9-4-1967

# The Suspect and Society

Lewis F. Powell Jr.

My Book Review
of Justice Schaefer's
Book — published
in ABA Journal
LFP

51/167 4cc 9/4/67

THE SUSPECT AND SOCIETY. By Walter V. Schaefer. Northwestern University Press, Evanston, Illinois 1967. Reviewed by Lewis F. Powell, Jr., of the Virginia Bar (Richmond).

This timely and superbly written volume, by one of America's most respected state judges, contains the Rosenthal Lectures delivered in the spring of 1966 at Northwestern University School of Law. The subject is custodial police interrogation and the constitutional doctrines bearing upon it, with emphasis on the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.

Justice Schaefer anticipated that the convergence of these doctrines would preclude the effective questioning of persons suspected of crime. It is a tribute to Justice Schaefer's prescience that he held this view in the spring of 1966 after Escobedo* but before Miranda.** The earlier decision had extended the Sixth Amendment right to counsel to the "accusatory" stage when attention had focused upon a "prime suspect." Miranda, decided in June, 1966, and reading new doctrine into the Fifth Amendment, encompassed all "custodial interrogation" regardless of the "stage" or whether suspicion had "focused."

In the subsequent months debate has raged - in the Congress, at bar meetings and in the literature - as to the effect which these historic cases will have on police interrogation. That it will be severely curtailed, few can doubt. The debate centers on questions of degree, on certain remaining ambiguities,*** and also - among

*Escobedo v. Illinois, 378 U.S. 478 (1964).
**Miranda v. Arizona, 384 U.S. 436 (1966).
***See Elsen & Rosett, Protections for the Suspect under Miranda v. Arizona, 67 Colum. L. Rev. 645 (1967); Warden, Miranda - Some History, Some Observations and Some Questions, 20 Vand. L. Rev. 39 (1966); George, A New Look at Confessions: Escobedo-The Second Round, a collection of lectures and panel discussions sponsored by the Institute of Continuing Legal Education, Ann Arbor, 1967.

academicians primarily - as to whether interrogation is worth saving. Justice Schaefer sheds light on all of this.

One would have thought that the usefulness, if not indeed the necessity, of police interrogation was beyond rational debate. As Justice Schaefer notes, a high percentage of all criminal cases is disposed of upon pleas of guilty, and in most of these cases the accused has confessed or admitted guilt upon interrogation.* Many cases which go to trial also involve pre-arraignment admissions. Thus, the issue relates to a cornerstone of our present system.

In assessing the usefulness of interrogation and the role of resulting confessions, Justice Schaefer is keenly aware of abuses in the past, and of the impossibility of eliminating all oppressive conduct short of outlawing all interrogation.** But balancing the interests involved, he concludes that "police interrogation (is) a useful and desirable technique of law enforcement." Justice Schaefer is in good company. If we look only to former members of the Court, Justices Frankfurter, Goldberg and Jackson each ~~have~~ has recognized the utility of police interrogation.***

Supporters of the new restrictions, while applauding the broadened protection of suspects, argue that law enforcement will not be unduly handicapped. First, they suggest that resourceful,

---

*Studies show the percentage of convictions resulting from guilty pleas running as high as 98% in some jurisdictions. See Goldstein, The State and the Accused, 69 Yale L.J., 1149, 1163 n.37 (1960).

**He notes that the legal systems of other countries, even where interrogation is restricted, do not go to the extreme of excluding all evidence obtained without regard to its reliability.

***Mr. Justice Frankfurter said: "Questioning suspects is indispensable in law enforcement." Culombe v. Connecticut, 367 U.S. 568, 578 (1961) (separate opinion), quoting People v. Hall, 413 Ill. 615, 624, 110 N.E.2d 249, 254 (1953). See also Mr. Justice Jackson's statement in Watts v. Indiana, 338 U.S. 49, 58 (1949)(concerning in part, dissenting in part); and that of Mr. Justice Goldberg in Haynes v. Washington, 373 U.S. 503, 515 (1963).

well trained and scientifically equipped police can obtain necessary evidence without resort to interrogation. Yet, as Justice Schaefer states from his own experience, even where witnesses are available to identify the suspect, such evidence often is unreliable. And past experience indicates that relatively few convictions result from laboratory or scientific investigation. If, as now proposed to the Congress, electronic surviellance is wholly denied to law enforcement, a most effective means of scientific detection will not be available - even against organized crime.

It is also argued by some that meaningful interrogation will not in fact be eliminated. The opinion in Miranda merely lays down a detailed code of procedure. If this procedure is strictly followed, interrogation may take place - provided the suspect does not request counsel. This is a significant proviso. The suspect is entitled to counsel unless he knowingly "waives" the right. No lawyer "worth his salt" will permit his client to be interrogated by police.* As this right to counsel, provided at State expense, becomes generally known and as court decisions implement Miranda and Escobedo, the only room for doubt concerns the extent to which interrogation and investigation will be handicapped.**

For his part, Justice Schaefer concludes:

> Today, I believe, the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion - to the point where no questioning of suspects will be permitted.

