PROCEDURAL FAIRNESS AT THE POLICE STATION

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ABSTRACT

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This thesis questions whether it is right to allow the police to detain and interrogate suspects at the police station. It asks whether there are procedures in place to ensure that suspects are not coerced or intimidated into confessing falsely; whether it is consistent with adversarial ideals of adjudication for the courts to endorse confessions of guilt which have been made in an inherently coercive atmosphere; and whether it is justifiable to use powers of arrest to facilitate interrogation.

The thesis provides some historical background to current police powers, and then goes on to demonstrate that controls on police questioning were gradually relaxed in the period of the Judges' Rules (1912-84). It is shown that the arguments put forward to justify the increase in police powers, namely that the police were neutral investigators from whom suspects had nothing to fear and that powers of questioning were vital for crime control, could not be sustained in the light of then known facts.

The legal framework which currently regulates police powers is described, and it is argued that it pays insufficient regard to due process values. The thesis draws upon interviews with defendants in order to address the issue of whether those who go through the process perceive police station procedures as fair or unfair. Through a combination of interview and observational data, the thesis seeks to establish that granting legal 'rights' to those detained at the police station does not always empower them to resist police pressure and coercion.

The thesis concludes that police powers of detention and questioning contribute little to the task of identifying and convicting offenders, sometimes lead to miscarriages of justice, and may be used to inflict arbitrary and summary punishment. It is therefore recommended that the police right to interrogate suspects be abolished.

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My thanks also go to all those individuals who formed part of the interview sample, without whose co-operation I would not have been able to record and report the views of those who go through the process of detention and questioning.

I was guided in the early stages of the project by Mr Adrian Zuckerman, and I thank him for his help. I am also extremely grateful to my supervisor, Dr Roger Hood. The fieldwork could not have been arranged without his help, and the structure of the thesis would have been weaker and the quality of the writing poorer if not for his patience in reading and commenting upon numerous drafts.

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CHAPTER ONE

INTRODUCTION: RESEARCH OBJECTIVES AND METHODS

This thesis seeks to provide an understanding of the issues surrounding police control of the criminal pre-trial process. The project was prompted by the findings of empirical research which indicate that the 'police ... effectively control the early stages of the criminal justice process; and through this early control... they are able... to influence powerfully the remainder of the criminal justice system'.[1] Baldwin and McConville found that almost half the 1476 defendants in their sample made an incriminating statement to the police, and that almost 88 percent of these defendants went on to plead guilty.[2] Even if the making of a confession does not induce the defendant to plead guilty, it still serves seriously to undermine the defence at the court stage.

There can be no doubt, therefore, that in a large number of cases the defendant's fate is decided in the police station and not in the courtroom. This gives rise to two related questions:

i. Is it desirable for the courts to endorse, without further inquiry, resolutions which have been reached between the police and the suspect in private? and,

ii. Are there procedures in place to ensure that the police do not use their powers of detention and questioning to coerce or intimidate suspects into confessing falsely?

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[1] Bottoms, A. and McClean, J. (1976) *Defendants in the Criminal Process*, at p.230.

[2] The authors had a total sample of 1476 defendants - see Baldwin, J. and McConville, M. (1980) *Confessions in the Crown Court*, (*RCCP Research Study No. 5*), at p.14. Mitchell carried out a study of committal papers at Worcester Crown Court and discovered that nearly 70 percent of defendants had made a confession to the police (Mitchell, B. (1983) 'Confessions and police interrogation of suspects', *Crim. LR* (pp.596-604) at p.598.

These questions cannot be answered without some understanding of the structure and underlying ideology of the criminal process, and of the police role within it.

The formal structure of legal adjudication in England and Wales is adversarial. The adversarial model is built upon the assumption that the 'truth' is best reached by structuring a contest between two opposing sides - the prosecution and the defence. In its ideal form, the contest takes place in a public forum before a judge and jury or magistrates, and each side is given the opportunity to convince the court that its version of the case is the correct one. Providing the defendant with an advocate, staging the trial in public, and placing the defendant's fate in the hands of an impartial tribunal all serve to enhance the reliability of the verdict, and to convince both the accused and the public that guilt adjudication takes place in a manner which is fair.

Rules of evidence are utilised in order to increase the likelihood of a factually correct outcome, and it is the duty of the judge in the Crown Court, and of the magistrates in the Magistrates Court, to ensure that the trial is conducted in accordance with these rules. So, for example, the jury is denied, and the magistrates are required to disregard, information which is likely to encourage prejudice rather than reason. This means that the previous convictions of the defendant are excluded, as is confession evidence procured in circumstances likely to render it unreliable. Hearsay, other than in exceptional circumstances, is also disregarded.

