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BOOK REVIEWS

Justice Without Trial. By Jerome Skolnick. New York: John Wiley and Sons. 1966. \$7.95.

Utopian thought continues to hold an appeal for thinkers of every generation, not only because it is ultimately escapist, but because its possibilities are infinite. The only limitations on the variety of forms and contents of Utopian societies are the bounds of the Utopian imagination. A challenging exercise in Utopian model-building is to devise a social system ordered in terms of the due process clause. In designing a model on this basis, careful attention must be paid to those regulations devoted to the police function in the social order. These must provide that all police would obey all laws, at all times, and under all conditions—not only prohibitions directed to the society at large, but also those specifically derived from the due process clause which relate directly to police routines.

The formulation of a detailed and precise body of such regulations is not beyond the ingenuity of policy makers and intellectuals. There exists already a substantial body of case law and legal commentary of a high degree of sophistication from which draftsmen could readily derive a variety of alternatives, arguments and imaginative suggestions. The difficulty lies elsewhere. To focus solely on the police removes them from their proper context, circumventing without solving the crucial operational problem. The police are an agency of society, whose very function is to interact with various other societal agencies and institutions. Any design which overlooks this must ultimately fail. It is at precisely this point that the difficulties of design present themselves. For there are two views as to the repercussions of such changes, and no way to determine the validity of either. On the one side, the standard police argument is that so drastic a step would have disastrous effects on the fabric of society. It would unleash the deviant, the lawless, the criminal—in short, the anti-social elements of society would take control. The police, the guardians of the moral order, stand as the chief deterrent factor, holding these forces in abeyance. In a struggle of this sort it is the worst form of naïveté to

impose handicaps on the police since ground once conceded is seldom retrieved. This is the argument for the status quo—to refrain from interfering in police practices,¹ and focus on the true enemies of society. On the other side, there is a tendency to regard crime as a symptom of some deeper social ailment, calling for treatment and rehabilitation rather than punishment and retribution. Explanations of crime as manifestations of deep-rooted hostility to order and culture are dismissed as superstition and unsupported by the data. There is a greater reluctance to enlarge the zone of conduct declared anti-social, as well as to scrutinize cautiously the evidence against all persons accused of criminal behavior, to guard against human error and frailty. Thus there is considerable stress on regularity and visibility within the criminal process.² Failure to ensure the “protection of ultimate decency in a civilized society. . . .”³ is considered a greater threat to the maintenance of freedom in society than limitations on the power to apprehend and control law-breakers.

Both arguments derive ultimately from differing views of the nature of men in society, one pessimistic, one optimistic. Both rest in large measure on belief, but lack sufficient data to support their assumptions. Nor have they systematically tested their hypotheses. This is the core of the problem. The proposed model would so depart from present reality that there is no possible way to extrapolate from existing knowledge for predictive purposes. There is presently insufficient information about cause and effect to place reliance on any given prediction. Thus, the only approach practical appears to be a cross-the-fingers-and-hope attitude. These two opposing views resemble an unmarked crossroads, with paths going in widely divergent directions. There is a dearth of empirical data about where either road leads. In pragmatic terms, the question resolves itself into the inquiry as to the prospects of the police complying with the due process model of society.

¹ The most convenient collection of articles expressing the police response to recent Supreme Court decisions is *Symposium, The Supreme Court and the Police*, 57 J. CRIM. L.C. & P.S. 237, 377 (1966). See in particular the articles by Inbau at 265, Broderick at 271, Wilson at 291.

² The basic arguments of this school are excellently described in Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). The footnotes to this article provide a useful compendium of libertarian articles on these questions.

³ Justice Frankfurter in *Adamson v. California*, 332 U.S. 46, 61 (1947) (concurring opinion).

There is, however, little value in undertaking this problem without first confronting the fundamental question—what is it that leads to violations of these norms by the police in the first place? What are the factors which have shaped this situation, and how are they to be altered to ensure compliance with these abstract standards in the concrete situations within which the police operate?

There are no simple answers to these questions. One shorthand answer is to characterize police as “authoritarian personalities”⁴ and proceed from that premise; but it is not very useful to generalize so loosely about so large, scattered and disparate an abstraction as “the police” in the absence of systematic study. There is very little literature on police personality types,⁵ and none of it asserts, as a blanket proposition, that they are all authoritarian. Again, this argument locates the causal factor within the personal make-up of the policeman, ignoring the effects of interaction with the rest of society on his outlook on the world.

