcing the constitutional privilege."<sup>14</sup>

The *Mapp* decision has without question complicated the law enforcement function. It has required that police officers be educated as to the requirements of the law of search and seizure. In New York City, for example, in 1960, the year prior to the *Mapp* decision, no more than a handful of search warrants were obtained by the New York City Police Department. Last year many thousands were obtained. New York State has long had search and seizure requirements on a state level comparable to those of the fourth amendment, but failure to comply with those rules had not rendered inadmissible evidence obtained after an illegal search<sup>15</sup>, and hence, as a practical matter, few search warrants were sought.

<sup>13</sup> 333 F.2d 12, 15 (2d Cir. 1964).

<sup>14</sup> *United States v. Pugliese*, 153 F.2d 497, 499 (2d Cir. 1945).

<sup>15</sup> *Cf. People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

to submit information as to the number of pre-*Mapp* cases in which New York State defendants were executed, after trials at which evidence was elicited that might have been affected by the *Mapp* decision.

<sup>10</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) has been retrospectively applied (*Doughty v. Maxwell*, 376 U.S. 202 (1964)). *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958), retrospectively applied the principle of *Griffin v. Illinois*, 351 U.S. 12 (1956) (State required to furnish transcripts of trial to indigents on appeal).

<sup>11</sup> 381 U.S. 618, 639 (1965).

<sup>12</sup> 382 U.S. 406, 418-19 (1966).

The more difficult educational problem has entailed the matter of permissible action on the street without a warrant; in other words what constitutes probable cause to make an arrest (and an incidental search) without a warrant. And the educational problem has been complicated by the absence of generally accepted ground rules.

Administrators in local law enforcement have moved consistently, in recent years, toward professionalization of the police function: toward recruiting the most able men, toward improving the initial and in-service training given to police officers. Great progress has been made, particularly in many of the larger cities. But the stark fact will always remain that the municipal police officer is called upon to take action alone, on the street, in the face of violently developing situations, without law books, without ready authorities, without legal advice, and quite often in an atmosphere of latent or overt hostility, in which his own life, and that of others, may be in danger. And in such a climate he is called upon to make decisive value judgments which ultimately may prove perplexing for scholars of the law who will consider them in the solitude of an office or in the relative tranquillity of a court of law. Should the criminal go free because the constable has blundered here?<sup>16</sup>

Is there not merit in seeking to develop some more flexible standards for enforcing the constitutional prohibitions against unreasonable search and seizure which do not require exclusion in the case of non-venal error? And is there not room for more flexibility in the determination of reasonableness in search and seizure on the street, in light of the conditions surrounding a particular incident? The exclusionary approach to unreasonable search and seizure cases has been developed in the context of federal law enforcement. *Mapp* has resulted in the application of that approach, without modification, to cases arising in municipal law enforcement. Too little attention has been paid, in my judgment, to the markedly different nature of the local law enforcement officer's responsibilities.

A local law enforcement agency is charged not only with the investigation and detection of crime; in addition, it has a responsibility not borne by the federal law enforcement agencies—that of maintaining public order.<sup>17</sup> The municipal police officer has the imperative of taking immediate action to

prevent breaches of the peace; he must react to developing crisis. This preventive responsibility is in addition to the responsibility for investigating crime which has already occurred, and calls, in my judgment, for the application of different criteria, and perhaps more flexible criteria, in evaluating the propriety of action taken. Yet in no federal case that I recall has this difference been noted, or been a factor in decision.<sup>18</sup>

*Mapp* is the law. It will continue to be the law. It was, in my judgment, a proper decision on its facts, and I would not change it. We in police work have learned to live with it. In time local judges will learn what it means and what it does not mean. In time, I hope, we will have developed principles on a local level which will make it possible for municipal law enforcement officers to cope with municipal problems, observing the substance and the spirit of the constitutional prohibition against unreasonable search and seizure, without being bound, in the maintenance of public order, by all of the precedents developed in the very different context of federal investigative law enforcement.

*Escobedo*, too, is the law, and we must learn to live with it. It has complicated the local law enforcement function not so much because of what it holds, but because of what it may portend.

It holds that on the facts presented (a defendant in custody, a lawyer present who wanted to see his client and a client who wanted to see his lawyer, a police refusal to permit that consultation) a statement obtained from the defendant was not usable as evidence.

