Buffalo Law Review

Volume 19 | Number 1 Article 15

10-1-1969

Constitutional Limitations on Evidence in Criminal Cases. by James George, Jr.

Irving Younger
Civil Court of the City of New York

CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES. By B. James George, Jr., New York: Practicing Law Institute, 1969. Pp. 413. $15.00.

IRVING YOUNGER*

Within every democrat there rankles a deep-seated distrust of the police.[1] It is an essential hedge against Demos rampant. Lacking it, no matter how kindly their intentions, philosopher, statesman, and judge walk heedless toward tyranny.[2]

Even so, not even a Messiah wants a world without constraints.[3] The democrat perforce wastes no time with dreams of anarchy. He takes it for granted that there must be a department of police, and devotes himself to marking out the limits within which policemen must tread. His purpose is to cabin their powers, for he knows that if the parish does not govern the constable, the constable will govern the parish.[4]

The American democrat reads his faith in the tables of the law handed down in 1791.[5] They vibrate with the same fear of law-enforcement that trembles within him. Thus they decree that there shall be boundaries passing which a policeman becomes a criminal;[6] further they do not go. Other institutions are left to say where the lines shall fall and to provide means for redressing any trespass beyond them.[7] Turning from the Constitution, the

---

* Judge, Civil Court of the City of New York; Adjunct Professor of Law, School of Law, New York University.

1. The perceptive Justice White has seen that the decision in *Escobedo* rests upon precisely this distrust of the police. Ironically, that is precisely why he condemns it. Escobedo v. Illinois, 378 U.S. 478, 498 (1964) (White, J., dissenting). Lest the reader conclude that Justice White is no democrat, he is reminded that Justice White's dissent in *Escobedo*—rejecting as irrelevant to a stationhouse interrogation the sixth amendment's right to counsel but remarking upon the significance of the fifth amendment's privilege against self-incrimination—supplied the rationale for the majority's step beyond *Escobedo*. *See* Miranda v. Arizona, 384 U.S. 436 (1966). But then, Justice White dissented in *Miranda* too. *Id.* at 526.

2. This idea is memorably expressed by W. H. Auden in a stanza of his "Letter to Lord Byron," part of AUDEN & MACNEICE, LETTERS FROM ICELAND (1937):

> Banker or landlord, booking-clerk or Pope,
> Whenever he's lost faith in choice and thought,
> When a man sees the future without hope,
> Whenever he endorses Hobbes' report
> 'The life of man is nasty, brutish, short,'
> The dragon rises from his garden border
> And promises to set up law and order.

3. ST. MATTHEW, 22:19-21.

4. *Compare* W. SHAKESPEARE, MUCH ADO ABOUT NOTHING, Act III, scene iii:

> *Dogberry.* This is your charge: you shall comprehend all vagrom men: you are to bid any man stand, in the prince's name.
> *Watch.* How, if a'will not stand?
> *Dogberry.* Why, then, take no note of him, but let him go; and presently call the rest of the watch together, and thank God you are rid of a knave.

5. The first ten amendments became part of the Constitution on December 15, 1791, when, after ten other states had done so, Virginia approved them.

6. For example, if any be needed, the fourth and fifth amendments.

7. The practice of totalitarian nations, by contrast, has been to set up several police departments simultaneously, and to rely upon the resulting strife and contention to keep each of them in check. *See, e.g.*, W. SHIRER, THE RISE AND FALL OF THE THIRD REICH, 120, 215 (1960). For various reasons not to the point here, democracies cannot use that technique.

democrat looks expectantly to his legislatures. He finds, however, that when the task is bridling the police, they are uncharacteristically diffident and ineffective.[8] In the United States, they have failed.[9] Instead, the Supreme Court has drawn the boundaries.[10] Using the Constitution's orphic generalities as a foundation, the Court has constructed a code of criminal procedure that surpasses in breadth and in detail any statute in the field.[11]

In one respect at least, the Court's work has been more cribbed than a legislature's need be. Parliamentary energy may be poured into virtually any mold ingenuity and sense suggest.[12] Judicial energy works only in the courtroom; it is impotent on the street or in the stationhouse.[13] Since courtrooms are apt for just one thing—the conduct of trials—the Supreme Court's code of criminal procedure manifests itself only when criminal cases are tried. It splits them in two. The first part is a trial on the issue whether the police have violated the code. If the police are convicted, there is no second part. If the police are acquitted, the second part follows—a trial on the issue whether the defendant has violated the substantive law of crimes laid down by the legislature.

