

Justice Without Trial: Law Enforcement in Democratic Society.

JEROME H. SKOLNICK. New York: John Wiley & Sons, Inc., 1966.
Pp. xii, 279. \$7.95.

Professional and scholarly appreciation of the problems of criminal law administration has lately risen to new levels of sophistication. Part of this new sophistication is a deepened awareness of the dubieties of conventional factual and policy estimates of the uses of the criminal law as an instrument of social ordering. Of course, the oldtime religion is not dead. Its appeal is especially strong among, for example, sectarians who see the coincidence of the Supreme Court's due process new testament and rising crime rates as the fateful result of abandoning the traditional faith. Despite this cultural lag, however, we have today a greater quantity of scientifically defensible knowledge about criminal law than ever before. More important, we have a wider appreciation of what we don't know.

Recognition of our ignorance has begotten an invigorated science of criminal law administration—as well, inevitably, as invigorated pseudo-science. The science is halting, imprecise, and exasperatingly slow in yielding productive results. All contributions, even bad ones, are provisionally welcome, for it is easier at this stage to distinguish wheat from tares in grown form than in the seed. A worthy and suggestive contribution is, to pursue the Biblical motif, to be received with gladness. Such is Dr. Skolnick's *Justice Without Trial*.

Justice Without Trial is concerned chiefly with the relationship between the ideal of legal regularity—the rule of law—and the exigencies of police operations. It is a study of certain aspects of the administration of criminal justice in a California city of about 400,000 persons. "Westville," a pseudonymous city having no discernible unlikenesses from Oakland, California, is in many respects a perfect locus for such an inquiry. On the one hand, in size, social composition, industrial base, and governmental structure, it is like at least a dozen or so cities in the United States, and therefore is presumably representative in its basic law enforcement problems. On the other hand, its criminal justice apparatus is reknowned for its integrity and technical efficiency. As Dr. Skolnick says, "The prosecutor's office, the police department, and the office of the public defender are generally of as high quality in facilities, pay, and national reknown as those of any middle-sized city in the United States."¹ Hence, the subject of study is a law enforcement mechanism operating in a fairly typical urban milieu at what is in practical terms of today's United States an optimum level. Because the

¹ P. 25.

Westville law enforcement mechanism is so good, the fact that it endures major subsisting problems has sharpened significance. The problems Dr. Skolnick reveals in Westville cannot be attributed to corruption, political venality, administrative sloth, or technical incompetence, for Westville law enforcement is substantially free of these common defects. The problems go deeper. They find their roots in the fundamentals of American criminal law enforcement policy.

Before coming to these questions, however, something should be said about the inquiry's method and style. Dr. Skolnick is a sociologist associated with the Center for the Study of Law and Society at the University of California, Berkeley, and was formerly an instructor and research associate at Yale Law School. His method of investigation was that of "participant observer," placing himself in the police working environment to learn by observation and informal conversation how and why the operatives went about their business. To the extent that anyone can put himself in a position to know a system of administration without becoming a part of it, Dr. Skolnick did so. The author's direct observation, which proceeded over a two-year period, was supplemented by reference to previous studies of a similar or collateral nature, by consultation with experts in practice and in the academic world, and by some parallel investigation in an East Coast city of a size comparable to Westville. It is clear that the author knows whereof he speaks.

The report of the inquiry is good. In exposition, it is clearly written and intensely interesting. In attitude, it is well balanced, being neither an apologia nor a polemic. The author is conspicuous for his sense of fairness in observation and evaluation, and he is entirely free of pretension, personal or professional. One feels full confidence that what he reports having seen is accurate and what he makes of it is sober.

The main points he develops are these:

1. How the police go about enforcing the criminal law is a product not only of the legal rules governing police practice and of police professional training and leadership, but also of the social environment that inheres in being police. This will not be news either to sociologists or to lawyers and police who have thought about the matter, but it is a fact widely ignored or half-heartedly conceded by people whose business it is to make the criminal law. It is also of capital importance. Assuming the will to do so, the legal rules governing police practice can be manipulated by legislative and judicial processes, and police professional training and leadership can be manipulated by educational and administrative processes. But the social environment of American police work as an occupational calling is not susceptible

to manipulation by the direct exercise of will, any more than Eskimos are susceptible to being made into gastronomes. This means that how the police can function is bounded by limiting conditions that are beyond the reach of immediate reform. Acceptance of these limiting conditions is difficult, especially in a society convinced that the realization of Eden is a problem of landscape architecture. It is also essential to unromantic policy in the criminal law.

