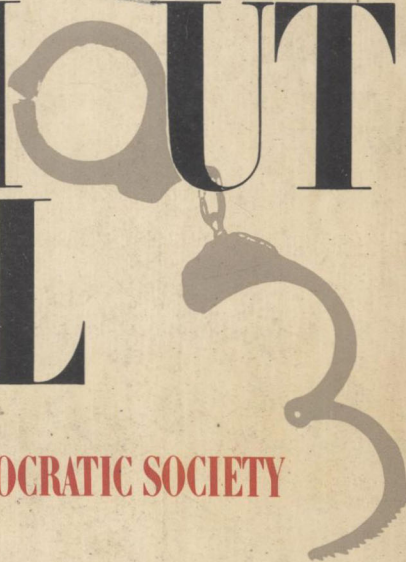


**JEROME H. SKOLNICK**

# **JUSTICE WITHOUT TRIAL**



**LAW ENFORCEMENT IN DEMOCRATIC SOCIETY**

# *JUSTICE WITHOUT TRIAL:*

*Law Enforcement in Democratic Society*

JEROME H. SKOLNICK

*University of California,  
Berkeley*

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*Justice without Trial*

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*For Arlene and Michael*

# Preface

Criminal or related proceedings in which an individual may lose his liberty, his reputation, or his property constitute the principal indicator of the character of a society. More than that, the very idea of *process*—of a disinterested, fair, and intelligent hearing when claims of right are presented—constitutes the underlying idea of a society that subscribes to governance by rule of law. This book is a sociologist's attempt, through the use of a variety of observational techniques, to understand how such governance may be enhanced or impeded. By examining the day-to-day behavior of police and other legal actors, I have tried to learn how those who are charged with enforcing criminal law in a constitutional democracy come to interpret rules of constraint—thereby giving these life and meaning—and to analyze the practical dilemmas they face. I have tried to be as impartial and objective as possible in analyzing the structure and dynamics of police behavior, but I make no claim to having been “value-free.” Indeed, the study will hopefully contribute to a growing body of literature attempting to understand, as a general matter, the social foundations of the rule of law.

It is an author's pleasure to have the opportunity of acknowledging long-held debts, and his fear that some of these will also have been forgotten. The idea for the study began when I was teaching at Yale Law School and was especially encouraged by Professor Abraham S. Goldstein. My “behavioral science” colleagues there, Professors Harold D. Lasswell and Richard D. Schwartz, were always a source of guidance and friendship.

Empirical study commenced at the Center for the Study of Law and Society, Berkeley, and the book was completed there. Philip Selznick, Chairman, and Sheldon Messinger, Vice-Chairman, created an intellectual environment for the pursuit of empirical research. They and other colleagues at the University of California were both encouraging and constructively critical. Edward L. Barrett, Jr. (now Dean, Law School, University of California at Davis) was especially helpful, as was Law Professor Sanford Kadish at a later period. Professors Herbert Blumer, Erving Goffman, David Matza, S. M. Lipset, and Neil Smelser, Department of Sociology, made pointed and useful

criticisms, as did Dr. Leonard S. Cottrell, Jr. of the Russell Sage Foundation, and M. Phillipe Nonet, of the Center for the Study of Law and Society. J. Richard Woodworth and Forrest D. Dill were research assistants. Woodworth collected and analyzed data and wrote first drafts of the appendixes. Dill edited, proofread, constructed the index, and made numerous useful suggestions regarding the final draft.

I am very grateful to the three foundations that provided funds for relief from teaching duties and for secretarial and research assistance: the Social Science Research Council (Committee on Governmental and Legal Processes), the Russell Sage Foundation, and the Walter E. Meyer Research Institute of Law.

My greatest debt is to my "teachers"—those policemen and lawyers in the cities studied who took the time and interest to "show the ropes" to a novice. Without their cooperation, the study could not have been completed. I should also like to thank the two men who were my first teachers of criminal law, in the order that they taught me: my father, William Skolnick of the New York Bar, and Professor Richard C. Donnelly of Yale Law School. My wife, Dr. Arlene S. Skolnick, heard out my ideas, commented on rough drafts, offered intelligent criticism, assumed the anxieties of a "policeman's" wife, and tolerated my irritability. This book is dedicated to her and to our son, Michael.