The prosecution is in a superior position to the defence in that it decides upon the charge to be levelled and, as it is backed by the State, has at its disposal immense resources to gather the evidence necessary to make its case appear to be compelling. The adversarial model is built upon a recognition that the contest is unlikely to produce a reliable outcome if the opposing parties are unequal in strength, and it therefore provides that the defendant has no obligation to convince the jury of his innocence, whereas the prosecution, in order to succeed, must present proof beyond reasonable doubt.

Some observers have asserted that to allow the police to detain and privately interrogate suspects gives rise to the danger of mistreatment and wrongful conviction. They argue that the police have a vested interest in securing the conviction of those whom they arrest, and they can, and sometimes do, pressurise suspects into accepting the charges levelled against them.[3] The outcome is a travesty of adversarial ideals: the State obtains convictions without having to prove its case beyond reasonable doubt to an impartial fact-finder in accordance with the rules of evidence.[4]

Others have argued, however, that whilst a contest or battle model may be useful at the adjudicative stage, it is inappropriate at the investigative stage. These writers meet the above criticisms by advancing one or other of the following two theories of the police role.

The first theory is one in which the police are placed outside the adversarial format. They are viewed as 'ministers of justice'; neutral investigators who seek to uncover all the evidence relating to the incident regardless of whether it points to guilt or to innocence. The police, it is argued, are suppliers of information to both parties and do not themselves enter the adversarial fray. As such, the suspect has nothing to fear from them, and needs no adversarial protections whilst in police hands.[5] This conception of the police role enjoyed widespread support for most of this century, and it heavily influenced the way

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[3] Packer, H. (1968) *The Limits of the Criminal Sanction*, at p.203; JUSTICE (1979) 'Pre-trial criminal procedure: police powers and the prosecution process' Evidence submitted to the *Royal Commission on Criminal Procedure* (1981); Legal Action Group (1979) 'Legality in the criminal process', Evidence submitted to the *Royal Commission on Criminal Procedure* (1981).

[4] Kamisar, Y. (1965) 'Equal justice in the gatehouses and mansions of American criminal procedure', in *Police Interrogation and Confessions* (1980).

[5] Devlin, P. (1979) *The Judge*, at pp.71-2.

in which the law regulating police interrogation of suspects was developed by the courts.

The theory which is now more commonly advanced to justify the adoption of a non-adversarial format for pre-trial process is one which accepts that the police cannot be neutral - accepts that they are in fact prosecution oriented. This theory states, however, that whilst not neutral, the police are *professionals* who seek to carry out their job in a manner which is *efficient*. Their job is to detect crime, apprehend the perpetrators and to gather the evidence necessary to secure convictions at trial. Efficiency dictates that they must screen out those not legally guilty of an offence; it would defeat the purpose of their role and be unprofessional for them to pursue the legally innocent. Citizens can be protected against unfair treatment by the police (wrongful arrest, charge, prosecution) not solely by the professionalism of the force, but also by legal provisions designed to encourage the police to screen out the legally innocent in an efficient way.[6]

The legal framework which currently regulates police powers of arrest, detention and interrogation is built upon an acceptance of this second theory. It is a framework which recognises that the police can become prosecution-minded, and therefore seeks to safeguard the suspect by granting him certain rights and protections. In common with the first theory, however, it accepts that to a large degree the police can be trusted to regulate themselves.

In this thesis I address the two questions set out above by subjecting these theories of the police role to critical analysis. In doing so, I have utilised historical, theoretical and empirical methodologies.

In order to provide some historical background to current police powers, Chapter Two concentrates on the developments which took place in pre-trial

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[6] The recommendations of the *Royal Commission on Criminal Procedure 1981* (Cmnd 8092) were premised on these beliefs.

procedure in the period 1750 to 1900. Drawing upon both case law and secondary sources, I will demonstrate that until the early nineteenth century Justices of the Peace played a substantial role in the interrogation and prosecution of suspected offenders. Towards the end of the eighteenth century the judiciary began to disapprove of pre-trial questioning on the ground that it was potentially coercive. The result was that the preliminary inquiry gradually acquired a more judicial procedure and function. The vacuum left by the Justices was filled by the police, who by the late nineteenth century were routinely interrogating and prosecuting the majority of defendants. This new police role was initially condemned by politicians and judges alike on the grounds that the police had no power to question and that custodial questioning was inherently coercive.