*Escobedo* may portend that the right to counsel extends to the first stage of incarceration at the station house; that police officers before taking a statement must warn a defendant that he has a right to remain silent, that any statement may be used against him, and that he has a right to counsel; and that no statement may be taken from a suspect once police activity with respect to a crime has passed from the investigatory to the accusatory stage—when, in short, a possible witness has become a possible defendant. It may also portend that no statement at all may be taken after arrest.

On the facts I do not question that *Escobedo* was correctly decided. I have great trouble with some

<sup>16</sup> See *People v. Defore*, *supra* at 21.

<sup>17</sup> This point is brought out by Judge Henry J. Friendly in *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929.

<sup>18</sup> While federal interpretations have long been applied to problems arising from municipal law enforcement in the District of Columbia, the distinction between the law enforcement responsibilities of federal agencies and those of the municipal police authorities has not been considered in the cases.

of the language in the opinion, and the implications of that language. Thus the suggestion by Mr. Justice Goldberg that police officers investigate rather than interrogate (not, I think, an unfair paraphrase of what he said) implies that investigation and interrogation are separate functions, and misses the point that interrogation is an integral part of most municipal investigations.

*Escobedo* by its language has raised spectres for the future. Does it portend what I have suggested it may portend, or does it not? What guidelines do law enforcement officials presently have with respect to future interrogation of those suspected of crime? May suspects be questioned? Must they be warned? If so, what warnings must they be given? Must they be informed of their right to counsel? If so, at what stage?

Thus, for two related reasons, the *Escobedo* decision troubles municipal law enforcement officials: first, because it seems to pose a threat to police interrogation as an investigative technique; second, because it offers no guidelines for the future, save for the unlikely situation that the fact pattern of *Escobedo* may recur.

#### THE LACK OF GUIDELINES AS AN INVITATION TO CONSTRUCTIVE COOPERATION

The Supreme Court has often been criticized for the open-ended nature of many of its decisions. Must we in law enforcement guess what the Supreme Court will do next? Specifically, must the detective investigating a murder, or a kidnapping, or a rape, tailor his investigation, or his interrogation of suspects, to his interpretation of the direction which the Supreme Court will take in the next "hard case" presented to it?

On the other hand, can we expect the Supreme Court to develop for us a revised code of criminal procedure?<sup>19</sup> Is it the function of the Supreme Court to lay out the ground rules, to devise the procedures, to define the prohibitions? Is it not rather our function to react affirmatively when the Court has said, in effect: "Here you overstepped the bounds?"

The lack of definitive guidelines for the future is troublesome to law enforcement officers. Yet this open-endedness in Supreme Court decisions, beyond the specific problem before the Court, can be interpreted as an invitation to the public, to the commentators, to the experts, to develop data and statistical information, to point up problems, and to develop a constructive approach.

We should, in my judgment, so interpret the lack of definition in *Escobedo*. We in law enforcement are fortunate indeed that the Supreme Court has not yet supplied it; that we have not been foreclosed by too precise a definition in the *Escobedo* opinion itself.

We know that there must be a more precise definition of standards of interrogation in the wake of *Escobedo*. And we know that implementation of some of the portents which may be found in the *Escobedo* language will imperil effective law enforcement. I think we have received an undisguised invitation to present the problems we see, to develop them, and to marshal facts and data which will support our position. It has been an invitation, however, to present problems, facts, and data; not polemics.

Part of the *Mapp* doctrine—that the fourth amendment applied to the states—had been clear since *Wolf v. Colorado*. If, between *Wolf* in 1949 and *Mapp* in 1961, the state courts and legislatures, and municipal law enforcement, had taken effective action to make fourth amendment rights available to defendants, the *Mapp* decision might never have been forthcoming and the exclusionary rule might never have received a constitutional encrustation in the state search and seizure context.

*Mapp* is law, and *Escobedo* is law: we must, and we should, accept them both. More than that, we in law enforcement should accept enthusiastically the principle which underlies both cases—that American democracy places a high premium on individual human rights, and individual human liberty. Then we should play a creative role in determining how the principles of those cases can be intelligently incorporated into effective municipal law enforcement.

#### POLEMICS OR DIALOGUE?

One of the problems with the national discussion of the impact of recent Supreme Court decisions has been that we have engaged in polemics and not in dialogue. Condemnation of the Supreme Court for "shackling the police" rolls trippingly off the tongue, but it accomplishes little. Charges that the police seek to protect their "right" to violate individual liberties are scarcely more constructive.