*Jerome H. Skolnick*

Cambridge, Massachusetts  
October, 1965

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## Democratic Order and the Rule of Law

FOR what social purpose do police exist? What values do the police serve in a democratic society? Are the police to be principally an agency of social control, with their chief value the efficient enforcement of the prohibitive norms of substantive criminal law? Or are the police to be an institution falling under the hegemony of the legal system, with a basic commitment to the rule of law, even if this obligation may result in a reduction of social order? How does this dilemma of democratic society hamper the capacity of the police, institutionally and individually, to respond to legal standards of law enforcement?

Such questions have posed a predicament since the introduction of the London metropolitan police in 1829. Charles Reith, in his book *The Police Idea*,<sup>1</sup> describes the hostility of early nineteenth-century England even to the idea of developing a metropolitan police force out of fear that the notorious activities of the pre-Revolutionary French police would be duplicated. He cites a parliamentary report of 1818 which considered the police idea and recommended against the establishment of a police force:

The police of a free country is to be found in rational and humane laws—in an effective and enlightened magistracy—and in the judicious and proper selection of those officers of justice, in whose hands, as conservators of the peace, executive duties are legally placed, but above all, in the moral habits and opinions of the people; and in proportion as these approximate towards a state of perfection, so that people may rest in security; and though their property may occasionally be invaded or their lives endangered by the hands of wicked and desperate individuals, yet the institutions of the country being sound, its laws well adjusted, and justice executed against offenders, no greater safeguard can be obtained without sacrificing all those rights which society was instituted to preserve.<sup>2</sup>

<sup>1</sup> Charles Reith, *The Police Idea: Its History and Evolution in England in the Eighteenth Century and After* (London: Oxford University Press, 1938).

<sup>2</sup> *Ibid.*, p. 188.

Reith, who is pro-police and pro-Peel, may exaggerate somewhat the degree of opposition to the police. Other authors also interpret the period as one of considerable hostility to a formal institutionalization of police. Mather, for example, points out that historians, like Whigs, are fundamentally antipolice.<sup>3</sup> Given such opposition, therefore, before introducing his "Bill for Improving Police in and near the Metropolis" in 1829, Peel laid a formidable groundwork. A. A. W. Ramsay describes it as follows:

Peel, with his usual caution, brooded for years over the problem before he undertook to solve it. In 1826 he began to collect evidence for the purpose of comparing crime with population. In 1828 he secured the appointment of a Parliamentary Committee to investigate the subject—the last of four successive Committees in the past twenty-five years, but the first to do valuable work. He had at first intended a measure which should create a police force throughout the kingdom: he ended with a modest scheme, whose operation was confined to London, and at first to a limited number of parishes.<sup>4</sup>

To buttress his argument for the necessity of a police force, Peel based his claims on the need for public order. Citing population statistics from London and Middlesex, he argued that crime was dramatically increasing in this early period of industrial revolution, and increasing at a faster rate than population. In the period of 1821 to 1828, population had increased 15½ per cent, while criminal committals had risen by 41 per cent. Deploring the existence of an army of "trained and hardened criminals" in London and Middlesex, Peel announced that "not less than one person in every three hundred and eighty-three had been convicted for some crime or other in 1828,"<sup>5</sup> without mentioning, although he was fully aware of the fact, that the number of acts considered criminal was so large, and the conditions of the working classes so onerous, that the figures he cited were hardly shocking.

In making this appeal for more efficient controls over crime, Peel was quick to add that he was "confident they would be able to dispense with the necessity of a military force in London for the preservation of the tranquility of the metropolis,"<sup>6</sup> an assurance he could hardly dispense with considering the strength of his opposition. The early conception of police accountability to the rule of law is a tradition which has contin-

<sup>3</sup> F. C. Mather, *Public Order in the Age of the Chartists* (Manchester: The University Press, 1959), p. v.

<sup>4</sup> A. A. W. Ramsay, *Sir Robert Peel* (New York: Dodd, Mead and Company, 1938), p. 88.

<sup>5</sup> *Op. cit.*, p. 250.