In Chapter Three I will describe how, following the promulgation of the Judges' Rules in 1912, the judges gradually relaxed the legal controls on police questioning of suspects. The reason that the rules were relaxed was because the judiciary accepted the twin arguments that controls were unnecessary in view of the neutrality of the police, and that rules designed to protect suspects were interfering with the ability of the police to detect crime and identify offenders. I will demonstrate that the theory of the police as 'ministers of justice' was flawed, and that the argument which blamed suspects' rights for police ineffectiveness could not be sustained. The chapter is based mainly on the primary source materials of case law, official Reports and newspaper articles, but I make use also of empirical research findings.

Chapter Four concentrates on the debate which led to the passing of the Police and Criminal Evidence Act 1984, which now governs much of pre-trial procedure. This Act was based on the *Report of the Royal Commission on Criminal Procedure*[7], and my aim will be to establish that the recommendations put forward by the Commissioners paid insufficient regard to due process values. It will be further demonstrated that many of the arguments advanced by the

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[7] 1981, Cmnd. 8092.

Commission to justify increased police powers were refuted by the Commission's own research findings.

In Chapters Five and Six I discuss the nature of police attitudes and work practices with the aim of assessing whether the police can be trusted to screen out the legally innocent. This is done through reviewing the findings of a host of studies which have investigated what has become to be known as police 'work-culture'. In these two chapters I will also address the question of whether suspects themselves feel that they are fairly treated by the police, and seek to identify the criteria they employ in making this evaluation. This is an issue which I investigated through interviewing 80 defendants about their experiences of detention at the police station.[8]

My determination to investigate and report the defendant's perspective arose from a concern that the views of those who are subjected to the criminal justice process are all too often ignored.[9] Furthermore, research suggests that if citizens feel that the substantive law is unjust or the procedures for its application are unfair, disrespect for and violation of the law is set to increase.[10] In view of such findings I felt that if information could be gathered which threw light on what defendants feel to be fair or unfair about police detention and questioning, it would place policy-makers in a better position to

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[8] Further details of the empirical project are provided in the introduction to Chapter Five.

[9] A concern voiced by McBarnett during the debate which led PACE: McBarnett, D. (1981) 'Balance and clarity: Has the Royal Commission achieved them?', *Criminal Law Review* (pp.445-53).

[10] Mueller, E. (1980) 'The psychology of political protest and violence', in T. Gurr (ed.) *The Handbook of Political Conflict: Theory and Research*, cited in Tyler, T. (1984) 'The role of perceived injustice in defendants' evaluations of their courtroom experience', *Law and Society Review* (Vol.18; pp.51-74). See also Lind, E. and Tyler, T. (1988) *The Social Psychology of Procedural Justice*, at p.64 and Tyler, T. (1990) *Why People Obey the Law*, where it is argued that citizens are more concerned about procedural fairness than they are about the substantive outcome.

evaluate the workings of present safeguards and to tackle the problem of perceived unfairness.

In Chapter Seven I look at whether the police comply with the rules designed to regulate their behaviour. A number of secondary sources are used, including recent research studies conducted on behalf of the *Royal Commission on Criminal Justice.*[11] The findings of these studies are interlaced with what I was told by defendants during the course of interviews, together with what I observed at the two police stations where these interviews were carried out.

I conclude in Chapter Eight by arguing that, in their current form, police powers of arrest, detention and interrogation lead to miscarriages of justice, allow the police to inflict arbitrary and summary punishment, contribute little to the task of identifying and convicting offenders and cannot be justified in a society which claims to subscribe to the principle of innocent until proven guilty.

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[11] Cm. 2263.

CHAPTER TWO

THE ORIGINS OF POLICE CONTROL OVER PRE-TRIAL PROCESS 1750-1900

In this chapter I seek to explain how the police came by their powers to interrogate, charge and prosecute suspected offenders. It will concentrate primarily on developments which took place during the one hundred and fifty years before 1900.

The account provided is at times speculative, but this is due to the dearth of historical material on the subject. The paucity of such material supports the argument which I shall present, namely that the law did not *establish* the structure of pre-trial process, but developed so as to *recognise* and *accommodate* it. Legal recognition of police practice was neither total, nor free of uncertainty and controversy. In fact, there was no serious attempt to define police powers and regulate police practice in this regard until the early twentieth century.

I. THE JUSTICE OF THE PEACE AS PROSECUTOR

The tasks of investigation, interrogation and prosecution which are today associated with the police were originally fulfilled by the Justice of the Peace. Although the office of Justice was set up in 1326,[12] it is the Marian statutes of 1554-55[13] which explain the precise role played by the Justices in the criminal process.