2. The chief environmental influence on police work is a sensitization to dangerous behavior. Dealing with dangerous behavior is at the same time the unique characteristic and the special responsibility of the police. This orientation to danger results in a peculiar type of social perception. If one's job is to deal with violence should it arise, it is both natural and prudent to develop an alertness for signs of violence. People incipient upon violence give off signs of their mood—agitation, loud and excited speech, changes in posture and position in preparation for action, and the like. The skill of the police is to notice these signs and to react to them. Of course, such signs are also emitted by people who are just naturally agitated, loud-mouthed, or shifty, and it is often difficult to tell what behavioral signs portend. The point is that, because they have special responsibilities, the police read these signs—and others more subtle—in a way that other people do not.² Compared to other people, they seem to have an anxiety neurosis, as indeed in a relative sense they do.

The tensions inherent in such a departmental *weltanschauung* are calmed by a decent quota of external confirmations. The organized form of confirmation is the handing down of convictions by the public courts. If the "quota" of convictions falls and a wide discrepancy is created between the level of dangerous misbehavior the police see to exist and the level the courts confirm to have existed, the police begin to think someone is literally crazy. To some extent, this may be police paranoia, a phenomenon long since identified. To some extent, an alternative explanation may be more nearly correct. In either event this predisposition is a source of fundamental conflict between law enforcement officials and the courts. What is involved is not a competition of ideas about policy regarding dangerous behavior—there is actually wide verbal agreement on that score. Involved, rather, are competitive interpretations of commonly observable events, and this at bottom is a question of who is mad. Orderly debate of that issue is hard, as we are now witnessing.

3. Beginning with the fact that deviance may be a sign of danger,

² See p. 216.

the police tend to see all deviance as dangerous. Policemen's work thus tends to make policemen socially conservative in the most fundamental sense. This has all sorts of consequences. For one thing, it helps to explain the strong negative responses that the police tend to display toward such events as picketing, wearing beards and sandals, and other socially disassociative activities. For another, and perhaps more practically significant, the police are inclined to classify as crime all behavior that they see as discrepant with "ordinary" behavior, regardless of whether such behavior is technically a violation of law. This inclination is, of course, checked by other pressures—political, social, and legal—so that the police in operation do not fulfill their inclinations. The policeman's tendency to regard all deviance as crime is, however, a real and largely uncontrollable social force.

This police tendency—which, be it emphasized, is inherent in their work rather than consciously chosen—has direct implications for substantive legal policy in the criminal law. The police will tend naturally and inevitably to interpret criminal proscriptions broadly rather than narrowly—to read the law as coextensive with their own highly conventional conceptions of what is wrong or improper. Such a point of view is diametrically opposed to the presumption under the rule of law that criminal prohibitions are to be narrowly construed. This phenomenon is at the same time a source of conflict with the courts, a factor to be considered by the legislative draftsman, and a consideration relevant to assessing the appropriate uses of the criminal law as a device for social ordering.

4. Police needs concerning the performance of law enforcement work produce conflict with the ideal of the rule of law in its procedural aspect—the rules of arrest, interrogation, search and seizure, adequacy of evidence, and so on. The rule of law in its procedural aspect is concerned with observances of form and with the requirement of "objective" demonstration of the rightness of official action. Observance of form in practice generally—perhaps even intrinsically—involves a certain amount of bother having no direct functional utility. "Objective" demonstration of the rightness of official action boils down to requiring the official to satisfy someone else that he has acted properly, in the case at hand requiring the policeman to satisfy the prosecutor and the courts. Satisfying someone else of one's actions entails palpable proofs, extra efforts, and the risk of embarrassment should there be a failure of proof. For these straightforward reasons alone, the procedural requirements of the rule of law are unavoidably burdensome to the police.

Beyond this readily apparent conflict between efficiency in police

work and the maintenance of the procedural rule of law lies another, more subtle source of difficulty. It has been conventional to think of police procedures as administrative routines devised to carry out the substantive mission of the police as efficiently as possible within the procedural boundaries laid down by public law. There is a sense in which this is true. Police procedures must be harmonized with the procedural rule structure of public law to the extent that the latter contains specifications that have to be met if a criminal charge is to pass muster with the courts. For some purposes it is therefore useful to think of the police procedures as regulated by public law, and of police departures from the procedural rules of public law as "illegal." Certainly they are illegal insofar as they must, upon challenge, give way to the rules of the public law of criminal procedure.

