Sacrificing The Innocent, Freeing The Guilty?

The Debate Grows Over Police Interrogation And Rights of the Accused

Natural Observer 8/9/65

It is better that ten guilty persons escape than that one innocent suffer.
—WILLIAM BLACKSTONE, 1765.

How far should a legal system go in making certain that the innocent do not suffer? When is society so imperiled by the freed guilty that it must risk sacrificing the one innocent?

The problem Blackstone discussed 200 years ago is going through another debate. It focused last week on an exchange of letters between Attorney General Nicholas deB. Katzenbach and Judge David L. Bazelon of the U.S. Court of Appeals, the questioning of U.S. Supreme Court nominee Abe Fortas, and pressure for a new crime law in the District of Columbia, whose laws sometimes prove "model" legislation.

Behind the debate is the fact that Federal court decisions, aimed at protecting the innocent, have been making it harder for police to bring the guilty to justice in the lower courts. The FBI report two weeks ago that the crime rate is advancing six times faster than population growth has increased the warmth of the debate.

Arguing Over Police Interrogation

Mr. Katzenbach and Judge Bazelon argued over the effects of police interrogation. The judge complained that it primarily affects the poor, who cannot afford lawyers. Mr. Katzenbach countered that law enforcement would be crippled if suspects were insulated from police questioning.


Mr. Katzenbach

Mr. Fortas, whose opinion will affect crucial Supreme Court decisions in this area, told the Senate Judiciary Committee it was "absolutely essential" for police to have time to question persons suspected of crime.

The Senate's District of Columbia Committee, pressured by a series of violent crimes in the nation's capital, reported out a crime bill that would give Washington police three hours to interrogate suspects. Not only whether accused people are to be questioned, but how long, is part of the argument.

Debate Across the Nation

Across the nation similar legal debates are being waged over the rights of the criminally accused.

✓ The New Jersey Supreme Court, in apparent defiance of a Federal court, last month upheld two lower-court murder convictions, even though the convicted had not been advised of their right to counsel before signing confessions.

✓ The Georgia Supreme Court last month ignored a U.S. Supreme Court de-

Please Turn to Page 13, Column 1

Continued From Page One

cision, upheld a death sentence, and lashed at the High Court for "shaking the foundation of orderly judicial trials which can only be followed by chaos in the courts of America."

✓ Earlier in the year, the California Supreme Court and a U.S. Court of Appeals threw out convictions, ruling that the accused cannot be interrogated until he is advised of his right to counsel.

The Door-Opening Escobedo Case

The U.S. Supreme Court in June of last year opened the current phase of this ancient debate with its already famous decision on *Escobedo vs. Illinois*. This reversed a murder conviction against Danny Escobedo, a young laborer, because he confessed only after Chicago police refused to let him see his attorney until after questioning.

It probably will be several months before the Supreme Court further clarifies its Escobedo ruling, letting police and lower courts know exactly what kind of confessions are valid, how much interrogation is allowed. But policemen and prosecutors are already convinced that the courts are handcuffing them by putting further restraints on interrogation, one of their most important crime-solving tools.

Most convictions in crimes of violence are based on confessions elicited during questioning, according to the Justice Department. Few city police forces go further than advising a suspect that any statement he makes may be used against him; some don't go that far.

The Constitution and Bill of Rights, as in most matters, offer guidelines, but fail to go into important detail.

When Is It Voluntary?

The Fifth Amendment states that ". . . [no] person . . . shall be compelled in any criminal case to be a witness against himself. . . ." But when is a confession voluntary and when involuntary? The Escobedo ruling did not answer this question fully, for that decision became enmeshed in a provision of the Sixth Amendment: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Is the state obliged to provide the ac-

cused with a lawyer only at the trial itself? During his arraignment? During questioning at the police station? At the very moment of arrest? The Supreme Court has not been clear, although Escobedo suggested that the critical moment of defense proceedings may well be at the time the accused is placed under arrest. If so, every county in the nation would have to underwrite the costs of "public-defender" staffs that would be as large or larger than those of the prosecutors. Such defenders would tend to shield all criminally accused from police interrogation, short-stopping potential confessions.

Like police forces around the world, those in America have a history of abuse in the area of interrogation, sometimes have employed the third-degree spotlight and the rubber hose. The Bill of Rights outlaws physical coercion in obtaining confessions, and in recent years little physical abuse has been employed. Instead, the sophisticated interrogator often employs psychology in prying loose a confession. Is this compelling a witness to testify against himself? The Supreme Court has not addressed itself to this issue, but law officers fear the trend is away from allowing any confessions obtained through questioning.