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[12] 1 Edward 3 c.16

[13] 1&2 Phil. and Mary c.13 1554, 2&3 Phil. and Mary c.10 1555.

These statutes closely regulated the power of the Justices: when presented with a suspected offender, they could either detain him until trial or bail him, but had no power to order an unconditional discharge.[14] The first Marian Act dealt with those cases where bail was granted. It placed a duty on the Justices to make a written record of the bailment, to examine both the suspect and the prosecution witnesses, and to make a written note of the evidence against the suspect. They were required to give this information to the trial court, and judges were empowered to fine Justices in cases where they formed the view that the grant of bail had been improper.[15]

The preamble to the second Marian statute made it clear that the non-examination of those not granted bail was a loophole in the law, and the Act extended the provisions of the first statute to those cases where the suspect was detained (committed) for trial. As with the first Act, the statute stated that only factors which indicated the prisoner's guilt were to be recorded. There was a change, however, in that the examination did not have to be put in writing straightaway, but within two days. This indicates that the State wanted a memorandum rather than a detailed transcript of the proceedings.

These statutes must be understood in the context of a system of private prosecution. Due to the considerable time and money needed to pursue a prosecution, it was not uncommon for an aggrieved citizen to have a change of mind regarding the whole venture. The Marian statutes, by laying a duty on Justices to examine the suspect and prosecution witnesses and to make a memorandum of the evidence, were aimed at ensuring that all cases went to trial and that the evidence relevant to proving the charge was available. The Justice was to be the principal witness against the accused at his trial,[16] and '(t)he

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[14] Langbein, J. (1974) *Prosecuting Crime in the Renaissance*, at p.6.

[15] *Ibid.*, at pp.8-10.

[16] Stephen, J. (1882) *History of the Criminal Law of England* (Vol. 1), at pp.222-3.

examination record was to be a sort of file memorandum for the J.P - a prompter, like the notes a modern policeman uses to refresh his memory.'[17] Beattie has come to a similar conclusion regarding the role of the Justice, writing that he 'was charged to assemble a prosecuting brief that would stiffen and supplement the case presented orally by the victim-prosecutor.'[18]

Langbein, whilst acknowledging the prosecutorial role of the Justices, has argued that the statutes were not aimed primarily at facilitating the creation of a prosecution case. In his view, they were meant to ensure greater control and supervision of Justices.[19] It is difficult to accept, however, that the imposition of 'control' was in itself the sole objective. It is more likely that the primary aim of the statutes was to give the Justices a more prominent role as investigators and prosecutors, and this *necessitated* greater control and supervision by the trial court.

This argument is given some weight by the fact that examinations taken at the preliminary inquiry supporting the prosecution case, including any admissions that may have been made by the defendant, were read out to the jury.[20] Langbein's study of Old Bailey trials in the 1750's found that pre-trial confessions were used with 'great frequency',[21] and research by Beattie demonstrates that they were usually fatal to any chance of acquittal. He found that in one court term in 1738,

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[17] Langbein (1974) *op. cit.*, at pp.35-6.

[18] Beattie, J. (1986) *Crime and the Courts in England 1660-1800*, at p.271

[19] Langbein (1974) *op. cit.*, at pp.10-12,23-4.

[20] See (cited in Langbein (1974)) Smith, T. (1565) *De Republica Anglorum*; T.W, (1660) *The Clerk of Assizes, Judges, Marshall and Cryer*; Hale, (1736) *Pleas of the Crown*, (Vol.2), at pp.284-5.

[21] Langbein, J. (1983) 'Shaping the eighteenth century criminal trial', *Univ. Chicago LR* pp.1-136, at p.81.

eighty-five percent of those who had made a confession at the preliminary inquiry were convicted.[22]

Finally, regardless of their main intent, there is some evidence to suggest that the Marian statutes succeeded, at least to some degree,[23] in establishing a system of State investigation and prosecution. Stephen, writing in 1882, described the Marian system as one under which some Justices carried out everything from investigation and arrest to interrogation and prosecution.[24]

The position of the defendant at the preliminary inquiry was not enviable. He was not told of the evidence against him, and neither was he allowed to examine the depositions of the prosecution witnesses. The view was taken that to allow the suspect access to this information would give him an unfair advantage.[25] The inquiry was structured upon the belief, as Beattie puts it, 'that the truth would be most clearly revealed if the prisoner was confronted with the evidence only in the courtroom so that the jury could judge the quality of his immediate

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[22] Beattie (1986) *op. cit.*, at p.416

[23] Hay and Snyder have argued that Langbein has probably overstated magisterial involvement in the pre-trial process: see Hay, D. and Snyder, F. (1989) 'Using the criminal law 1750-1850: Policing, private prosecution and the State', at p.23, in D. Hay and F. Snyder (eds.) *Policing and Prosecution in Britain 1750-1850*.