And yet, perforce, and very quietly, much constructive work is underway. Thus the American Law Institute is in the course of preparing a model Code of Pre-Arrest Procedure, which entails a re-evaluation of the rights accorded those suspected of crime. Various other commissions, committees, and groups are studying the role of in-

<sup>19</sup> Friendly, *supra* note 17.

custody questioning in crime detection and law enforcement.<sup>20</sup>

The Supreme Court must be very much aware of the work being done by the American Law Institute and the other groups, and it will undoubtedly pay close attention to the progress of those projects.<sup>21</sup>

In England the so-called "Judges' Rules" require that arrested persons be warned of their rights before statements are taken from them. These rules, we are told, work very well, and appellate activity predicated upon improperly admitted confessions is rare indeed. One reason for this, undoubtedly, is that the trial court has a great deal of flexibility in the application of the rules to particular cases. Another very important reason is that the appellate courts have confidence in the police, in the prosecutors, and in the lower courts.

I suspect that one reason for the tremendous Supreme Court activity in recent years in the area of police and court procedures is that the Supreme Court does not have a comparable confidence in the police, in the prosecutors, or in the lower courts. In fact, there is to be discerned, in some Supreme Court decisions, a fundamental distrust of police and police methods that is generalized beyond the facts of the particular case and the police officers there involved. Mr. Justice White, dissenting in *Escobedo*, underlined the presence of this suspicion:

This new American judges' rule, which is to be applied in both federal and state courts, is perhaps thought to be a necessary safeguard

<sup>20</sup> Among them, the National Crime Commission, the District of Columbia Crime Commission, and the American Bar Association's Project on Minimum Standards for Criminal Justice. The Reporters for the American Law Institute are James Vorenberg, director of the President's Commission on Law Enforcement and Criminal Justice, and Paul M. Bator of Harvard Law School. On the Advisory Committee of the ALI are, among many others, David Acheson, Special Assistant for Enforcement to the Secretary of the Treasury; Richard G. Denzer, formerly in the New York District Attorney's Office, who served as Counsel to the New York Temporary Commission on Revision of Penal Law; Chief Judge J. Edward Lumbard and Judge Henry J. Friendly of the U.S. Court of Appeals, Second Circuit; District Attorney Frank S. Hogan of New York County; Michael J. Murphy and Howard R. Leary, former and present Police Commissioners of New York City; and Herman Goldstein, professor at Wisconsin University and formerly assistant Superintendent of the Chicago Police Department.

<sup>21</sup> Since this paper was delivered, the Supreme Court has rendered its opinion in the five confession cases. See *Miranda v. Arizona*, 86 Sup. Ct. 1602 (1966) and *Johnson v. New Jersey*, 86 Sup. Ct. 1772 (1966). The prediction contained in the text of this paper does not seem to have been borne out by the *Miranda* opinion.

against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere, unsupported by relevant data or current material based on our own experience. . . .<sup>22</sup>

It would be bootless, today, to attempt to assess the reason for this suspicion, or, indeed, to argue that none of it is justified. It does exist, and it may explain the Court's readiness to turn to exclusionary remedies when violations of rights are found.

We in law enforcement are fortunate, in my judgment, that through the American Law Institute, the National Crime Commission, and the Special Committee of the American Bar Association on Minimum Standards for the Administration of Criminal Justice, persons outside the law enforcement spectrum have become interested in police matters, in police techniques, and in the nature of the law enforcement process on a municipal level. They bring to their work a concern for individual liberties and a concern for the administration of justice. They will have great influence, in my judgment, not only upon the Supreme Court and inferior courts, but also—and this is significant—upon state legislatures.

We in law enforcement should familiarize ourselves with the work of these groups. We should offer our assistance, and we should participate actively with them in the development of their programs. We should delineate the problems we see in various proposals which they have under consideration. We should conduct experiments, pilot projects and research to test the feasibility of those proposals. We should be free with proposals of our own, and we should back up those proposals with data and statistics.

If we do not constructively participate in the work of these groups, we can blame only ourselves if the end product they develop, and upon which we may expect the Supreme Court, state courts and state legislatures to rely, provides unworkable guidelines.

