Draft Code On Suspects Made Public

ALI Draft Expected To Fan Controversy Over Police Queries

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A proposed model code, governing police conduct from the time a suspect is arrested until he goes before a judge on a formal charge, was made public in tentative draft form yesterday by the American Law Institute.

The draft code is certain to add fuel to the national controversy over criminal law. The questions lie at the heart of this controversy:

1. What right do police have

See ALI, A7, Col. 1

to question prisoners who lack counsel?

2. How long can the questioning last?

ALI draftsmen, headed by Justice Department attorney James Vorenberg and Harvard law professor Paul M. Bator, contend that the code would permit necessary police questioning without running afoul of a suspect's right to counsel and privilege against self-incrimination. Critics of the code already have charged that it would legalize invasion of important individual rights, especially when the accused is poor and ignorant.

Is Incomplete

The code is incomplete and a long way from official adoption by the ALI, a select group of lawyers, teachers and judges who work on improvements in the law.

Its latest version, hammered out over several months by an advisory committee of law teachers, prosecutors, defense attorneys, judges and police chiefs, is now being circulated to 1800 ALI members. Later it will go to more than 7000 members of the American Bar Association, which will debate the subject at its August convention.

The 39-member ALI council has "agreed in principle with the approach" of the drafters. But several important sections are still unwritten, including key provisions on the exclusion of illegally seized articles.

Here are some of the draft code's most important and controversial features:

• A policeman could "stop" a person in suspicious circumstances and order him to remain in his presence up to 20 minutes before arresting him or letting him go. The officer could lightly "frisk" the person as a self-defense measure, but the code does not yet say what use could be made of any weapons or contraband discovered.

• Police executing arrest warrants would have to take suspects promptly before a judge. But arrests without warrants would be permitted if the officer has "reasonable cause"—what the drafters call the equivalent of the Constitution's requirement of probable cause—to believe that the suspect has committed a crime. During a period called "preliminary screening," police would have four hours to investigate and question a suspect in serious crimes such as murder, robbery and rape; the suspect could be detained up to 22 hours but not questioned except for comment on new evidence."

• At headquarters, police would be required to warn the suspects that he is not obligated to talk, that anything he says may be used in evidence and that he may telephone counsel, friends or relatives. Questioning could take place without the presence of counsel. Authorities would not be required to provide counsel for those unable to hire a lawyer.

• Confessions obtained in violation of the code's warning provisions or other safeguards would be thrown out of court at the defendant's trial. Other evidence or leads obtained illegally would also be inadmissible — unless the trial judge ruled that the violation was inadvertent or not grave" or that police probably would have found the evidence anyway.

• The warnings and interrogation would have to be tape-recorded and made available to defense counsel.

Delay Refused

Washington's long-standing controversy over crime and the rights of the accused is intimately caught up with the code's recent history. Last year the Senate rejected an ALI appeal to delay action on city crime legislation, but the Senate has been unable to reconcile its bill with a House measure even more vigorously opposed by the ALI.

One recently added provision in the code calls on police to notify indigent prisoners if there is a free legal service available. The provision undercuts the recent opposition of United States Attorney David G. Bress to a request by the Neighborhood Legal Services Project here that police mention its availability in their warning to prisoners.

The 250-page document is certain to reach the justices of the Supreme Court, who took under advisement last week five cases raising deeply disputed questions about the use of confessions obtained from prisoners who lacked counsel.

Supporters of the code concede that a sweeping set of Supreme Court rulings could wash out much of their efforts to set a pattern that state legislatures could copy. Some of the backers are known to feel that some affirmative action on the code is needed at the ALI's meeting here in May if the code is to have any impact on the Court.

Yesterday one ALI drafter, Judge George C. Edwards of the U.S. Court of Appeal, released a letter criticizing the manner in which an American Bar Association committee had approved the code in principle. Edwards write Chief Judge J. Edward Lumbard of the 2d Circuit protesting that the ABA group had been asked to approve the draft without seeing or discussing it.

Lumbard, chairman of an ABA criminal law study, said yesterday that Edwards had been outvoted, 10-to-1. He said the committee's approval was tentative and designed merely to stimulate discussion.

Leading critic of the code has been Chief Judge David L. Bazelon of the United States Court of Appeals here.

In an extraordinary ex-

JAMES VORENBERG
. . . role in drafting code

change of letters last summer, Bazelon asked Attorney General Nicholas deB. Katzenbach to join him in denouncing the code's failure to provide counsel for the poor. Katzenbach replied that the law cannot always equalize the treatment of rich and poor.

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AN INDEPENDENT NEWSPAPER

Inquisitorial Justice

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A tentative draft of the American Law Institute's long-heralded Model Code of Pre-Arraignment Procedure has at last been made public. What it amounts to is nothing less than a proposal to abandon the American system of accusatorial justice and to embrace in its place at least the beginnings of the European system of inquisitorial justice. The European system is certainly not without merit. However, it is at variance with the Constitution of the United States and could not be adopted here without major amendments of that Constitution, and especially of its Bill of Rights.

The dominant theme of the ALI proposal is that police officers must be afforded opportunity to investigate a crime by interrogating a suspect during a period following arrest of the suspect and prior to his being taken before a magistrate and charged with a specific offense. To facilitate this kind of investigation, the ALI code would allow the police to arrest a suspect whenever they believed they had "reasonable cause" to do so but without requiring them to let a magistrate pass promptly on the validity of the arrest. The ALI code would also allow the police to detain the arrested person for a period of "preliminary screening" to last not more than four hours—and longer in some situations—during which they could question him whether or not he had a lawyer present; and no lawyer would be provided for persons unable to hire one.

We think these procedures are constitutionally and morally wrong. First, they make possible arbitrary and capricious arrests, the very hallmark of a police state. It is true that they authorize arrests only when the police think they have "reasonable cause" to make them but they abandon that judicial check on police action which is indispensable to the protection of liberty. "History shows," as Mr. Justice Douglas has observed, "that the police acting on their own cannot be trusted."

Second, these procedures seem to us to fly directly into the face of what a unanimous Supreme Court said in the *Mallory* case:

> The police may not arrest upon mere suspicion but only on "probable cause" . . . The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt . . . It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Third, these procedures dangerously erode the constitutional privilege against self-incrimination by making it contingent upon an arrested person's knowledge of his rights and upon his resolution in asserting them under hostile circumstances. It is true that the code provides for a police declaration of right to silence; but this is in no sense equivalent to a judge's explanation.

Fourth, these procedures wipe out the constitutional right to the assistance of counsel at the moment when such assistance can be most effective. Again, the code flies in the face of Supreme Court decisions. The Court has said that "a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." And it has said in another case that "when the process shifts from investigatory to accusatory and its purpose is to elicit a confession—our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer." If a rich man may obtain a lawyer, equal justice demands that a poor man be provided one.

America has no need to cheat men of their constitutional rights, or to take advantage of their ignorance and helplessness, in enforcement of its laws. America has no occasion to enthrone its police or to confer judicial powers upon them. We are confident that the members of the American Law Institute will reject this alien code when they come to pass upon it. The Constitution of the United States is doubtless a difficult and restrictive document. But it has this virtue: it has kept America a free country.