[24] Stephen (1882) *op. cit.*, at p.225. See also description of the work of Fielding, the Bow Street magistrate, given in Langbein, J. (1983) *op. cit.*, at pp.67-76.

[25] *In Thurtell's Case* (*The Times* 5th December 1823, at p.2), Mr. Justice Park deprecated the new practice of examining prosecution witnesses in the presence of the accused. Referring to the operation of the Marian statutes in the past, '(h)e appealed to the experience of every gentleman who heard him ... whether the constant course was not to transmit them (the depositions) to the judge, taking good care that the person accused should not have any opportunity of seeing them .... For what would be the consequence if the latter had access to them? Why, he would know everything which was to be produced in evidence against him - an advantage which it was never intended should be extended towards him.'

unprepared response.'[26] Although in the dark as regards the case against him, he was interrogated by the Justice of the Peace, and was no doubt expected to answer and make his defence. Looking back at the operation of the Marian statutes, Stephen was highly critical: 'I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which Justices of the Peace ... took their examinations and committed them to trial.'[27]

II. THE JUDICIALISATION OF THE PRELIMINARY INQUIRY

In 1848, Sir John Jervis, the Attorney-General, introduced an Act[28] which set out the procedure to be adopted at the preliminary inquiry. It stipulated that all witnesses were to be examined in the presence of the accused, who was to be at liberty to cross-examine them. Justices of the Peace could question the accused, but only after cautioning him that he was under no obligation to answer.[29] The Act also gave defendants the right to call defence witnesses, whose testimony had to be recorded. It further stipulated that the defendant was to be given an unconditional discharge in cases of insufficient evidence.[30] In short, the picture painted of the Justice of the Peace in Jervis's Act is one of a quasi-judicial figure, far removed from the investigator-prosecutor of the Marian statutes. Sir James Stephen wrote that the Act changed the inquiry from one where the object had been to 'expose and detect a man assumed to be guilty'

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[26] Beattie (1986) *op. cit.*, at p.271.

[27] Stephen (1882) *op. cit.*, at p.225.

[28] The Indictable Offences Act 11&12 Vic. c.42 (henceforth referred to as 'Jervis's Act').

[29] S18. It was later held in the cases of *Higson* (1849) 2 C&K 769 and *Kimber* (1849) 3 Cox C.C 223 that the caution was a condition precedent of the accused's statement being received in evidence.

[30] S25.

to one where the object became one of conducting a 'full inquiry into ... guilt or innocence'.[31]

This Act represented not an instant break with the past, but statutory recognition of changes which had already taken place. Introducing the Bill in the House of Commons, the Attorney-General declared that 'he endeavoured to introduce nothing new ... his object had been simply to collect together the enactments and decisions forming the existing law upon these heads'.[32] No debate took place on the Bill at any stage. Jervis's Act was the culmination of a gradual change in magisterial practice which, it is submitted, began in the late eighteenth century with the common law's rejection of confessions extracted by torture and coercion.

Although there are indications in the law reports that the common law never approved of torture,[33] it appears that the courts made a determined effort around the middle of the eighteenth century to distance themselves from all practices which could be seen as relying upon coercion of the defendant. In a case reported in 1741,[34] the court was invited to rule that the defendant's confession, made before a Justice of the Peace, should be ruled inadmissible unless it could be shown to have been made voluntarily. The Recorder, Mr. Justice Foster, stated that had the defendant 'made it part his case, that his confession was extracted by threats, or drawn from him by promises, ... it would have been proper for us to enquire by what means the confession was procured.'[35] In the later case of *Rudd*,[36] Lord Mansfield stated:

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[31] Stephen (1882) *op. cit.*, at p.221.

[32] *Parl. Debates* (H.C) Third Series (Vol. 96) Col. 5, 3 February 1848.

[33] In the case of *Felton* [1628] 3 How St. Tr. 371 the judges refused a request made on behalf the Crown that the defendant be tortured.

[34] *White* [1741] How St. Tr. 1079, at 1085.

[35] *Ibid.*

> 'The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them at their trial.'[37]

In the case of *Warwickshall*[38] in 1783, the courts expressly ruled that an involuntary confession could not be given as evidence.