#### THE DRAFT MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

The American Law Institute's proposed Model Code of Pre-Arrest Procedure (Tentative Draft No. 1) is in certain ways a startling document. It is must reading for anyone concerned with the administration of justice on a local level. It is

<sup>22</sup> 378 U.S. 478, 498 (1964).

startling because of its recognition of the right and obligation of police to *inquire*, even in the absence of reported crime; and because of its recognition of the need for police to *interrogate*, even after arrest. It is startling, also, because of its specification of a duty to warn arrested persons of certain rights, and because of its specification that the interrogation of prisoners be circumscribed in time, and that a sound recording be taken of the interrogation process.

A close look at some of the salient features of this draft Model Code is in order.

The draft sets forth a fairly comprehensive statutory pattern for relationships between police and suspected persons prior to arraignment. Among other provisions, it authorizes law enforcement officers to seek the voluntary cooperation of persons in furnishing information in connection with the investigation or prevention of crime, although the cooperation may not be compelled. It must be made clear to such persons that they have no legal obligation to respond. If the questioning takes place in a station house the person questioned must be informed that he may communicate with his counsel or others, and that they may have access to him.

The proposed Model Code also authorizes a police officer, if he has reasonable cause to believe that a crime has been committed, or, if he finds suspicious people in suspicious circumstances, to order persons in the vicinity to remain at the scene for no longer than 20 minutes. It also authorizes him to use force, but not deadly force, to detain such persons and to search them for deadly weapons.

With respect to arrest without a warrant, the Code contains the usual authority to arrest if the officer has reasonable cause to believe a felony, or a misdemeanor in his presence, has been committed. It also authorizes arrest for a misdemeanor not committed in his presence if the police officer believes the suspect will not otherwise be apprehended, or may cause injury to persons or damage to property. In determining whether or not there is reasonable cause, the officer may draw upon his own expert knowledge, and he may rely upon information from any informant whom it is reasonable to credit, whether or not he knows him.

When a police officer arrests a person he must, under the proposed Code, identify himself; he must notify the person that he is under arrest, and of the basis for the arrest. He must warn the person that

he is not obliged to answer any questions; that any statement may be used in evidence; and that when he reaches the station house he may communicate with counsel, relatives, or friends.

At the station house the prisoner must be given a similar warning by the desk officer which must be sound recorded, and he must be given a printed form with the same warning thereon. Information as to his presence at the station house must immediately be given to a central facility, available by telephone to the public, so that his counsel, relatives or friends can immediately locate him.

A person arrested pursuant to a warrant may not be detained at the station house and may not be questioned, except in the presence of or with the consent of counsel.

A person arrested without a warrant may be detained for a period of up to four hours of preliminary screening. He may be detained for a further period if he has counsel, and counsel consents. For certain specified crimes, the prisoner may be detained for longer than the four-hour period; the additional period authorized varies according to the time he was first brought to the station house:

If brought in between midnight and 8 a. m., detention permissible until 4 p. m.; if between 8 a. m. and 2 p. m., detention permissible until 10 p. m.; if between 2 p. m. and midnight, until 12 noon.

Once the authorized detention period is over, the prisoner must be released if no complaint has been issued, although if reasonable cause exists he may be issued a citation. Once the complaint does issue the prisoner must be brought before a magistrate without delay.

During the period of detention the prisoner may be questioned, fingerprinted, photographed, placed in a lineup or identified in some other way, and confronted with the victim, a witness, an accomplice, or evidence.

If the prisoner is interrogated during the period of detention, a sound recording must be made if the interrogation extends beyond a few questions, and a copy of the recording must be made available to the prisoner or counsel. No questions may be asked of the prisoner after a complaint issues, unless he is represented by counsel.

The Draft Code requires that counsel have prompt access to the arrested person, and that the prisoner be given reasonable opportunities, from time to time, to consult with counsel or friends.

It should be clear from the foregoing selective summary that the ALI's Draft Model Code articulates requirements which will greatly circumscribe post-arrest inquiry by law enforcement. It requires warnings which have not previously been required, and it imposes requirements which will be difficult and perhaps expensive to administer.

The Code demonstrates, at the same time, an awareness of the problems faced by law enforcement, and it represents a thoughtful and conscientious effort to strike a balance between the rights of the citizen and the needs of society for effective criminal investigation. It warrants careful scrutiny by all of us. And those of us in law enforcement should regard it as a constructive first step away from a collision course.