A Sheriff's Testimony

Sheriff Michael Canlis of San Joaquin County, California, approximated the general attitude of police officers toward the courts when he testified at a Senate hearing two years ago:

"Respect for the law is diminishing rapidly, and those who seek illegitimate gain hesitate less and less to commit grave, unprovoked assaults against their hapless victims and law enforcement officers, and even to sacrifice human life when it suits their purpose to do so.

"Some of the High Court decisions decribe the activities between the criminals and law enforcement as if we were engaged in some sort of contest, with rules applicable to both, applied equally and fairly, as if we had chosen up sides."

With no encouragement from the courts, law officers are turning hopefully to Congress for support, asking not for legislation running counter to the court decisions—for they expect such law would be declared unconstitutional—but for model legislation that would allow them the broadest use of their investigative powers and at the same time be upheld as Constitutional.

The District Crime Bill

Much of their attention is directed at the crime bill reported out by the Senate District of Columbia Committee last week. For in modifying a controversial portion of the Federal Rules of Procedure, it is expected that the bill would have a sweeping influence on investigative procedures in all of the states.

Working separately but co-operatively on model legislation to deal with the same subject are dozens of distinguished law professors, jurists, prosecutors, defense attorneys, and police officials, with sponsorship by both the American Bar Association and the American Law Institute (ALI). The Office of Criminal Justice, a branch of the U.S. Department of Justice, is working with these groups, drafting recommendations on law that will be offered to Congress.

The controversial portion of the Federal Rules with which their studies deal is the so-called Mallory Rule, a Supreme Court interpretation of Rule 5 (a) of the Federal Rules drafted by Congress in 1943.

Why a Conviction Was Reversed

In 1957, the U.S. Supreme Court reversed a rape conviction, which had been found against Andrew R. Mallory, a janitor in the District of Columbia. The Court pointed out that Mallory had been detained by District police for more than nine hours before he signed a confession, that he was "not told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and 'that any statement made by him may be used against him.' "

Police had opened their questioning of Mallory by telling him his brother had already implicated him. After 30 or 45 minutes of questioning police asked if he would take a lie detector exam, and he agreed. Following an hour and a half of steady interrogation, he "first stated that he could not have done this crime, or that he might have done it. He finally stated that he was responsible," the polygraph operator testified. The Supreme Court refused to "sanction this extended delay," and, "not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him."

This, said the court, was in violation of Rule 5 (a), which states that a person arrested by Federal officers must be brought before a magistrate "without

TABLE OF CONTENTS

From a handbook on police interrogation, methods the courts decry.

unnecessary delay."

Justice Frankfurter's Views

In writing the decision, Justice Frankfurter said:

"In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5 (a) as a barrier."

Since 1957, the Mallory Rule has been rigorously applied and deeply felt in the District of Columbia; several subsequent convictions were thrown out because the appeal courts felt there had been "an unnecessary delay" between the time a suspect was arrested and brought before a magistrate to be formally charged.

In one 1963 case, a confession was thrown out although it occurred within 15 minutes after arrest. The ruling was based on the ground that no interrogation of *any* length is permissible, that an arrested person must be brought before a magistrate forthwith.

District Police Chief John B. Layton, asking the Senate's District of Columbia Committee for relief, declared: "Under the restrictions of the Mallory ruling and other decisions flowing from that ruling, our rate of offense clearance has decreased and the related effectiveness of swift arrest and punishment for crime has been diluted."

Questioning Is Permitted

The U.S. Department of Justice last month ordered Washington police to clearly advise the accused of all his rights, especially his right to silence, but said it would permit questioning between time of arrest and time of arraignment, 10 a.m. every morning. This in itself sparked a Senate controversy, with Sen. Wayne Morse of Oregon insisting the order contravenes the spirit of *Mallory*.

Cincinnati Police Chief Stanley Schrotel, commenting on police frustration before the Senate's District Committee, reminded the courts that they are "as ethically bound to ascertain the guilt of the guilty as (they are) to ascertain the innocence of the innocent."

Mr. Schrotel complained that many people believe "the police are evil," that they believe third-degree spotlights and rubber-hose beatings are still the order of the day in police grillings. He said:

"We go so far—in fact in the Mallory case—mindful of this grim specter of public criticism, they even took Mr. Mallory to a doctor to have him examined so that they would be in a position to say that he bears no particular marks of abuse at the hands of the police. The police have to constantly labor with this."