Nevertheless, Dr. Skolnick's study reveals that the police procedural system is not a value-free exercise in administrative convenience. It is rather a system of *rules* of procedure. The system of police rules is designed to foster technical efficiency, safety, and staff discipline. In most respects, of course, the system conforms to public law rules of procedure, so that most police activity is "valid" or "legal" according to *both* police procedural law and public procedural law. In some respects, however, police procedural law conflicts with public procedural law. Consider the case of a policeman searching for narcotics who kicks in a door to get the drugs before they can be flushed down the toilet. This procedure conforms to the police "rule" that the best evidence of crime should be gathered if at all possible. But it violates the public law that "unnecessary" force should not be used to gain access to premises which are to be searched. While this type of police conduct violates the rule of law (i.e., public law), the point is that it is not wholly lawless; it is conformable to a "department law" recognized by the police. In contrast, for example, a policeman who slaps around a prostitute in the course of arresting her would be recognized as violating *both* public law *and* departmental law. Such conduct is, as the police would say, not merely illegal but unprofessional.

"Police lawlessness" thus appears to be a much more complex problem than is frequently supposed. In certain important facets of police work, it is not a matter of simple illegality, but rather a species of conflict of laws. It therefore becomes highly relevant to inquire whether particular police conduct is not only illegal but also unprofessional, and, if illegal but *not* unprofessional, what are the moving forces that produce the conflict. The source of the legal norms of criminal procedure can be passed for present purposes with the statement that they constitute an accommodation between two general and amorphous

objectives: public safety and procedural decency. The sources of police professional norms are much more concrete, immediate, and identifiable. On this point, Dr. Skolnick throws much illumination. It is out of place to spell out the details, for he does that very well indeed. Two illustrations will suffice:

(a) The police need to satisfy *themselves* that the suspect is guilty, whatever conclusions a court might reach. The confession problem is the best illustration. Any way one looks at it, a creditable confession is the most satisfying evidence of guilt, even if other reasons exist for refraining from seeking a confession. These "other reasons," which underlie the fifth amendment, are utterly irrelevant to the professional police need to gain assurance that the right man is in custody. A rule conflict not unexpectedly ensues.

(b) The police need to protect themselves in situations where there is a high risk of attack. The weapons "shakedown" in an uproarious barroom is a good illustration. A policeman would be incompetent by professional standards, and perhaps also a damn fool, if he failed to take aggressive measures of protection against being bushwhacked in such a situation. The "other reasons" for refraining from "indiscriminate search," which underlie the fourth amendment, are irrelevant from a professional point of view, and a rule conflict again ensues.

These illustrations are enough, I think, to show the kind of rules problem Dr. Skolnick is getting at. The basic point is indicated in the sociological proposition Dr. Skolnick advances in a more limited connection: "[I]n all work organizations . . . the worker always tries to perform *according to his most concrete and specific understanding of the control system.*"³

It is precisely the dilemma of the policeman that he confronts in many situations not only a conflict between acting in conformity to the rules and "getting results," but also a conflict between acting in conformity to public law and acting in conformity to a set of *rules* that have the aim of getting results. For a work group specially sensitive to rules of behavior, this is surely an excruciating conflict. One would expect attempts to rationalize it to be emotionally charged and confused, and indeed they usually are. Dr. Skolnick's study should help make the problem clearer and its discussion more to the point.

The broad implications of these points can be stated in the following way: The police, by reason of the nature of their work, are disposed to regard all socially deviant behavior as dangerous and all rules of legal procedure impeding fulfillment of their immediate law enforcement

³ P. 180 (*italics in original*).

objectives as wrong. Therefore, where the law proscribes conduct that is deviant but not necessarily dangerous and where enforcement of such a law as a practical matter requires skirting or ignoring rules of legal procedure, then the police will tend to enforce the law in that way and will justify their nonobservance of procedural amenities on the ground that the safety of society is at stake.

This helps in particular to explain the peculiar problems of vice crime enforcement. Vice crimes are not directly dangerous to society—the immediate “victims” of gambling, prostitution, and narcotics use are those who themselves volunteer to suffer. For that reason also, vice crimes are not detectable without systematic procedures—tipster networks, stake-outs, and organized raids—that all involve surveillance and penetration of privacy. Per contra, the chief objective of the procedural rule of law in a free society is to minimize or prevent official invasion of private personality. Vice prohibitions thus implicate, as a practical matter, an intense conflict between public law procedural regularity and the normative requirements of police administration. The conflict that vice prohibitions create has already received attention, but Dr. Skolnick’s presentation suggests that the problem is a much more deeply rooted one than previously appreciated. Moreover, the conflict of procedural norms generated by vice prohibitions has effects not limited to vice crime enforcement: The police attitude toward procedural amenities in vice crime enforcement tends to be generalized to all criminal law enforcement. In consequence, the enactment of criminal prohibitions against vice in a free society is, by an inexorable institutional dialectic, a subversion of the rule of law. It may be hoped that the cogency of this point is not lost on those who most strongly profess the value of liberty under law. Be that as it may, in a time when law and order is a deep social necessity, the legal price paid for trying to control morality is perhaps too high.