---

*Mr. Justice Jackson, in Watts v. Indiana, supra at 59.

**Another distinguished state court justice, also writing prior to Miranda, described the situation as a "mounting crisis" in the constitutional rules that "reach out to govern police interrogation." Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 664 (1966). See also Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965); Lumbard, The Administration of Criminal Justice: Some Problems and Their Resolution, 49 A.B.A.J. 840 (1963).

One solution, he suggests, lies in the development of a legislative code to govern the defendant's pre-arraignment rights. In this context, Justice Schaefer analyzes sympathetically the proposed ALI Model Code of Pre-Arraignment Procedure.* This contemplates three periods of detention: on the scene for 20 minutes without counsel; for four hours at the police station, with counsel if desired; and thereafter in certain cases for a longer period but only upon consent of counsel. Although commending the Code as a "rational adjustment," Justice Schaefer questions whether the Sixth Amendment requires a lawyer's presence during any period of police interrogation. If the Constitution requires a lawyer for station house interrogation, logic would require him for on-the-scene interrogation as well. It would be "obviously impracticable," he adds, "to equip every squad car with instant counsel."

Yet, Miranda appears to require just that. Its principal thrust is against "custodial interrogation." This was defined as including "questioning initiated by law enforcement officers after a person has been . . . deprived of his freedom of action in any significant way."** As Professor Kamisar has said, the language used by the Court "clearly covers the stop-on-the-street-and-question situation."*** Thus, unless the Court's language is modified, there cannot be "on the scene" interrogation without counsel if he is requested.

---

*Prepared by American Law Institute, Tentative Draft No. 1, 1966.
**Miranda v. Arizona, supra, at 444.
***George, supra pp. 98, 99.

In the last of his three brillant lectures, Justice Schaefer subjects the privilege against self-incrimination to searching scrutiny. He concludes that the privilege, as now interpreted, is justified neither by its history nor by any need to protect the innocent in a criminal trial.* The historic purpose of the privilege, as he noted, is protection against governmental suppression of ideas - particularly against inquisitions into political or religious beliefs. This high purpose "now is in the process of being remitted to the First Amendment" where it belongs. There is an emerging "First Amendment privilege" not to respond to questions which diminish the significance of the Fifth Amendment.**

If ascertainment of the truth is - as one would hope - a basic objective of our criminal justice system, we should put aside slavish adherence to the privilege and adopt more realistic reforms. Justice Schaefer thinks the answer lies in broad mutual discovery in criminal cases. He recalls the fight, three decades ago, for pre-trial discovery in civil cases, now proved successful beyond even the fondest hopes.

---

*As to the history, see 3 Wigmore, Evidence 819 (3d ed. 1940); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1 (1930); Developments in the Law - Confessions, 79 Harv. L. Rev. 935 (1966); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949). As to protection of the innocent, in Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (1966), the Court itself said that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction. . . ."

**As harbingers of the trend, Justice Schaefer cites Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); and Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

There is, indeed, a clearly discernable movement toward increased discovery in criminal cases.* But discovery will remain largely a "one way street" so long as the accused may invoke the privilege.

Nor would mutual discovery procedures, familiar in civil cases, be entirely appropriate in criminal cases. The real need is for discovery or interrogation before a judicial officer, where the suspect's rights can be safeguarded but where the goal would be ascertainment of the facts - as known both to the prosecution and the defense - at an early stage in the proceedings. The magistrate, before whom the suspect would be brought promptly, would advise of the right to remain silent. But the suspect should also "be advised that if he is subsequently charged, his failure to answer will be disclosed at his trial." This would be the only sanction.**

Justice Schaefer recognizes, of course, that judicially supervised interrogation would be impossible under prevailing Court interpretation of the Fifth Amendment. The seriousness and difficulty of amending the Bill of Rights is self-evident; yet, it is probable that most lawyers, and other citizens as well, will agree that "the time has come for intensive public consideration" of a solution of the interrogation dilemma.

---

*See Report, President's Commission on Law Enforcement and Administration of Justice 138, 139 (1967).

**Interestingly, Justice Schaefer's proposal has precendent. Under the early common law in England, accused felons were examined by magistrates and their answers were introduced in evidence at trial. See 8 Wigmore, Evidence 286 (McNaughton rev. 1961); Morgan, supra, at 18. The English practice was followed in the American colonies. Morgan, supra, at 18-19.

This forthright call for consideration of a constitutional amendment, by one of Justice Schaefer's stature, judicial experience and dedication to justice, deserves the most thoughtful response.*

---

*See Report, President's Commission on Law Enforcement and Administration of Justice, Additional Views of Seven Members, 303-308 (1967), endorsing in substance Justice Schaefer's proposal.