#### PROBLEMS RAISED BY THE MODEL CODE

Obviously this Model Code raises many problems: Will a suspect answer questions if he is informed of his right to remain silent? Will advice concerning the right to counsel negate further efforts at interrogation? We are told that such warnings present no problem for federal law enforcement officers, but, as has already been noted, federal agents do not engage in the same type of law enforcement functions as do municipal police officers. Nor, in fact, do they usually deal with the same type of crime—with murder, rape, robbery, assault—the crimes of violence which violate the social order of the municipality.

Will sound recording of an interrogation deter response? Do we really know? Are the time periods allotted for inquiry on the street sufficient in fact to provide effective inquiry and verification? Are the time periods allotted for post-arrest inquiry and interrogation sufficient?

There are many other questions which the Model Code Draft raises. I have no answers. I do not believe anyone has the answers at the present time.<sup>23</sup>

#### THE PILOT PROJECT APPROACH

A few years ago the Vera Foundation, after studying bail practices in New York courts, sug-

gested a pilot project of releasing prisoners charged with certain offenses without bail, after preliminary checks from which it could be determined that, in effect, the prisoners would probably return to answer the charges against them. The Manhattan Bail Project was instituted in New York, and it has been a rousing success.

A related pilot project was instituted in certain New York precinct station houses. Vera Foundation personnel were posted in these station houses. They briefly questioned arrested persons charged with certain crimes, made telephone verification of the information received, and in appropriate cases recommended to the desk officer, who could exercise a veto power, that summonses be served in lieu of arrest. This project, too, has been successful, and is in the process of being expanded, with police rather than Vera Foundation personnel handling the telephone verification.

The Manhattan Bail Project and the Manhattan Summons Project have made distinct contributions to the administration of justice. The Bail Project directly attacked the problem of discrimination among arrested persons on the basis of relative means; *i.e.*, the more affluent prisoner posting bail while his impoverished brother remained in jail. The Summons Project met this problem and also relieved the police officer of the non-productive burden, in terms of effective law enforcement, of accompanying his prisoner to court.

The significant factor about these projects is that they have, through simple and limited, although thorough, experiment, laid the groundwork for a constructive revolution in bail and detention practices throughout the country.

Why should this pilot project technique not be applied to problems raised by *Escobedo*, and in the aftermath of *Mapp*? Why should we not test, in our various police departments throughout the country, the proposals advanced in the Model Code draft? If we test these on a pilot project basis we can choose our area—a precinct, division, etc.—so that there is a comparable control area which can be used as a basis for comparison.

Cooperation of this sort, on a pilot project basis, can only be productive, whatever the results. Confining the scope of the project will minimize expense. If it is found, for example, that compliance with the Model Code requirements with respect to post-arrest warning, inquiry, access and arraignment procedures does not impede law enforcement ac-

<sup>23</sup> I understand that the New York State Police presently warn prisoners of their right to remain silent and their right to counsel. The New York State Police have a function in many ways more akin to federal than to municipal law enforcement agencies, and hence may not provide a useful experience pattern. A few municipal law enforcement agencies give similar warnings to their prisoners prior to interrogation, but I do not know of any study with respect to the effect of these procedures. Nor do I know of any study which develops the manner in which warnings, on a state or federal basis, are given.

tivity, this will be of interest to the American Law Institute in its ultimate adoption of a model code, and to legislatures which consider its adaptation within the several states. If, on the other hand, it is determined, on a documented basis, that adherence to the Model Code formulae impedes effective law enforcement, the nature and extent of the impediment can also be determined, and this too will be of interest to the American Law Institute in considering modification or adjustment of its formulae.

What I am suggesting, in brief, is that the time has come for law enforcement to play a creative role, a role which the Supreme Court cannot, and should not, play. Isn't the Supreme Court, after all, in the nature of a referee who has blown the whistle and said: "That play violates the rules?" The charting of the next play is not for it unless law enforcement and the states fail to heed its warning.

It is proper no longer, even if it were ever proper, for us in law enforcement to bemoan the fact that the whistle was blown. The whistle should be blown when individual rights are violated. Nor should we bewail the lack of guidelines for the future; instead, we should participate to the full in charting meaningful guidelines.