A far better argument is that set forth in this book. Professor Skolnick sets out to develop a theory of police behavior by emphasizing as the crucial feature the environment in which they perform their functions. The crucial factors, as isolated by this theory, are structural and environmental. They are therefore susceptible to analysis in terms of organizational dynamics, working conditions, and their impact on the perspectives of participants within the process:

Thus, the police, as a result of combined features of their social situation, tend to develop ways of looking at the world distinctive to themselves, cognitive lenses through which to see situations and events. The strength of the lenses may be weaker or stronger depending on certain conditions, but they are ground on a similar axis.⁶

Implicit in the questions Professor Skolnick poses as essential for an adequate understanding of police behavior is the premise that statistical data would contribute little of significance to his theory. The method employed in this book does not require quantification. It is shaped both by the theory under exploration and the

⁴ T. ADORNO, *THE AUTHORITARIAN PERSONALITY* (1950).

⁵ *E.g.*, M. BANTON, *THE POLICEMAN IN THE COMMUNITY* (1964).

⁶ J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 42 (1966) [hereinafter cited as SKOLNICK].

significant questions isolated by its terms, and is known as "participant observation." The operative principle of this method is "the idea that the investigator can best perceive the meaning of events through the eyes of the participant."⁷

Professor Skolnick proposes two major variables which operate to produce that set of behavior patterns loosely referred to as "police practices"—the "working personality"⁸ of policemen, and their "operational environment."⁹ The chapters of this book explore these two factors, tracing the effect of variations in operating conditions on variations in police behavior. The initial postulate is the existence of a "working personality" which colors the perceptions of all policemen, and reveals itself in the emergence of certain practices, primarily of a protective nature. The significant concepts in this "working personality" are 'authority' and 'danger.' To the policeman, the theory goes, every encounter is potentially dangerous, every situation harmful, every unusual or unexpected event threatening. Every confrontation is fraught with this undertone of menace. To protect himself, therefore, the policeman learns to view all non-police as potential threats to his safety, and adopts mannerisms and routines which will provide him with maximum protection. Similarly, organizational requirements as well as functions generate a complex of attitudes and action which can be described by the concept of 'authority.' Skolnick identifies two types of authority—internal, or organizational, by which the paramilitary nature of the organization becomes part of the individual's perspective on himself; and external, the more familiar role of the policeman as authority symbol.

The chapter on the "working personality" is at once the most provocative and the most disappointing part of the book. Suggestions, insights and penetrating observations are to be found throughout the chapter; yet few of them are elaborated at any length. A large number of questions are raised briefly, but few are explored in depth. It would be most unreasonable to expect answers to so wide a variety of problems. Yet, it must be deemed unfortunate that Professor Skolnick did not choose to deal with the existing literature in terms of its limitations, and the questions it poses,

⁷ *Id.* at 26. There is a general discussion of this method and its utility at 23-25.

⁸ *Id.* ch. 3.

⁹ *Id.* at 71-90, 231-34.

rather than attempting, as he did, to base a broad general theory of "police personality" on the limited data available. To take one noticeable omission, a discussion of the strengths and weaknesses of the literature relating to police performances on the "authoritarian personality" tests would have been a most valuable contribution.

In the light of Professor Skolnick's assertion that "the policeman's working personality is most highly developed in his constabulary role of the man on the beat,"¹⁰ the absence of any analysis of perspectives and work patterns of these—the most visible members of any police force—is ironic. Specifically, how far is his theory supported by empirical observation? What, if any, differences are revealed by contrasting the behavior of patrolmen with that of narcotics detectives? What variations in immediate environment contribute towards perceived differences? And what characteristics does observation reveal them to hold in common?

In any event, it is not clear how relevant personality characteristics are to the focus of the study, which is on police routines and behavior patterns, in terms of the due process restrictions imposed upon them by the court. Although the "working personality" is subjected to extensive discussion and analysis, its immediate bearing on many of the police routines described in the book is not immediately obvious. Although Professor Skolnick proposes a relationship between various police practices and their "working personality"¹¹ he does not elaborate the terms of the causal nexus involved. Factors such as work conditions and production pressures are analyzed with some particularity, and the case for their relevance is made with some cogency. The absence of a similar analysis for the theory of the "working personality" raises doubts as to the existence of any direct relationship between it and the behavior reported on.

Rather, the concepts of "danger" and "authority" around which much of this chapter is focused would appear relevant to a related but distinct problem—"police brutality." Protection against threatened harm usually takes the form of a forceful response, thereby raising complaints of "police brutality." While a significant problem in its own right,¹² it is not the central issue in most of the

¹⁰ *Id.* at 43.

¹¹ *Id.* at 231.

