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Book Review: Denial of Justice: Criminal Process in the United States

Cover Page Footnote

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Book Review

DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES. By Lloyd L. Weinreb. New York: The Free Press, A Division of Macmillan Publishing Co., Inc. Pp. xi, 177. \$12.95

How many times have we heard lawyers or laymen lament the failings of our criminal justice system, only to hear them finally conclude: "But it's still the best system there is." In his book, Lloyd L. Weinreb argues persuasively that American criminal process not only falls short of being the best there is, but it denies us a system which we can properly call "just."¹

Weinreb's work is divided into two sections. The first part, which comprises the bulk of the book, explains how criminal process works and, more significantly, how it has failed to achieve effectively the goals for which it was developed. In the second part, he describes in general theory an "alternative model" which he considers to be more in keeping with the goal of criminal process.²

Weinreb frames his critique in terms of the various stages of American criminal process, beginning with criminal investigation, and moving on to prosecution, guilty pleas and finally the trial. His criticisms at each stage ring true for anyone who has perceived the process from within for any period of time. What sets Weinreb's treatment apart from the myriad works on the American criminal justice system which currently glut our law libraries is his thoroughly dispassionate and intellectual approach to the problems he discusses. The objections he levels at our criminal process, as well as his "alternative model," are ideologically neutral and wholly pragmatic. He assumes the posture of neither the civil libertarian nor the "law and order" conservative. His model, for example, would cut back drastically on the role and authority of the police in our society, and at the same time curtail a number of constitutional rights of defendants which are currently deemed by our

1. L. Weinreb, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977).

2. Weinreb sees the goal of criminal process as the determination of guilt with a view toward imposing a penalty. *Id.* at 1.

collective legal psyche to be indispensable.

Central to Weinreb's book is his proposed restructuring of the process of criminal investigation. He begins with the premise that our police are required to perform schizophrenic functions in American criminal process. They perform extensive peace-keeping and emergency assistance duties on the one hand, and investigative and even judicial functions on the other.³

Weinreb argues impressively that those qualities which make the police uniquely qualified to perform their duties as keepers of the peace render them ill-suited to perform effectively in an investigative or judicial role.⁴ In his capacity as a "street cop," for example, a police officer is required to move swiftly, generally on-the-scene, and with force if the circumstances so require. In the course of these duties, his overriding concern is to bring an emergency situation under control where lives may be at stake.

Following an on-the-scene encounter with a suspect, this "street cop" is required by our present system to transform himself into a figure who exercises the judgment of "a neutral and detached magistrate."⁵ He can no longer be that monolithic crime fighter whose sole concern is the protection of a frail citizenry. His concern must now shift to the rights of the individual he has just apprehended. He is expected to administer the array of formalized arrest procedures, perhaps conduct a search of the suspect, a custodial interrogation or lineup, all in a manner that conforms with the latest edicts from the United States Supreme Court and which splits the finest constitutional hairs.

To remedy this apparent conflict, Weinreb suggests a principle of separation.⁶ While acknowledging that the principle is easier to state than apply,⁷ he claims that after the police have made an on-the-scene arrest, their authority should end. The sole responsibility of the police at this point should be to escort the suspect to other officials, who will be responsible for whatever further steps are proper in furtherance of a criminal investigation or prosecution.

In response to the logical question of who should be responsible

3. *Id.* at 13-14.

4. *Id.* at 20-21.

5. *Id.* at 42, quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948).

6. *Id.* at 40-41.

7. *Id.* at 41.

for the investigative and prosecutorial work which the police now perform, Weinreb states:

We need, then, to establish the office of a magisterial investigator or investigating magistrate, whose responsibility for investigating and preparing a case for prosecution is distinct from the work of the police As between the police station and a public agency with the neutral, nonforceful trappings of the judiciary, the choice is obvious. So too, the choice is obvious between removal of the person to a police station, where he must submit to police officers whose primary authority, training, and identity are bound up with the use of force, and his immediate release into the custody of a judicial officer trained for the tasks assigned to him.⁸

Thus, according to Weinreb, if the police do not catch a suspect in the act and do not make an on-the-scene arrest, their authority, strictly limited to its peace-keeping function, would permit them only to report the crime and whatever evidence they have to the appropriate magistrate.⁹ It is thereafter the duty of the magistrate to determine whether, and if so how, to investigate further.

