

# THE ROLE OF THE SUPREME COURT OF THE UNITED STATES

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I should begin by qualifying myself, in the sense in which a lawyer qualifies his witness. This is generally proper, and particularly so since I share this platform with one who brings to the subject wide, deep, and considered experience, who brings to the subject, in a word, the authority of Commissioner Murphy.

Well then, I have read my share of opinions in criminal cases—more, I have often thought, than my just share—and I have pored over my share of records, darting from witness to witness, from ambiguous question to incomplete answer—one such record seems fully more than a just share. But I have never prosecuted a criminal nor defended one, nor sat as a trial judge in a criminal case. I have never had to make an arrest, nor interviewed a criminal defendant or a convict, nor ever been one. My contact with the police has been slight, and on the whole pleasant. I don't recall ever being inside a station house. All I know about what goes on there is what I read in the papers—the newspapers and the scholarly papers. My credentials, in other words—I think I can say without giving myself airs—are those of the average appellate judge; certainly this lack of an intimate experience of the criminal process is shared by a majority of the members of the Supreme Court of the United States.

I believe it to be a good thing, however, that generalists, people who have little personal experience of, and no sense of engagement with, the criminal process should pass on the rules that govern it. An adversary, accusatory system is not the only method—as compared, for example, with the European inquisitorial system—and perhaps not even the best method for attaining justice. But it is the one we have, its fundamental premises operate to produce a sort of combat between the prosecution and the accused, and it would not be an adversary system if there weren't someone—and the trial judge does not quite fit this description—with supervisory authority over it who is above the battle. I have said that the adversary system is not the only and may not be the best method for attaining justice. But I will also say, if briefly and somewhat sententiously, that the worst possible system would be a mixed one, an adversary system that for reasons of expediency permitted itself here and there to be false to its premises.

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I don't wish for a moment to give rise to a delusion of precision and certainty with my reference to the premises of an adversary system. Except as they apply to the rudiments—I had almost said the mechanics—of the trial process, these premises do not generally have a prior, objective existence—neither in history nor in some other body of knowledge—before our appellate judges speak. It is largely a euphemism even to say that the judges elaborate these premises. At most they evolve them, and often, one can say, mincing no words, they invent them. The magnificent prose of the fourth amendment does not define the phrase “probable cause,” let alone apply it to the circumstances of a modern, urbanized industrial society, nor do the writings and speeches of Lord Camden and James Otis, which stand behind it. And the sixth amendment, as Judge Friendly has recently pointed out, started out in life, of course, as a guarantee that the government would allow a defendant in a criminal case to have the assistance of counsel, not that it would at its own initiative and expense provide him with counsel.<sup>1</sup> Moreover, the sixth amendment, with its compendious reference to “all criminal prosecutions,” most assuredly does not fix the point in a man's progress from the moment of arrest to the moment of sentencing when the assistance of counsel becomes constitutionally indispensable.

But this is the way with our singular and miraculous process of judicial review. Surely it comes as no surprise that in the performance of their constitutional function our judges make more law than they find. This is not the occasion for me to justify the function of judicial review, in the large, or to suggest its proper limits and the restraints under which it should operate. But it is relevant to point out that a distinction is commonly taken in constitutional law between procedural and substantive decisions, as they are called, and that it is a generally valid distinction, because procedural decisions for the most part deal with the “how” of governmental action, whereas substantive decisions go to ends, they deal with the “what.” Procedural decisions do not generally cut off the power of government, they do not generally foreclose the attainment of ends, but point rather to infirmities of method that are curable by executive and legislative action. Procedural decisions are consequently less affected by principles of limitation on the exercise of the judicial function, less affected by considerations of restraint. To quote the late Mr. Justice Jackson:

Procedural due process is more elemental and less flexible than substantive due process. . . . Insofar as it is technical law, it must be a specialized responsibility . . . of the judiciary . . . on which they do

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<sup>1</sup> Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 944 (1965).

not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.<sup>2</sup>

It would be too facile, however, to rest on this distinction without more, valid as it generally is. Most procedural decisions uncover curable defects of method. But some do foreclose effective pursuit of the substantive policy at hand, because as a practical matter, no process or method other than the one the Court has forbidden will do. Cases in which this is true must be viewed as dealing not with means, but with ends.

This rather obvious insight brings us to one of the sorest points in the current controversy about judicial review of police methods. Many of our judges, on the one hand, talk and act as if they were merely performing their relatively routine function of enunciating procedural rules, laying down, as Mr. Justice Jackson said, the applicable "technical law," which "must be a specialized responsibility . . . of the judiciary." Police and prosecutors, on the other hand, talk as if the ultimate aims and objectives of what they are all too prone to call "the war against crime" and what some of the rest of us might prefer to call the criminal law were involved in each decision. To that some judges and many commentators reply that police and prosecutors have always complained that any new procedural requirement disabled them from doing their job, and that this has never proved true.