I have three adverse comments about Dr. Skolnick’s analysis. First, he epitomizes the conflict between police professionalism and the rule of law as the discrepancy in the “conception of [the] policeman as *craftsman* rather than as *legal actor*, as a skilled worker rather than as a civil servant obliged to subscribe to the rule of law.”⁴ This is unhelpful and really question-begging. The question is why the policeman does not see his craftsmanship as *including* “legal acting.” A judge, for example, engages in “legal acting” by wearing a robe, listening with ostensible if not always genuine patience, and speaking sonorously. Of course, the materials presented by Dr. Skolnick suggest

⁴ P. 231.

why the policeman's craft does not now sufficiently include "legal acting." But it seems clear that American police seriously need inculcation in the practical professional values of observing legal decorum. Wasn't that part of the genesis of Watts?

Second, the organization of the book as a whole and of several of its chapters suffers from some vacillation of purpose. The author says, for example, that the book is not alone about the police, but also "about other officials, the defense attorney, the prosecutor, the judge, [and] the probation officer."⁵ In fact, however, the center of attention is almost unreservedly the police. The prosecutor, defense attorney, and judge are treated only sporadically; the probation officer is mentioned only once. With regard to the police themselves, there is little specific attention to the "beat" officer, most of the attention being given the burglary and vice squads, particularly the latter.

Within some chapters there is a similar wavering of attention. Chapter 4, "Operational Environment and Police Discretion," for example, goes from parking ticket enforcement to the problem of bias against Negroes and back again, via an analytic apparatus that is not strong enough to hold the two components tightly together. Police confrontation of the suspect is split between a general discussion of the policeman's sensitization to danger in Chapter 3 and a more particular treatment of the apprehension of prostitutes in Chapter 5. In Chapter 9, "Police Attitudes Toward Criminal Law," there is a detailed narrative of a "plea-bargaining" session among a prosecutor, defense attorney, and judge, the relevance of which to police attitudes is merely to illustrate something the police wish didn't happen: Not surprisingly, the police would rather fight and lose in court than have a case "dealt out" in a bargaining exchange to which they are not a party.

The third disappointment is the failure of the author to develop the possibilities of his material in the richness and depth which some allusions in his text and footnotes suggest. For example, he approaches an interesting analysis of the question of racial discrimination in law enforcement by pointing out that the alienation of the police from the Negro community, expounded most bitterly perhaps by James Baldwin,⁶ is in many respects simply a special case of the alienation of the police from the whole community—so that what Baldwin sees as a function of race appears in important degree to be a function of police-civilian relationships in general. Having touched the point, however, Professor Skolnick moves on without fully probing it.

⁵ P. 28.

⁶ BALDWIN, *NOBODY KNOWS MY NAME* 65-67 (1962), quoted at p. 49.

Another example of my disappointment in this regard is the author's failure to explore the interesting reminder that Robert Peel considered it necessary to reform the English penal law—rationalizing its content and radically moderating its severity—*before* promoting creation of a professional police.⁷ Someone has observed that English criminal law prior to its nineteenth century reform consisted of severity tempered by inefficiency. Peel apparently concluded that in order to establish an enduring social order, the benefits of inefficiency in enforcement would have to be replaced by those of leniency in disposition. This political wisdom seems to have been lost in modern times, specifically in our attitude toward narcotics. If, as did Peel, we want to regard law enforcement efficiency with seriousness, then we have to regard with equal seriousness what it is we are trying to enforce. It seems to me Dr. Skolnick has the material, but misses the opportunity, to develop this fundamental point with special force. My disappointment in this respect, as in the others mentioned, however, does not mitigate my admiration for the work as a whole. No one interested in the administration of criminal justice should miss it.

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⁷ See p. 209.

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Expanding Liberties—Freedom's Gains in Postwar America. MILTON R. KONVITZ. New York: The Viking Press, 1966. Pp. xvii, 429. \$8.95.

At a time when civil rights and civil liberties have become matters of national as well as of international concern, Professor Konvitz's recent work provides an inventory of what has been accomplished in the United States over the past two decades. The era of which he writes has produced considerable turmoil. In fact, the road toward the achievement of a greater measure of human freedom and dignity has never been an easy one. Though the post-World War II record reveals occasional lapses that can hardly be cause for pride, the advances outweigh the reversals. Few can disagree with Konvitz that "in the last twenty-five years, progress in civil liberties and civil rights has been made at an unprecedented pace."¹

There is much that is familiar in Konvitz's recounting of the development of first amendment freedoms and of landmark actions in the

¹ P. xiii.