<sup>6</sup> *Ibid.*

ued to the present day. Maitland reaffirmed it in 1885 when he wrote in a book entitled *Justice and Police*:

There is a large body of rules defining crimes and the punishment of those who commit them, rights and the remedies of those who are wronged, but there is also a body of rules defining how and by whom, and when and where, rules of the former kind can be put in force. . . . It will little avail us that our law about rights and remedies, crimes and punishments, is as good as may be, if the law of civil and criminal procedure is clumsy and inefficient.<sup>7</sup>

This same tradition of the hegemony of the rule of law is eloquently stated in the 1962 Royal Commission Report in a refutation of the argument that a national police force would lead to the development of a "police state" in Great Britain. The commission argues:

British liberty does not depend, and never has depended, upon any particular form of police organization. It depends upon the supremacy of Parliament and on the rule of law. We do not accept that the criterion of a police state is whether a country's police force is national rather than local—if that were the test, Belgium, Denmark and Sweden should be described as police states. The proper criterion is whether the police are answerable to the law and, ultimately, to a democratically elected Parliament. It is here, in our view, that the distinction is to be found between a free and a totalitarian state. In the countries to which the term police state is applied opprobriously, police power is controlled by the government; but they are so called not because the police are nationally organized, but because the government acknowledges no accountability to a democratically elected parliament, and the citizen cannot rely on the courts to protect him. Thus in such countries the foundations upon which British liberty rests do not exist.<sup>8</sup>

The theory of the police in the United States mirrors the conflict between order and legality found in English conceptions of the police, but characteristically American features add complexity. In reading about the American police, especially through the period of the 1930s, one feels that constitutional issues of legality have been almost too remote to be of immediate concern. Not that American police conformed to the rule of law. Rather, they seemed so far out of line that a writer summarizing a major American study of police practices entitled his book *Our Lawless Police*. The study, completed in 1931 by the National Committee of Law Observance and Enforcement (the Wickersham Commission), found practices so appalling and sadistic as to pose no intellectual issue

<sup>7</sup> F. W. Maitland, *Justice and Police* (London: Macmillan and Company, 1885), pp. 1-2.

<sup>8</sup> Royal Commission on the Police Cmnd. 1728. (London: Her Majesty's Stationary Office, 1962), p. 45.

for civilized men.<sup>9</sup> It is one thing to talk quietly to a suspect without his counsel and artfully, perhaps by deceit, persuade him to incriminate himself; it is quite another to hang a suspect out of a window by his heels from a great height, or to beat a confession out of him by putting a telephone book on his head and pounding the book with a blackjack so it does not leave marks. Both techniques may be illegal, but responsible police officials would not publicly support blackjack interrogation. On the other hand, interrogation of suspects without the presence of counsel and even deceptive interrogation are standard "professional" police techniques.<sup>10</sup>

For many municipal police forces in the United States, the observer's question is, therefore, not whether police operate under the constraints of due process of law, but whether they operate within bounds of civilized conduct. In the old-fashioned police department, riddled with political appointees and working hand in hand with the rackets, a reformer is not concerned primarily with the niceties of constitutional rights. When the citizenry is facing the arbitrary use of "club, blackjack, and gun,"<sup>11</sup> the police reformer's problem is to reduce gross brutality, which seems traditionally to have been associated with corruption. Given this situation, it is not surprising that the solution to the "police problem" in America has been frequently conceived as changing the quality of people, rather than the philosophies of policing. Fosdick wrote in 1920, in a characteristically American passage on police reform:

We are concerned with facts and conditions and not with theories or labels. It is not a matter of democracy, of caste, or birth, or position, or anything else. It is solely a matter of finding the best possible brains to handle a most difficult public task.<sup>12</sup>

Police reform means finding a new source of police, and police control is a matter of having the "right" sort of people in control. "Reform" of police means increasing the efficiency of police personnel. It is rarely recog-

<sup>9</sup> National Commission on Law Observance and Enforcement (Washington, D.C.: U.S. Government Printing Office, 1930-1931), Publications, No. 1-14.

<sup>10</sup> See Fred E. Inbau and John E. Reid, *Criminal Interrogation and Confessions* (Baltimore: The Williams and Wilkins Company, 1962), pp. 20-115; Charles E. O'Hara, *Fundamentals of Criminal Investigation* (Springfield, Illinois: Charles C. Thomas, 1956), pp. 95-114; and Worth R. Kidd, *Police Interrogation* (New York: R. V. Basuino, 1940), pp. 124-125, pp. 133-186.