¹² There is a brief exposition of the historical perspective of this problem in Chief Justice Warren's opinion for the Court in *Miranda v. Arizona*, 384 U.S. 436, 445-58 (1965). See especially n. 5, 445-46.

areas on which Professor Skolnick focused in his study. It is tangential, for example, to the basic values being asserted in search and seizure cases. The analysis of the "working personality" of policemen set out in this chapter is an invaluable framework within which to understand the nature of the police response to recent criticism. For them, the greatest flaw in the due process argument is that it rests on assumptions and criteria which are impractical, and irrelevant to a system operating in terms of the production demands made upon policemen. Accordingly, since "the policeman operates according to his most concrete and specific understanding of the control system"¹³ the probabilities are that due process requirements will be treated as formal pre-requisites for conviction, rather than as craft-skills leading to greater proficiency:

The effects of the exclusionary rule and in general, judicial controls over police behaviour are therefore best understood when examined through the filter of police culture. This culture sees the procedural rule as something to be observed rather than obeyed; it is an unpleasant fact of life, but not a morally persuasive condition. The policeman, as a tactical matter, recognizes an obligation to appear to be obeying the letter of procedural law while often disregarding its spirit.¹⁴

The implications of this conclusion are not lost on Professor Skolnick and the most challenging portions of the book are those in which he traces the terms of the dilemma it creates. The confrontation between observed reality and libertarian doctrine enables him to structure the fundamental questions in terms of the challenge (and dangers) police lawlessness presents to libertarian values.¹⁵ The pressures on the libertarian ideal stem from two sources—police understanding of the demands made upon them by society through elective officials and prominent personalities, and these pressures reinforce the dynamic of the 'production' mechanism. Far more subtle, is the other factor proposed. Skolnick argues¹⁶ that it is a characteristic of democratic societies that the bureaucracy

¹³ SKOLNICK 234.

¹⁴ *Id.* at 228.

¹⁵ Professor Skolnick refers to these as "democratic" values, while it is my preference to describe them as "libertarian," since it is a narrower concept, and permits of a more precise focus on the issues immediately at stake. That nothing turns on this point is revealed by the fact that diminution of these rights must undoubtedly have serious repercussions on the democratic process at large.

¹⁶ SKOLNICK at 231-33.

retains a measure of initiative, and that the police, having bureaucratic features, must logically be entitled to exercise their proper share of this phenomenon. Therefore, to stifle the police, and rigidly to delimit their functions and performance, is a manifestation of totalitarian politics. This leads to the paradox that the Court, in protecting the supremacy of individual liberty in society, can do so only by imposing restrictions of a totalitarian nature on police initiative. This proposition is highly dubious, and rests on the questionable equation of police to more traditional bureaucratic agencies. Unfortunately, Professor Skolnick did not explore this issue in depth. Yet, the concept of "bureaucratic initiative" deserves further consideration as part of the theory of police behavior.

Professor Skolnick is pessimistic about the ultimate outcome of this confrontation. In his view, unless attitudes and perspectives change within the society at large, "then the prospects for the infusion of the rule of law into the police institution are bleak indeed."¹⁷ It is a somewhat depressing result to reach, but the most realistic one to be drawn from his data. It reflects the scrupulous attention to evidence, and the closeness of the reasoning which has already marked the book as one of the most important contributions to the field. Both in the crisp and convincing posing of questions and in its formulation of the fundamental issues, this book is a major contribution to the literature on police practices. It may soon achieve the status of a classic.

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The Intruders: The Invasion of Privacy by Government and Industry. By Senator Edward V. Long. New York: Frederick A. Praeger. 1966.

In *The Intruders*, Missouri Senator Edward V. Long has written about a subject of importance and significance to every citizen of the United States: the invasions of individual privacy now possible through use of modern electronic eavesdropping and surveillance techniques. Though written for the layman, the book is of significance to the legal profession. It serves to warn us of the

¹⁷ *Id.* at 245.

extent to which our clients, and even ourselves, may today be subjected to such eavesdropping or surveillance by government agencies or business competitors. It also serves to remind our profession of its special obligation to this nation to protect against such invasions.

For much of its length, the book details examples of invasions of the privacy of citizens by governmental agencies, businessmen and private individuals. Most of this material was gathered as a result of hearings before the Senate Subcommittee on Administrative Practice and Procedure, which the author chaired. Although both the hearings and the Senator have fallen into some disrepute after allegations that the hearings were connected with the several Hoffa trials, *The Intruders* deserves a careful reading because of the importance of its topic. For whatever motivated the hearings becomes irrelevant when the subcommittee's findings are examined. Any reader will be shocked with the examples of unwarranted intrusions into private lives which the hearings uncovered. To the extent that this book may help to sound the tocsin of alarm, it can only be praised. Unfortunately, perhaps, *The Intruders* accomplished little more than sounding an alarm. A polemic may bestir activity, but successful solution of the problem requires far more. Recognition of the need for action is but a precondition for resolution of the dilemma presented by the legitimate informational needs of our complex society, and the invasions of personal privacy which may result.