As shown above, the Justice of the Peace was very much under the control and supervision of the trial judge. His task was to gather the evidence on behalf of the court, and to deliver the prisoner to the court at the trial date. The judges had power to punish incompetent Justices by imposing a fine. This close relationship between the trial court and the Justices meant that judges were reluctant to allow magistrates to engage in practices which could easily give rise to accusations that defendants were regularly coerced into confessing. To allow magistrates to behave in an inquisitorial fashion would reflect badly on judges themselves; it would taint the *majesty* of judicial office, and undermine the *authority* of the law. As Hay has demonstrated, the 'majesty' and 'authority' of the law in eighteenth century England was very much embodied in the trial judge, and was recreated through his powerful image as 'fair' and 'merciful'.[39]

Judges were no doubt conscious of the fact that the Justice, through his power of refusing bail, was similar to the judge in that he could deprive an individual of liberty. As such, at least in the opinion of some judges, it was improper for

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[36] (1775) 1 Leach 115.

[37] *Ibid.*, at p.118

[38] (1783) 1 Leach C.C 263

[39] Hay, D. (1981) 'Property, authority and the Criminal Law', in M. Fitzgerald, G. McLennan and J. Pawson (eds.) *Crime and Society: Readings in History and Theory*. See also the observations of Cottu, M. (1822) *Administration of Criminal Justice in England*, at pp.90-1.

him to take on a prosecutorial role. This explains the entry in *East's Pleas of the Crown*:

> 'Saying to the prisoner that it would be worse for him if he did not confess, or that it would be better for him if he did, is sufficient to exclude the confession according to constant experience.'[40]

Such a question format, when utilised by an examining magistrate, was undoubtedly seen as carrying the implicit threat of imprisonment and resembled too closely methods deployed by the Star Chamber.

In the case of *Wilson* in 1817,[41] Richards C.B excluded a confession extracted by magisterial questioning on the ground that questioning by a magistrate was improper *per se*: 'an examination of itself imposes an obligation to speak the truth ... it is irregular in a magistrate to examine a prisoner in the same manner as a witness'. Cross-examination of the defendant was seen, therefore, as being inconsistent with judicial (magisterial) dignity. The decision was not followed in the later case of *Ellis*,[42] but it does demonstrate that there was judicial unease at the role assigned to the Justice by the Marian statutes.

The judiciary wrought significant changes to the format of the preliminary inquiry in the first quarter of the nineteenth century. In *R v Dingler*[43] the court refused to accept as evidence the dying testimony of a murder victim on the ground that it had not be taken in the presence of the accused, who had thus been deprived of an opportunity to cross-examine the witness. The 1825 edition of Burn's *Justice of the Peace* stated that, in order for the testimony of

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[40] (1803) at p.659.

[41] Holt N.P.C 597.

[42] (1826) 1 Ry & Mood 432.

[43] (1791) 2 Leach 561.

prosecution witnesses to be admitted at trial, it had to be taken in the presence of the accused.[44] The Criminal Law Act of 1826 had required Justices to make a record of the proceedings straightaway, and not, as under the Marian statutes, within two days. This indicates that the courts were no longer looking for a memorandum of evidence from a prosecuting magistrate, but for an accurate transcript of the proceedings. Finally, of the provision in Jervis's Act requiring the Justice to caution the defendant before questioning, Archbold wrote that it was nothing new: 'most Justices were in the habit, previously to this statute, before they called upon an accused person to make answer to the charge against him, to caution him that what he should say might be given in evidence against him'.[45]

By the mid-nineteenth century, therefore, the judges had made their position clear: they would not allow those connected with the trial process to engage in interrogation of the accused. This type of activity was incompatible with judicial office, and could act to undermine the notion that the law treated the accused with the utmost fairness. Wilde CJ, presiding in the case of *R v Petit*[46] in 1850, rejected a confession extracted by magisterial questioning:

> 'I reject it upon the general ground that magistrates have no right to question a prisoner ... The law is so extremely careful in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry ... A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol.'

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[44] (Vol. 1), at pp.1006-7. As *Thurtell's Case* (above) shows, not all judges approved of this practice.

[45] Archbold, J. (1848) *Jervis's Acts (1848)*, preface at p.3.

[46] 4 Cox C.C. 164.