Senator Dominick's Proposal

On an earlier Senate proposal by Sen. Peter Dominick, Colorado Republican, that police be allowed no more than six hours of interrogation before the accused is taken to a magistrate for arraignment, Mr. Schrotel testified:

"The inconvenience of six hours of detention short of arrest is experienced only by the innocent person who inadvertently or by poor judgment is found in a situation that arouses police suspicion and which the suspect is unable or unwilling to explain on the spot. In view of the present jeopardy to public security, such inconvenience seems a small price to pay for the privilege of living securely and peacefully."

While those in law enforcement believe this position is reasonable, the courts, university legal theorists, and political leaders are divided on whether the standard police techniques are "a small price to pay" for preserving the collective peace and security.

The Vote in The Escobedo Case

In the Escobedo decision the Supreme Court divided, five to four, with former Justice Arthur Goldberg taking the lead in expanding the rights of the criminally accused:

"No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of Constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

Justice Byron White, joined by Justices Clark, Stewart, and Harlan, took striking, almost alarmed exceptions to the majority opinion in *Escobedo*.

"The decision is thus a major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether made involuntarily or not." And " . . . the Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial."

Professors With Opposing Views

Noted legal theorists, like Prof. Louis B. Schwartz of the University of Pennsylvania law school, have opposed relaxation of restraints on police. Others, like Prof. Herbert Wechsler of Columbia law school, who is also director of the American Law Institute, favors some relaxation of these court-imposed restraints.

Mr. Schwartz wrote in April as testimony in a Senate hearing:

"The proposed repeal of the Mallory rule extends police power to detain suspects without authorization by impartial judicial authority, and for the unconstitutional purpose of securing incriminating statements. . . . .

"I am opposed to these extensions of police power because they are oppressive and useless. The problem of crime prevention is real and very important, but misdirected police power will not solve that problem."

The American Law Institute, now completing a three-year study on these problems, hopes to influence Congress and state legislatures to adopt legislation that would enable police to keep, with safe-

guards, their investigative tools of interrogation. Mr. Wechsler explains:

"It proceeds on the theory that there is a duty to co-operate with a police investigation, that the police must have authority to stop and question and detain upon the street, and finally, that there must be authority to screen after an arrest has been made, without immediate presentment of a formal charge.

"It takes the view that there is an important difference between the grounds that warrant an arrest, as a preliminary to such screening, and the grounds that warrant lodgment of a formal charge.

"It contemplates, of course, the propriety of some interrogation under careful standards that increase as the period of screening is protracted to a limit that will be described."

Fashioning a Model Law

The semifinal draft of the institute's model law was dissected and debated in closed session at an Atlantic City meeting in June and will be fashioned into final form in November.

By no means, however, will any "outside" advice, such as that from the institute or American Bar Association, pass into law without debate, especially in the Senate. The House last year was so eager to bolster the fight against crime and expand police powers that it passed a bill that almost everyone now agrees would have been torn apart in the courts.

In the Senate, liberal senators like Wayne Morse of Oregon and Vance Hartke of Indiana have made it clear they do not favor extension of police power. In a joint report to the Senate, they appeared to feel that elements of the police state would be invited in such extension of police powers:

"It is plain that . . . this runs against the grain of the Anglo-American system of administering criminal justice. [It] would inject into our accusatorial system of criminal-law enforcement the seeds of the inquisitorial system."

Skilful Investigation Enough?

Senator Morse said he believes the police should be able to prove their case through evidence secured by skilful investigation, not by interrogation of the accused.

He says, however, that he will listen to the findings of the American Law Institute, that perhaps it has been able to work out a solution satisfactory to law enforcement but also containing the necessary Constitutional safeguards.

The unfinished ALI report, prepared by Harvard law school's Dr. James Vorenberg, who is also chief of the new Office of Criminal Justice, has not yet been openly debated, but those familiar with it believe it to be a workable compromise. It would not be entirely satisfactory to either police officials or to civil-rights liberals.

It would provide that a suspect detained for reasonable cause and brought to police headquarters would have to be advised of his rights to remain silent, that he may call on friends or relatives, with public funds if necessary, and have access to an attorney.

The Nature of the Protection

He would be protected during interrogation, which would have no time limit, by the presence of friends, relatives, or counsel, and in the absence of these, police would have to tape-record the interrogation. If he admits a crime during custody, the courts could not exclude the confession, except if the previously mentioned safeguards were not observed.

But the hearings, discussions, and debate are necessarily prolonged. For after the time, money, and talent spent in seeking a formula that will allow the policeman to investigate and the accused to have his rights preserved, it would do no good for Congress and 50 state legislatures to enact a "model law" only to have the Supreme Court strike it down.

The current debate may extend at least for several years before the police and their suspects know better where they stand.

—JUDE WANNISKI