Although invasions of privacy by electronic eavesdropping and surveillance are documented in detail by the author, such invasions represent but one of many problems we face today in the area of recognition and protection of the individual's right to be an individual. Computer technology, for example, presents an entirely different but no less serious threat to the individual's "right to be left alone." The increased use of psychological tests, detailed application forms for employment or credit, and national informational exchanges all have impact upon solitude and individuality. If Marshall McLuhan's thesis is accepted, the existence of mass communications media itself is having an impact upon our individuality as yet unmeasured and almost unrecognized. Credit cards, electronic banking, social security, the draft, income taxation, and so forth, all have brought progress but also an increased need for a

technology which can keep track of transactions and hence people. As one contemplates these recent advances, it becomes too easy to translate them into the Orwellian nightmare of 1984, and to believe it is already too late to act. By focusing exclusively upon one aspect of the broader problem, *The Intruders* ignores the more generalized issues facing this culture.

Because technology has outdistanced the legal control thereof, the development of such controls immediately is essential. Nonetheless, an Orwellian imagery and its resultant panic does not serve well in such a cause. The above-described technology may serve us well or poorly. This is our choice. Controls are needed, not outright abolition. Privacy, after all, is really a relative thing. Few persons desire absolute solitude. Society itself brings a multitude of benefits, despite the tremendous loss of privacy which results. Physical proximity alone decreases isolation and individuality. Any significant assault upon the problem of privacy must begin by recognizing the need to balance competing interests, and must strive to achieve the compromise which maximizes recognition and protection of all interests, both individual and social.

It is precisely at this point that *The Intruders* falls short. In his final chapter, Senator Long calls for Congressional action banning wiretapping and other types of snooping. This recommendation, albeit desirable and necessary, does not strike at the heart of the problem. It does not even provide a complete solution to the eavesdropping problem. Federal legislation cannot play a predominant role in granting to each person the maximum privacy consistent with proper social and economic development. It can, of course, regulate intrusions by federal agencies, and can do something about regulating interstate usage of electronic eavesdropping equipment. Congress cannot, however, provide the unified approach to all aspects of protection of individual privacy which is called for today. This can only be done through a concerted effort which utilizes the wide variety of regulatory tools provided in our legal system. Although the legal system has in the past been resourceful in developing controls over unruly technological servants, recent advances which threaten us require such a unified attack.

In the past the legal system has been hindered in the development of adequate safeguards against unwarranted intrusions into an individual's life through lack of a unified conception of privacy pro-

tection. The tort of invasion of privacy is a creature of the 20th Century. Its most significant use to date has been to protect against uncompensated appropriation of a person's name or likeness. Extension of tort protection against other intrusions has been sporadic and unsystematic.¹ Although the fourth, fifth and sixth amendments to the U.S. Constitution have offered protection in limited areas, application to the states through the fourteenth amendment of these protections is of recent origin. Specific bits and pieces of legislation at both the federal and state levels have helped, but have not been based upon an overall plan of attack. As the findings of the Senate Subcommittee reported in Senator Long's book make clear, the patchwork approach has not solved the obvious privacy problems which are inherent in electronic eavesdropping technology. It is thus too much to expect the same approach to make workable a solution to the broader problems presented.

Perhaps, then, the recent Supreme Court decision in *Griswold v. Connecticut*² takes on increased significance. To the extent it recognizes a broad constitutional plan of protection of privacy, it can serve as a focal point for the development of the needed systematic attack upon technological and economic advances which threaten our individuality. It is now clear that power exists to develop the necessary overall controls. Legislation, both federal and state, can of course be useful in the regulatory process. The deterrence function implicit in much of tort law can be brought to bear. However, this can only be done after some initial, overall plan for guidance and direction has been provided. Had Senator Long developed such a plan, *The Intruders* would have become a truly significant document. Because it does not do so, we can only hope that sometime soon such a plan will appear. Only then can we begin the task of control which is so badly needed.³

¹ See, e.g., W. PROSSER, TORTS § 112 (3d ed. 1964); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

² 381 U.S. 479 (1965).

³ After this review was written but before it was published, release of Professor Alan F. Westin's book, *Privacy and Freedom*, was announced. Although the reviewer has not as yet had the opportunity to read Professor Westin's book, because of his long interest and efforts in the area of privacy it may prove to provide the unified approach called for in this review.