III. THE LOGIC OF POLICE PROSECUTION

In recognising the judicial status of magistrates, Jervis's Act also accepted and consolidated the position of the police as the new prosecutors. Although Peel's Bill for the establishment of a Metropolitan police force was only reluctantly accepted in 1829[47], by 1856 there existed a legal obligation on all counties to maintain efficient police forces.[48] The turbulent political climate of the 1840s, when the Chartist threat was at its height, encouraged many counties to establish police forces on a voluntary footing before 1856.[49]

Unlike the old parish constables, the new police did not simply patrol the streets and help individuals to apprehend suspected offenders. Despite Peel's assurances to the contrary in 1829,[50] individual constables were actually collating evidence, setting themselves up as nominal prosecutors and conducting prosecutions in court well before Jervis's Act officially recognised the demise of the prosecutor-magistrate. Giving evidence to a Royal Commission in 1837, the Commissioner of the Metropolitan Police stated that the police were conducting prosecutions in court 'in many cases'.[51] Police involvement in prosecutions was set to increase, and by 1854 a Select Committee was told that

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[47] 10 Geo. IV c.44. For the controversy surrounding the passage of this Act, see Radzinowicz, L. (1968) *The History of English Criminal Law: Grappling for Control* (vol.4), at p.158.

[48] The County Police Borough Police Act (1856) 19 & 20 Vict. c.69.

[49] Radzinowicz (1968) *Op. cit.*, at p.232. Radzinowicz has shown that the Home Office did its utmost to persuade local magistrates, composed mainly of manufacturers and traders, that it was in their interests to have a standing body of men to protect their property and quell industrial unrest (at p.280).

[50] Hay and Snyder (1989) *op. cit.*, p.35.

[51] Richard Mayne, testimony given to the *Royal Commission on the Criminal Law, Parliamentary Papers 1837* (vol. XXXI Appendix 1), at p.23.

the police carried out the 'vast number', or 'great majority', of prosecutions.[52]

The system of police prosecution was not without its critics. There were those who took the strongest objection to it, and urged the setting up of a public prosecutor.[53] Phillimore, a lawyer, Liberal Member of Parliament and chief advocate of a public prosecutor system, argued that the function was too important for it to be placed in the hands of a body men who could not be made accountable to the law:

> '... we (have given) to policemen, to a class amongst whom (are) to be found some of the most hardened and profligate of mankind, and over whom the most incessant vigilance (is) requisite to prevent flagrant and cruel abuses of their authority, we (have) given to these men an unlimited power of pardon and connivance; and we (have) entrusted them with an authority which (is) in every country but England ... regulated with as much anxiety as the functions of the judge himself.'[54]

Concern was expressed that prosecution by the police placed defendants at risk of being wrongfully convicted, because the role of the police as neutral

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[52] *Select Committee on the Public Prosecutors Bill, Parliamentary Papers 1854-5* (Vol. XII) at p.98. See also *Report on the Public Prosecutors Bill, Parliamentary Papers 1865* (Vol. XIX), at p.132.

[53] Between 1855 and 1875 several Commissions and Select Committees were set up to consider the possibility of setting up a system of public prosecution, and Bills were introduced and discussed in Parliament. See *Select Committee on the Public Prosecutors Bill, Parliamentary Papers 1854-5* (Vol. XII); *Report of the Select Committee on the Public Prosecutors Bill Parliamentary Papers 1856* (Vol. VII); *The Fifth Report of the Judicature Commission on the Advisability of appointing a Public Prosecutor, Parliamentary Papers 1874* (Vol. XXIV); and *Parl. Debates* (H.C) Third Series (Vol. 138) Cols. 697-702, 17 May 1855, *Parl. Debates* (H.C) (Vol. 201) Cols. 240-246, 4 May 1870 and Cols. 465-480, 10 May 1870.

[54] *Parl. Debates* (H.C) Third Series (Vol. 136) Col. 1651, 20 February 1855.

investigators could not be reconciled with their role as prosecutors.[55] To allow them to prosecute was to encourage corruption, and it was alleged that police officers, acting with the collusion of corrupt solicitors, were mounting unfounded prosecutions in order to collect discretionary rewards and falsified expenses bills.[56] The Attorney-General, speaking from his experience as a Recorder, argued that allowing the police to prosecute amounted to nothing short of a 'great scandal', and had the 'mischievous effect' of policemen becoming 'over-zealous' in the conduct of prosecutions so as to improve their chances of promotion.[57]

By the late 1870s these objections to police prosecution had faded away. This was because the police had become effective and efficient prosecutors, and had made the introduction of a Public Prosecutor appear superfluous.[58] Furthermore, police prosecution was extremely convenient in that it allowed the theory of private prosecution to survive, thereby appeasing those who objected to State prosecution on the ground that it would expose the citizen to persecution by the government.[59] The correspondence generated by the last Public Prosecutors Bill in 1873 shows that most judges, lawyers and magistrates who were approached for their views on the matter fully supported the system

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[55] Mr. Russell Gurney, *Parl. Debates* (H.C) Third Series (Vol. 205) Cols. 1746-7, 26 April 1871.