It seems to me clear that, very often, complaints that a procedural decision forecloses the attainment of substantive ends are indeed nonsense. The attainment of no substantive end was foreclosed by the Supreme Court's decision in the *Gideon* case that counsel must be provided by the state to indigent defendants. That the response to this holding is wholly procedural and easy enough is demonstrated by the federal Criminal Justice Act of 1964.<sup>3</sup> As to other decisions, it is equally plain that the objectives of the criminal process are in play, that on one or another permissible procedure will depend the results which police and prosecutors will be able to achieve. And the issue then becomes quite fundamental: What are the results that the criminal process should properly be enabled to achieve?

It is of the first importance that judges and commentators should identify the issue realistically and correctly, that they should know, as well as may be, when they are talking about means, and when about ends. No ultimate satisfactory solutions are possible otherwise; none are possible with respect to many of the conundrums that confront us unless we are prepared to ask, and until

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<sup>2</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (dissenting opinion).

<sup>3</sup> 18 U.S.C. § 3006A (1964).

we are equipped to answer, hard questions about the proper aims and objectives of the criminal law, and about the consequences of various procedural options for the attainment of these aims and objectives.

And yet there are elements of the problem to which we can hold fast along the way, before we know enough to reach final satisfactory resolutions. We are not excused from obligations of common sense and intellectual coherence even when dealing with questions that can be characterized as procedural. And there are in play values other than the objectives of law enforcement, values that analysis can help us identify, and that we may wish to guard faithfully and consistently, at least until it can be shown with some assurance that we should not. I take for an example the vexing problem of police interrogation before arraignment, and its corollary, the question of the point at which a prisoner must be allowed to consult counsel, and perhaps have counsel provided for him. This is the problem of the *McNabb* and *Mallory* cases, and now, as applied to the states, of *Escobedo v. Illinois*.<sup>4</sup>

In some measure, ends are here surely in play. If we are to make a lawyer available in the station house, or even if we are clearly and unmistakably to warn each person arrested that he need say nothing to the police and that whatever he might say will be held against him, we are likely to get fewer incriminating statements at that stage. We don't know how many fewer. The former United States Attorney for the District of Columbia, David C. Acheson, told a Senate committee, "Frankly neither the police nor we know whether it would have that effect in five per cent of the cases or ninety-five per cent of the cases."<sup>5</sup> Nor do we really know the statistical significance of station house incrimination—the number and kinds of cases that depend upon station house admissions for successful conclusion from the prosecution point of view. We have a very good notion of the statistical significance of pleas of guilty, and it is widely feared that a significant decrease in the percentage of such pleas would bring the criminal process, with the present human, institutional, and financial resources committed to it, to a grinding halt. But the crucial bit of information that is lacking goes to the relationship between station house incrimination and the ultimate plea of guilty, which is of course so often the product of bargaining between counsel and the prosecuting attorney.

Nevertheless, although we don't know in what measure the accustomed administration of criminal justice is in question, nor whether so much of the objectives of that administration as we might be sacrificing, however much

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<sup>4</sup> 378 U.S. 478 (1964).

<sup>5</sup> *Hearings on S. 1526 and H.R. 5688 Before the Committee on the District of Columbia*, 89th Cong., 1st Sess. 503 (1965).

that might be, should be deemed important or, perchance, eminently worth abandoning—nevertheless there is some initial, familiar ground on which we can begin our intellectual maneuvers.

The police must make arrests, with and without warrants, and there is bound to be some kind of a time lag between the arrest and the arraignment before a magistrate. Let us assume that all arrests are made on probable cause, as they should be. Yet probable cause does not mean guilt. It is therefore to everyone's interest that there be some opportunity for interrogation, since a prisoner may want the chance to prove himself innocent, as by establishing an alibi, without making, so to speak, a federal case out of it before a magistrate. Besides, it simply isn't common sense—it would be a rule running counter to normal and decent human impulses, and hence not a plausible and not an enforceable rule—to require the arresting officer not to speak to the person he has arrested. It is equally impossible as a practical matter to provide counsel at the moment of arrest—on the street. So it seems perfectly clear that there must in any event be a period of informal interrogation following the arrest—open air interrogation, one might say—and that this would be so even if we should require the policeman to go straight to a magistrate who is on twenty-four hour duty, rather than to the station house. But again it would make no sense to avoid a stopover at the station house, if for no other reason than to bring the district attorney into the case. Even if at this point there was to be an obligation to provide counsel, the police might not be able to produce instant counsel. The whole process, including provision of counsel, if that is deemed necessary, and appearance before the magistrate, involves people, not machines, and people eat and sleep and are otherwise occupied. Hence delays are under all circumstances inevitable, and the question reduces itself to whether we are to impose a vow of silence on the police in the interval. To impose such a vow, I suggest, would exhibit a large disproportion between the problem and the solution.