#### THE DEVELOPMENT OF PROCEDURAL GUIDELINES

What we should realize, in fact, is that we should seek and encourage legislative rather than judicial solutions to our problems. The Model Code of the American Law Institute points in that direction. Thus the constitutional imperative, as derived from *Wolf* and made binding by *Mapp*, is that there must be no unreasonable searches and seizures by the State. Is it not then for the State to delineate by statute those searches and seizures which are reasonable? The constitutional imperative to be derived from *Escobedo* is less clear and more ambiguous. Is it not for the state to clarify the area by definitive legislation?

I do not suggest that we seek state legislation in the areas of search and seizure or post-arrest interrogation which will thwart the Supreme Court. I suggest, as Judge Friendly has previously suggested,<sup>24</sup> that the Bill of Rights is not a code of criminal procedure, and that a legislature rather than the Court is the appropriate body to which to turn for procedural direction. When legislation is sought, the predicate for that legislation is a body of facts, and the body of facts germane to law en-

forcement problems can best be developed by those in law enforcement. And if, for example, a legislative procedural blueprint is developed for post-arrest interrogation, underlying the legislation will be legislative findings, based upon empirical data, as to the reasons why the legislation is necessary. I would expect that if there were a challenge to the admissibility of a confession taken in conformity with that legislation, the basic question for the Court would concern whether the legislation was reasonable, and it would have access to the legislative findings in making this determination.

#### POST-ARREST INQUIRY

The tentative draft of the ALI Model Code limits the period during which post-arrest inquiry can be made, and it delineates carefully the circumstances under which it can be made, but it does not proscribe it. The draft, and the commentary contained therein, indicate that the draftsmen have been at least tentatively convinced of the necessity to permit law enforcement officers some freedom to inquire after arrest.

While, as I have noted earlier, the Supreme Court is obviously interested in problems of the administration of justice as they affect the common weal, we cannot assume, in face of some of the possible portents of *Escobedo*, that the Supreme Court has accepted as a fact that post-arrest inquiry is more than an important tool of law enforcement and is, in fact, a necessity. Nor, of course, can we be sure that the American Law Institute will retain the provisions circumscribing and then authorizing such inquiry. And it is always possible that a state appellate court will lay down a rule excluding all post-arrest confessions.<sup>25</sup>

We who have been engaged in law enforcement are certain that the right of inquiry is integral to the continued effectiveness of much of our crime detection effort. And since a pattern of crime detection deters crime, it is integral to much of our crime prevention effort. The arguments can be marshalled.<sup>26</sup> But marshalling arguments is very

<sup>25</sup> The Supreme Court may be the bellwether, but often state courts outstrip it in progressing down the road. I am sure that this can be documented by any number of post-*Mapp* search and seizure cases. And can we say, in the wake of *Spano v. New York*, 360 U.S. 315, that *Escobedo* went any further in its holding than did the New York Court of Appeals in *People v. Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628?

<sup>26</sup> Nowhere, in my judgment, have the arguments against proscription of voluntary post-arrest confessions been as effectively marshalled as in the brief filed on

<sup>24</sup> See Friendly, *supra* note 17.

different from, and much less effective than, marshalling evidence. We pay the penalty today for too much polemics and too little research in the past. It is not too late, however, for us to marshal the evidence, gather the data, do the research which will persuade the Supreme Court not to prohibit truly voluntary post-arrest confessions—evidence which will sustain the draftsmen of the ALI tentative draft in retaining the provisions authorizing post-arrest inquiry and which perhaps will persuade them to broaden their scope; and which will deter state courts from outstripping the Supreme Court in placing restrictions on the admissibility of post-arrest confessions.

What sort of evidence should we gather; what data should we compile? To those engaged in law enforcement it seems self-evident that post-arrest inquiry is essential to effective crime detection. We postulate this judgment, however, on our past experience—experience with burglars arrested in the act who are suspected of having committed a series of other burglaries throughout the city, or within a given area; with kidnappers whose colleagues still hold the victim; with criminals who have stolen property which has yet to be recovered; and with solitary killers where the only witnesses to their crimes, the victims, are dead.

Self-evident? Perhaps. But our judgment is predicated on a vast body of past experience, personal or vicarious, and the data with respect to this experience can and should be assembled. Are there cases where, save for post-arrest inquiry of the defendant, the crimes would not have been solved? Certainly there are. But we must assemble the data. Are there cases where the failure to make post-arrest inquiry would have required the release, to prey again upon the public, of a compulsive killer or rapist? There are. But where is the data? Why has it not been made available to the Supreme Court, to every state appellate court where the admissibility of an incriminating post-arrest statement is at issue, and to those working on the ALI's model code?