<sup>11</sup> For a summarization of the Wickersham Commission Report, see Ernest Jerome Hopkins, *Our Lawless Police* (New York: The Viking Press, 1931), index reference to "National Commission on Law Observance and Enforcement."

<sup>12</sup> Raymond Fosdick, *American Police Systems* (New York: The Century Company, 1920), p. 221. (Fosdick's italics.)

nized that the conduct of police may be related in a fundamental way to the character and goals of the institution itself—the duties police are called upon to perform, associated with the assumptions of the system of legal justice—and that it may not be men who are good or bad, so much as the premises and design of the system in which they find themselves. For example, V. A. Leonard, a specialist in police administration, indicates how the conception of punishment as the basis of order invites objectionable side effects:

A system of legal justice based upon the thesis of punishment has exerted a tremendously negative effect on the professionalization of police service. As a corollary the low quality of personnel required to exercise the police power under these conditions was not conducive to good public relations, with the result that a negative public opinion had been created. The withdrawal of public interest and support, together with public apathy and indifference, has further served to retard the advance toward professionalization. No less important has been the fact that a substandard personnel became easy prey for corrupt political figures and others in the community who profit when the risks associated with vice operations are reduced. The highly lucrative enterprises of prostitution, gambling, and narcotics enjoyed a field day during this period of American police history.<sup>13</sup>

Leonard, however, does not raise the basic issue of the meaning of the “professionalization of police service.” Clearly such a notion suggests that police must be honest and capable. But is this enough? The question is what the concept of “professionalization” suggests to police in a society committed to the rule of law.

With the concern for reform of police practices in America, a growing and responsible debate over the theory of the police in America may be anticipated. There are those police officials and other spokesmen for law enforcement who emphasize the importance of social order. They are not unconcerned about the arbitrary use of police authority, but feel that that answer lies in the continued improvement of internal police administration. By raising the standards for admission to the police force and by making efficiency a goal and personal honesty a requisite, the quality of police work will be raised and police work will become akin to a “science.”<sup>14</sup>

At the same time, there has always been a considerable body of opin-

<sup>13</sup> V. A. Leonard, *Police Organization and Management* (Brooklyn: The Foundation Press, 1951), p. 6.

<sup>14</sup> Cf. William H. Parker, *Parker on Police*, ed. O. W. Wilson (Springfield, Illinois: Charles C Thomas, 1957); O. W. Wilson, *Police Planning* (Springfield, Illinois: Charles C Thomas, 1962); also see two police journals, *The Police Chief* (pub. Chicago) and *Police* (pub. Springfield, Illinois).

ion, usually outside police circles—among defense attorneys, law professors, and judges—demanding that police adhere strictly to the rules governing the legal system, that they ultimately be accountable to the legal order irrespective of their “practical” needs as law enforcement officials. This position was summarized in the landmark case of *Escobedo v. Illinois*,<sup>15</sup> the United States Supreme Court overturning a conviction when the police refused to honor the request of a suspect to have a lawyer present at his interrogation. Justice Goldberg, for the majority, wrote:

We have . . . learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. 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.<sup>16</sup>

The purpose of this study is to show, through empirical investigation of police, how value conflicts of democratic society create conditions undermining the capacity of police to respond to the rule of law. Its chief conclusion (and orienting hypothesis), elaborated in the closing chapter, may be summarized: *The police in democratic society are required to maintain order and to do so under the rule of law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the rule of law emphasizes the rights of individual citizens and constraints upon the initiative of legal officials. This tension between the operational consequences of ideas of order, efficiency, and initiative, on the one hand, and legality, on the other, constitutes the principle problem of police as a democratic legal organization.* The work attempts to analyze, through empirical investigation of police, how conceptions associated with order and interpretations regarding legality develop within a professionalized police department, and to study the processes through which these conceptions and interpretations come to be associated with certain patterns and practices of policing.

#### LAW AND ORDER: THE SOURCE OF THE DILEMMA

If the police could maintain order without regard to legality, their short-run difficulties would be considerably diminished. However, they

<sup>15</sup> 378 U.S. 478 (1964).

<sup>16</sup> 378 U.S. 478, 490.