Let me now come at the matter from the other direction. Should we welcome all possible methods short of the outright brutal—which we exclude as revolting, regardless of the consequences—to secure admissions and otherwise vigorously pursue a criminal investigation in the period following the arrest? Should we allow the prisoner to be held incommunicado for a period, say, of a day, three days, a week, and questioned? I think clearly not. There is, for one thing, enough evidence that the credibility of confessions obtained under such circumstances is seriously in doubt—New York City alone in the last few years has had at least three celebrated cases of false confessions—the Whitmore case, the Hector Cruz case, and the Santo Sanchez case. Moreover, if the adversary system means anything, it means that the state and the

prisoner are each, so to speak, on their own, and that the state is not entitled to the prisoner's assistance in the process of bringing him to book. The prisoner may choose to speak or to plead guilty, but he need not; he may stand mute. It is up to him whether to speak or not, but it *is* up to him. Now everyone will admit—police and prosecutors will be the first to admit; it is the factual premise of their entire argument—that prolonged interrogation in the menacing circumstances of a police station has a tendency to coerce, even in the scrupulous absence of any overt coercion, physical or psychological. A week's detention and questioning has a tendency to coerce a great deal, a day's detention to coerce less, but still to coerce—that is the whole purpose of prolonged initial detention and interrogation, whether for ten days or one. And so the question is, how do we square with our professed principles a practice whose professed purpose is to defeat those principles?

The answer begins, as I have suggested, with the fact that there is an unavoidable period of initial detention. We could during this period forbid any questioning on the ground that any questioning is bound to be coercive. But that would be unnatural and go beyond what the relevant principle of free choice demands. Is it enough that the prisoner be unmistakably informed of his right to stand mute, and of the possible consequences to him of a decision to speak? Suppose, as in *Escobedo*, that he has a lawyer and wants to see him? The argument about whether to allow this always starts with the proposition that a lawyer will invariably advise his client to say nothing. But there will be a period of time before counsel can possibly appear, or even be reached on the telephone, and so necessarily a period before such advice can take effect. Even if counsel's first move is to advise silence and the advice is taken—and this may not always be the automatic initial advice—it is not necessarily permanent advice, as the percentage of pleas of guilty must be taken to demonstrate. Counsel, to be sure, may not yet know enough about the case to be able to advise intelligently, and hence wants everything in statu quo for the moment. Or he may prefer to deal with a fellow professional in the prosecuting attorney's office rather than with the police. But if the right to stand mute is conceded, and if the right to the assistance of counsel is conceded once formal proceedings commence—even if they commence and end with a plea of guilty—then on what basis can it be argued that a request to call or see a lawyer may be denied in the station house? The argument again involves us in a flat contradiction with professed principle, for the right to counsel is denied only in order to direct the choice between speech and silence, which ought to be free, and to launch and predetermine without counsel proceedings which ought to be conducted only with counsel.

The matter has further ramifications. The case, like *Escobedo*, of a pris-

oner to whom counsel is readily available is atypical. The typical case is indicated by the names of the three men I mentioned earlier from whom false confessions were obtained in New York recently. One was a Negro and two were Puerto Ricans. Should friendless, indigent defendants be supplied with counsel in the station house? That is the burning question. The Attorney General of the United States and the Chief Judge of the Court of Appeals for the District of Columbia recently fell to arguing the improbable issue whether the objective of the criminal process is to achieve equality between rich and poor. I don't propose to join this argument. No doubt the poor are at a general disadvantage as compared with the rich, and it is no obligation of the criminal process to cure that pervasive social injustice, if it is always an injustice. The objectives of the criminal process are other ones. The criminal code should not be confused with the Economic Opportunity Act of 1964. But the real issue is whether the criminal process should permit itself to *trade* on the disadvantages to which the poor are heir. No one, I take it, would be willing to argue the proposition that the well-to-do and well-counseled should have the right to stand mute before police interrogation, but the poor and friendless should not. A great deal—very much indeed—would have to be shown about the necessities of the criminal process, about the menace to society that it needs thus to ward off, before such a proposition could begin to be rendered palatable. Well, if a corollary of the right to stand mute is, for the rich, the right to be advised by counsel, then it must be the more so for the poor, who are more easily intimidated and need counsel worse.