Weinreb is not clear as to what, if any, role the police might assume in this subsequent investigative stage. What is clear, however, is that to whomever the task should ultimately fall, any further investigative steps will be subject to the magistrate's authority and supervision.

As Weinreb himself admits, the notion of a magistrate performing both prosecutorial and judicial functions is alien to our system of criminal jurisprudence.¹⁰ I have some reservations regarding the duality of the magistrate's role. Whether this investigating magistrate will head his own staff of investigators or merely supervise the police in their investigative efforts, he might well lose that element of independence which is both characteristic of and central to his judicial role. Not every investigation concerns an open-and-shut street crime. An investigating magistrate undoubtedly will be called upon to supervise more sophisticated and complex investigations involving homicides, corruption and white collar crimes. These will require a zealous and committed prosecutor whose total energies are devoted to the investigation of such crimes. It is doubtful that a magistrate who is carrying on a dual role will be able to muster the

8. *Id.* at 42.

9. *Id.* at 125.

10. *Id.* at 126.

resolve and devote the time to such demanding investigative efforts and, at the same time, remain sufficiently independent to perform his judicial duties.

Weinreb's primary objection to our present system of criminal investigation is the dual role which the police have played in it. It thus appears inconsistent to replace the police as investigators with a magistrate who, in addition to his investigatory duties, would also sit as a judge. I would suggest that the duality of the magistrate's role would be equally offensive to our sense of fair play. Surely, the magistrate's legal training does not set him above the police officer in his ability to assume dual responsibilities without compromising one or the other.

Moreover, Weinreb does not convince me that police generally perform their investigative functions poorly. The police have failed only in those limited factual situations which give rise to close constitutional questions involving the rights of defendants. To say that our police have not had an overabundance of success with pre-trial identification procedures, search and seizure problems and custodial interrogation situations does not mean that they have failed to fulfill their overall investigation function effectively. Our detective forces, for example, solve numerous homicides, burglaries, robberies, and arsons each year by utilizing investigative methods which they have developed over decades of trial and error. To strip them of this function merely because a magistrate may be temperamentally more adept at administering *Miranda* warnings¹¹ carries Weinreb's point too far.

Finally, even if police were strictly limited to their so-called peace-keeping duties, their investigative and judicial function would not be wholly eliminated. "Search and seizure" and "stop and frisk" situations, for example, would nevertheless confront police officers as a normal concomitant of their on-the-street encounters with suspects.

On balance Weinreb's alternative model as it relates to criminal investigation is a reasonable one. Our police clearly are better equipped to handle their peace-keeping functions than they are those which are at least partially judicial in nature. The fourth, fifth and sixth amendments to the United States Constitution, at least

11. *Miranda v. Arizona*, 384 U.S. 436 (1966).

as they have been interpreted and expanded by contemporary decisional authority, place an unrealistic burden on those who are charged with the enforcement of our criminal laws. To the extent that Weinreb's model would take this burden off our police, I would applaud it.

Weinreb is correct in his claim that there is no legitimate reason why many of the criminal procedures which immediately follow an arrest are conducted in the hostile atmosphere of the police station-house. A magistrate, even one with investigatory authority, would be a preferable vehicle through which routine booking procedures, lineups or other forms of post-arrest identification, and in-custody questioning of the defendant could be performed. The adoption of this aspect of Weinreb's model would be a significant step in the development of our criminal process. At the very least this procedure would clothe that critical stage in the criminal process immediately following the arrest of a suspect with an aura of detachment and impartiality which it now lacks.

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