And the evidence and data need not, and indeed should not, all be historical. In every police department in the land today we should be compiling current, up-to-date information on the processes of crime solution. We should, if possible, enlist the assistance of objective outside researchers, perhaps from universities or law schools, perhaps retained by various foundations.

behalf of the United States by Solicitor General Thurgood Marshall in *Westover v. United States*, *subjudice* in the Supreme Court.

## POST-ARREST WARNINGS

It is not too late for us to gather empirical data with respect to the necessity or the desirability of warning arrestees of their right to remain silent, and of their right to counsel. Should such warnings be required? The prevailing opinion among municipal law enforcement officers seems to be that they should not, because they will deter effective post-arrest interrogation. But do we know this? The special agents of the FBI generally give such warnings to those suspected of crime. Is the difference between federal and municipal law enforcement, and the crimes and criminals with which each is concerned, such that these warnings, particularly with respect to right to counsel, will prevent meaningful inquiry in the municipal context, when they do not do so in the federal context? Or in federal law enforcement has the investigation in fact been completed when the arrest is made, so that post-arrest inquiry is not a vital part of the investigation? If this is so, the fact that warnings may actually be a deterrent to effective inquiry is relatively unimportant in the federal context, and federal experience is irrelevant to municipal law enforcement problems.

Municipal law enforcement officers *know* that post-arrest inquiry is vital; the problem is to make available to others the evidence and data upon which that knowledge is grounded. With respect to the deterrent influence of warnings upon the *effectiveness* of post-arrest inquiry, most municipal law enforcement officers can make only a slightly informed guess, since they have rarely given such warnings.

## THE USEFULNESS OF PILOT PROJECTS

Here is a prime area for the development, on a prospective basis through pilot projects, of empirical data. Why cannot every large police department institute pilot projects, in which simply the warnings with respect to the right to remain silent are given? Then in other areas the full panoply of suggested warnings, including that of the right to counsel, would be given. The rest of the city would remain a control for comparison purposes. Comparison could also be made with past experience in the pilot project areas. The information derived from the pilot projects would be, in my judgment, invaluable.

If the warnings substantially deter effective investigation of crime, and hence the due administration of justice, this information would be valuable

to the Supreme Court and to all other non-law enforcement groups considering the matter. Any value judgment would then have to balance the desirability of requiring the warnings against the established impediment which such a requirement would impose to the due administration of justice. If, on the other hand, it develops that the warnings do not materially impede effective post-arrest inquiry, then there will be no over-riding reason why the warnings should not be given, and the way will be clear to require them.

The areas for the pilot project studies I have suggested will have to be carefully selected. They must include various types of precincts, with various social, economic, and ethnic compositions. Police investigations tend to be most difficult in those municipal areas where, for social, economic or historic reasons, there is a hostility to the police. Ironically, it is in those very areas that the public most needs protection because it is against the residents of those areas that crime—violent crime—tends to be most rampant. There is already, in such areas, a reluctance, bred of hostility, to talk to police. It is possible that warnings given in the course of investigation will reinforce this reluctance and make effective inquiry impossible. Such areas, therefore, should be included in the pilot projects, but the projects should not be confined to them.

#### THE IMPORTANCE OF POST-ARREST INQUIRY

Actually, the most critical threat posed to effective law enforcement today (and hence to the protection of society as a whole) is that of the proscription of post-arrest, pre-arraignment, inquiry. In my judgment such inquiry should be permitted, and the constitutional focus of the Supreme Court should be upon whether or not, in light of all the circumstances, the statements elicited from the defendant are voluntary. In determining whether or not the statements are voluntary the Court must consider, of course, all of the circumstances: where the statement was made; who was present; if there was interrogation how long it lasted and what was its nature; whether or not the arraignment was postponed to enable the interrogation to take place or continue; the age, education, background, and mental state of the defendant; the nature of the alleged crime; the law enforcement exigencies, if any, requiring extended interrogation, such as the need to establish the whereabouts of the defendant's partners, or perhaps of his victim, or the location of stolen property.