In the District of Columbia, under a directive worked out by Chief of Police John B. Layton with the advice of David C. Acheson, then United States Attorney for the District, police are required clearly to warn an arrested person as follows :

1. You have been placed under arrest. You are not required to say anything to us at any time or to answer any questions. Anything you say may be used as evidence in court.
2. You may call a lawyer, or a relative, or a friend. Your lawyer may be present here and you may talk with him.
3. If you cannot obtain a lawyer, one may be appointed for you when you first go to court.

Prisoners, the directive goes on, "may be questioned in a reasonable and non-coercive manner concerning their knowledge of any alleged offense. The total period of actual questioning, exclusive of interruptions, should be limited to three hours except where an arrested person consents in writing to a polygraph examination." The directive also states: "In pursuing an investigation, members of the force have a duty not only to ascertain the facts of alleged

offenses (beyond the level of probable cause required for arrest) but also to protect arrested persons from false, mistaken, or exaggerated accusations of crime. Investigating officers should keep in mind that frequently these purposes can be fulfilled before the end of three hours of questioning and that in any event questioning should be as brief as is consistent with these objectives."

Here is a directive that goes a long way toward solving the problem on a realistic basis. It has been in effect since August of this year; I assume it is being complied with, and I have not heard that law enforcement has broken down in the District of Columbia, at least no more than one always hears that it has. I would suggest that the directive could be improved by making certain that the ambiguous and slippery distinction drawn in the *Escobedo* case by Mr. Justice Goldberg between an "investigatory" and an "accusatory" stage of questioning does not operate. The directive ought to apply to all police questioning, on the street or in the station house, during any period that is recognizably one of custody. Secondly, as I have indicated, I don't see on what principle counsel is allowed to those who can afford to buy counsel, but not provided to the indigent. Finally, it is possible, if costly, to make a record of all interrogations, preferably on television tape, and thus guard against abuses which we must always suppose will occur from time to time, despite the best efforts of professional heads of police, and which are hard to detect.

Be all that as it may, any police department governed even by the somewhat restricted Washington directive will stand an excellent chance to avoid doctrinaire and altogether unsatisfactory decisions such as that of Judge Bazelon, for example, in *Alston v. United States*.<sup>6</sup> This was a manslaughter case, in which Alston, having been arrested at about 5:15 a.m., arrived at the police station with his wife at 5:30 a.m. During about five minutes of questioning, he made no admission. He was then allowed to see his wife again, who had been waiting outside, and when he returned, he confessed. Judge Bazelon reversed, throwing out the confession. There was some question whether Alston was warned of his right to remain silent, and it was on this point that Judge McGowan joined Judge Bazelon to make a majority. But for Judge Bazelon this point was of no importance. The prisoner, Judge Bazelon apparently was willing to hold, should not have been questioned at all before arraignment. Since it was unlikely that a magistrate could be found immediately at 5:30 a.m., Judge Bazelon's holding amounts to imposing a vow of silence on the police. I doubt that any such rigidity would be insisted upon by the courts with respect to a police department operating in compliance with the Layton-Acheson directive to the District of Columbia police. (That directive was not yet in effect when the *Alston* case was decided.)

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<sup>6</sup> 348 F.2d 72 (1965).

But how many police departments have responded by intelligently attacking the problem as the District of Columbia police have begun to do? How many have responded with anything but complaints about lack of understanding on the part of the federal judiciary? How many have admitted that there is a problem at all? How many have instead engaged in a name-calling contest with doctrinaire libertarians, a contest conducted by each side on the presupposition that no problem exists, merely mutual ill will. We have had altogether too little creative response to the pressure exerted by the courts. The courts have made their errors, and are perhaps poised to make some more, but no one from the law enforcement side has authoritatively pointed out to them the error of their ways in the one fashion that courts are sure to understand—by demonstrating in action the right way. The courts, even in the exercise of their constitutional function, address other institutions, the legislature, the executive, and the administrative, and they expect that they will be spoken back to. Unfortunately, police administration is not institutionalized. Even within a single state there is no unified administration of police. Yet the major urban police departments are administrative units to which the court is addressing itself, and from which it is entitled to hear constructive replies.