About the latter kind of trial there are numerous books.[14] About the former there has been much miscellaneous material,[15] but nothing clear, compact, co-

8. Let me touch upon the two main reasons. The democratic legislator must be alert, first, for the outcries of ignorant demagogy (*e.g.*, the attacks on the Warren Court for "shackling the police"), and, second, for the more delicate arguments available to a police department reluctant to be reined (*cf.* Georges Simenon's novel, THE PREMIER, 48 (Pocket Books Edition), in which an ambitious French politician chooses "to be Minister of the Interior, and have the police records at his disposal.").

9. By way of proof and of example, I would ask where were the laws, before *Mapp*, giving effect to the fourth amendment, and where the penalties suffered by the Federal Bureau of Investigation for its scandalous violations of section 605 of the Federal Communications Act. *See* A. WESTIN, PRIVACY AND FREEDOM, 177 (1967); Younger, *Laying Down the Law to Number-One Lawman*, New Republic, March 4, 1967, at 11.

10. The Court's march unto the breach left by Congress and the state legislatures is a complex event. Several forces have shaped it. In addition to distrust of the police, sketched in this review, there are: (1) the tendency of one institution (the Court) to fill any vacuum in public affairs left by another (the legislatures); (2) the pressure felt throughout the law to move from rules that are exact but difficult to apply (*e.g.*, a confession shall be admissible only if it is voluntary) to rules that are absolute and easy to apply (*e.g.*, a confession shall be admissible only if the police have first said certain things to the suspect); and (3) the suspicion that policemen testify perjuriously in order to avoid the application of rules they dislike (*e.g.*, if a seizure would be illegal under *Mapp*, the policeman testifies that the suspect abandoned the thing seized, hence avoiding the difficulty.). *See* Younger, *The Perjury Routine*, The Nation, May 8, 1967, at 596.

11. I do not, in this brief review, mean to characterize the Supreme Court's work for good or for ill. My purpose is merely to note what has been done.

12. For example, were a legislature so inclined, it might enact a rule like the rule of *Miranda* and provide that if a policeman violates it, he should forfeit one month's salary to be paid by the public treasury directly to the suspect whose rights have been affronted.

13. The Supreme Court, for example, can tell a trial judge to admit or to exclude a policeman's testimony. It cannot tell the policeman to do his job in a certain way on pain of discipline.

14. *E.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960): CLARK & MARSHALL, CRIMES (7th ed. 1967).

15. *E.g.*, Note, *Pre-Arrest Delay: Evolving Due Process Standards*, 43 N.Y.U.L. REV. 722 (1968): Developments in the Law, *Confessions*, 79 HARV. L. REV. 935 (1966).

herent, and comprehensive. Until now. Professor George's book possesses those four rare virtues,[16] and is an indispensable volume for every criminal lawyer.

The author treats in sequence the six major issues with which the Supreme Court has dealt: search and seizure, the exclusionary rule, wiretapping and eavesdropping, line-ups and show-ups, the privilege against self-incrimination, and confessions. As to each, he states the problem, describes the cases in which the Supreme Court has grappled with it, summarizes enough lower court decisions to give the practitioner a sense of the direction in which the law is moving, suggests something of how the advocate can turn the rules to his client's advantage, and, where Congress or a state legislature has attempted to modify or refine doctrine pronounced by the Supreme Court, he lavishes upon the reader *in extenso* discussion of the statute.[17]

I have used the word "reader" in a Pickwickian sense. *Constitutional Limitations on Evidence in Criminal Cases* is not a book to be read straight through. It conveys much matter with no art. Professor George has none of the little tricks of seduction that slip a reader smoothly from page to page *sans* labor, *sans* ennui, *sans* slumber. This, rather, is a book to be consulted. Let a practitioner anticipate that some phenomenon of police conduct will figure in a trial. Let him find the chapter where George discusses it, and there he will discover everything he must know to do his job intelligently and efficiently. For that, Professor George deserves the profession's thanks, and those are laurels enough for any man.

16. It also offers relief to the myopic lawyer weary of volumes printed to be read by insects. The book is set in visible type with decent margins and plenty of space between the lines.

17. For example, pages 151 to 183, dealing with wiretapping and electronic surveillance under the Crime Control Act of 1968, and pages 183 to 193, dealing with New York's statute on that subject.