It is difficult to recreate for a court the pressures

under which the investigation of serious municipal crime is carried out. The court, it seems to me, tends to equate criminal investigation with the preparation of a case for trial, but the analogy is inapt. There are, at times, hectic activities in connection with the preparation of a case for trial, but it generally involves the careful organization of available pieces of evidence, with only an occasional scramble to secure a missing piece. Investigation of serious municipal crime, on the other hand, is constant scramble: scramble to locate evidence, and missing witnesses, reluctant witnesses, and perhaps unknowing witnesses; scramble to verify statements, by door to door searches, laboratory analyses, and interviews with other witnesses; scramble to make and maintain order out of a chaotic flow of information and misinformation; scramble to establish identification.

Arrest in municipal law enforcement—and in striking contrast to the patterns of federal law enforcement—very often necessarily takes place at the beginning rather than the end of an investigation; often before there has been identification of the arrestee or even verification of the crime to be charged. To proscribe post-arrest inquiry would in many cases frustrate investigation. It might even frustrate exoneration of the accused. By the time the case reaches court the pieces have fallen neatly into place, and the whole tale unfolds in an orderly pattern, but the investigation itself is often chaotic. In reviewing the propriety of action taken, this atmosphere of constant flux, with the pressure it places upon the police officers concerned, must not be overlooked.

All this goes, too, to considering whether or not the cut-off suggested by Mr. Justice Goldberg is appropriate as the touchstone for determining the admissibility of a confession. When, one may ask, does the investigation turn the corner, with respect to the defendant, from the investigative to the accusatory stage?<sup>27</sup> Who is to judge, in the chaos of the station house, when that corner is turned?

Solicitor General Marshall pointed out, in the brief filed on behalf of the Government in *Westover v. United States*, that the greatest need, in the investigation of a criminal case, is "to hear a suspect's first explanation and then to screen his story so as to make a prompt and proper disposition of his case." In many cases, investigation which follows inquiry of an arrested suspect may establish his innocence and this, as General Marshall has noted, is certainly relevant in striking a balance

<sup>27</sup> *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

between permissible and prohibited post-arrest inquiry. This inquiry may not establish innocence, but may establish the appropriateness of a lesser charge. It may also—and often does—provide the only means of solving other crimes which the suspect committed, or of establishing the identity of a suspect's colleagues. Therefore, in my judgment, it would seriously deter effective law enforcement if a rule were promulgated proscribing post-arrest inquiry. Post-arrest statements should be admissible in evidence if, on consideration of all the circumstances, it is determined that they were voluntarily made.

#### CONCLUSION

The primary thrust of this paper has been to call upon law enforcement agencies to clearly recognize the subordinate role which law enforcement plays in the democratic scheme. Law enforcement is not an end but an instrument; and it is an instrument of the people. The climate of law and social order that law enforcement agencies are charged with maintaining is not an end but a means; the end is the availability to all of the opportunity to exercise and enjoy their rights and liberties. Thus, it is incumbent upon municipal law enforcement agencies so to order their activities that those activities themselves do not violate those rights, and do not unduly impinge upon those liberties.

It is important, at the same time, that law enforcement not be deterred from its task of maintaining law and social order, by restrictions which may render it substantially less effective. Every extension of newly enunciated rights into the area of law enforcement activity has the potential for seriously impeding law enforcement. Mr. Justice

White drew attention to this problem in his *Escobedo* dissent when he said:

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.<sup>28</sup>

All law enforcement activities impinge, to some extent, upon individual liberty. The justification for this impingement is that the activities are necessary to insure individual liberties for all; only the strong enjoy liberty in a chaotic society.

What we must strike, therefore, is a balance: how much impingement by law enforcement will be necessary in the corporate interest of society? Today I call upon law enforcement to play a constructive, rather than a substantially negative, role in assisting to strike that balance. But I call also upon those primarily concerned with the rights of the individual to recognize the essential role which effective law enforcement plays in endowing individual rights with significance, and I ask them to pay close attention to the arguments which law enforcement representatives make today, and to the evidence and data they may submit tomorrow.<sup>29</sup>

<sup>28</sup> 378 U.S. 478, 499 (1964).

<sup>29</sup> I suggest, in this paper, various pilot projects on the part of municipal law enforcement, and am subject to the criticism that I did not initiate such projects while I was Police Commissioner of the New York City Police Department. I regret that I did not. Expansion of the Manhattan Summons Project was, in my short time in the Department, vigorously pursued, and, if I had remained, pilot projects along the lines suggested herein would also have been undertaken.