As I suggested earlier, however, while we can apply more common sense and mutual good will to our problems, and thus reduce them, we cannot permanently avoid confronting fundamental questions concerning the aims of the criminal law and the compatibility of those aims with current practices and with revised procedures. Clarity about the aims and objectives of the criminal law is unfortunately in very short supply. Indeed, police and many prosecutors on the one hand, and judges and most academic lawyers on the other, quite evidently have in mind processes with radically different objectives when they each talk about the administration of the criminal law. As Professor Herbert L. Packer has written<sup>7</sup>—in what is, incidentally, one of the most brilliant of recent papers in the field—there are two models of the criminal process, the crime control model, as he calls it, and the due process model, and they have very little in common. The crime control model sees a direct relationship between the rate at which we grind out convictions and the attainment, to quote one of its few full-fledged academic defenders, Fred Inbau, himself quoting the preamble to the Constitution, of “domestic tranquillity” and “the general welfare.”<sup>8</sup> So direct does the relationship seem to those who have the crime control model in mind that Senator John Stennis of Mississippi could recently say, while urging passage of a bill to ameliorate the rigors of the

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<sup>7</sup> Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

<sup>8</sup> Inbau, *Law Enforcement, the Courts, and Individual Civil Liberties*, in *CRIMINAL JUSTICE IN OUR TIME* 99, 134 (Howard ed. 1965).

*McNabb-Mallory* rule, that the Senate "had better help protect our women from roaming robbers and rapers now." One step behind is the premise that the criminal law is a suitable instrument for controlling and containing the broad range of behavior to which it is at present applicable, from first degree murder all the way to gambling, fornication, and drug addiction, not to speak of the kind of protest symbolized by draft-card burning.

The due process model is altogether and irreconcilably different. It holds that the relationship between convictions and the crime rate is much less direct or immediate. "Court rules," Deputy Attorney General Ramsey Clark told a Senate committee not long ago, speaking in the accents of the due process model, "do not cause crime. People do not commit crimes because of decisions restricting police questions or because they think they might not be convicted." Unquestionably, for the due process model also, the crime rate and the criminal law are related. The crime rate rises as the criminal law attempts, and of course fails, to control behavior with which it cannot possibly cope, and which should therefore not be branded as criminal: *e.g.*, narcotic addiction, gambling, and homosexuality. The crime rate would rise, even though marginally only, if as a matter of declared policy we ceased enforcing portions of the code. And the incidence of undesirable behavior—*e.g.*, stealing and homicide—would probably be higher if the criminal law ceased to forbid it. But speaking for myself, at any rate, I think the criminal law serves more to sustain and vindicate the conduct of those who do not commit crimes than to prevent the misconduct of those who do. The criminal law must, I believe, be enforced, and visibly enforced. But if it is remembered that its prime function is to encourage and sustain civilized conduct, to declare and confirm the basic moral code, then the justice and evenness of its administration, the decent and civilized, calm and self-consistent manner in which it is brought to bear are crucial to the attainment of its objectives, and are of a much higher order of importance than considerations of the speed and effectiveness with which we can process large numbers of cases to a successful "enforcement" conclusion. To put the matter more concretely: If the criminal law can realistically aim only at sustaining and vindicating the conduct of the great peaceable majority of the population in, say, Harlem or Watts, at demonstrating that good and bad are indeed meaningful concepts and that the difference between them is confirmed by the solemn judgment of society, and if it cannot realistically aim at deterring much crime, but must rely on other institutions to remove the conditions that breed it—then a civilized and even-handed administration of the criminal law, which can command respect and identify itself with the moral values it vindicates, is the first and essential requirement for effective pursuit of its aim.

To be sure, the criminal process also provides the method by which we

confine and get off the streets those who have exhibited dangerous antisocial tendencies. But I am unable to place a great deal of weight on this objective, given our present system of dealing with the convicted criminal, for if the little we know proves anything, it shows that confinement in prison leads to more criminal conduct than it prevents.

In the end, as Professor Packer has made clear, we cannot reconcile the crime control model with the due process model. We have long shut our eyes to the differences between them, and we can still in some measure go along in a common sense way papering over the crack with practical compromises. But the assumptions of the crime control model are misguided. We need empirical knowledge which, to paraphrase Holmes, will further educate us to this obvious fact. We need also, as Professor Packer has urged, a jurisprudence of sanctions which will sort out a proper set of objectives for a properly limited code of criminal law. Until we have either or both, there is no excuse for imposing irrational restraints on the police, nor any justification for hastening to freeze into permanent law palliatives and expedients, compromises and middle ways out of our present conundrums. When we have both, I venture to foresee that the values that are just now playing a dominant role in the case law will be shown to be decisive values, not only compatible with the objectives of a sensible criminal code, but fairly indispensable to their attainment.