[56] Evidence of clerk of the Northern Circuit, *Report of the Commissioners for Inquiring into the County Rates, Parliamentary Papers 1836* (Vol. XXVII), at p.46); Evidence of C S Greaves QC (p.49), H C Trafford, stipendiary magistrate (p.90) and J H Preston, solicitor (p.98), *Select Committee on Public Prosecutors Bill* (Minutes of Evidence) *Parliamentary Papers 1854-5* (Vol. XII).

[57] *Select Committee on the Public Prosecutors Bill, Ibid.*, at p.186. Similar concerns were expressed by Judge Baron Cleasby: See *Fifth Report of the Judicature Commission, op. cit.*, at p.19 Appendix one.

[58] Cornish W, (1978) 'Defects in prosecuting: Professional views in 1845' in P. Glazebrook (ed.) *Re-shaping the Criminal Law*, at p.315.

[59] Hay and Snyder (1989) *op. cit.*, at p.44.

of police prosecution, arguing that 'public prosecutors, if appointed, would have to look (to the police) for the information as to the committal of crimes, and the evidence on which they rest.'[60]

This latter argument was especially true with regard to the increasing number of public order offences being prosecuted by the police. The nineteenth century saw an explosion in public order legislation, and a steady increase in police powers. Consequently, street offences and drunkenness accounted for nearly one-third of the summary offences prosecuted in the mid-victorian period.[61] It was hardly surprising, therefore, that the police were beginning to be seen by virtually the entire middle class as the symbol of an ordered society, and the agents of effective and efficient law enforcement.[62] Most of those who constituted the main target of police surveillance and prosecution were beggars, vagrants, the unemployed, the seasonally employed and the lower working class. Exclusion of such persons from the electoral register ensured the emergence of a consensus on issues such as 'the nature of order and acceptable police behaviour' amongst politicians of all parties.[63]

Consensus on the subject was also evident amongst those in charge of processing the largest number of defendants. The 1908 *Royal Commission upon the Duties of the Metropolitan Police with Regard to Street Offences*[64] took evidence from a large number of London magistrates, including the Chief

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[60] Mr. E.H Leycester-Perrhyin, Chairman of the Court of Quarter Sessions (Surrey), *Correspondence between September 1872 and December 1873 containing suggestions made to the Secretary of State for the Home Department upon the Public Prosecutors Bill, Parliamentary Papers 1875* (Vol. LXI), at p.21. See also the comments of Baron Cleasby (Judge) at p.18, and Mr. A. Duncombe, Chairman of the Justices of the Peace (East Riding of Yorkshire) at p.30.

[61] Lustgarten, L. (1986) *The Governance of Police*, at p.28.

[62] Hay and Snyder, *opt cit.*, p.45.

[63] Lustgarten, *op. cit.*, p.40

[64] *Parliamentary Papers 1908*, (Vol.L).

Magistrate Sir Albert de Rutzen, and the Recorder of London, Sir Ralph Littler. All were agreed that the police exercised their duty with 'honesty, discretion and efficiency'.[65] The possibility that the police might abuse their authority was no longer viewed as a plausible argument against the extension of their powers of arrest and prosecution. Mr. P. Taylor, a magistrate since 1895, summed up the official attitude towards those on the receiving end of policing when he stated, 'It is not an uncommon complaint to have made by a very rough class of persons that they have been roughly handled by the police ... I can only say that the more ruffianly the prisoner, the more likely are you to have the complaint made.'[66]

IV. THE RE-EMERGENCE OF INTERROGATION BY PROSECUTORS

Once the police seized the power to prosecute, it was only a question of time before they sought to increase their chances of securing convictions by extracting confessions from suspects prior to trial.

As shown above, interrogation of suspects by persons with an interest in their conviction was the system which operated under the Marian statutes and which had become unacceptable to the judges by the second half of the eighteenth century. In his evidence to the Criminal Law Commissioners in 1845, J. P. Cobbet, a radical London Barrister and son of William Cobbet, drew attention to the even greater dangers inherent in allowing the police to interrogate suspects:

> 'What then must this pressing, this twisting, this turning be, when performed in a station house, or lock-ups, by policemen, in the presence of none but policemen, to obtain evidence of the most 'killing' kind, which is to be extracted, culled, and finally delivered forth by policemen - the most interested, and as they prove by their conduct, the most to be suspected of all witnesses.'[67]

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[65] *Ibid*, p.64.

[66] *Ibid.*, at p.67.

[67] *The Eighth Report of Her Majesty's Commissioners on the Criminal Law, Parliamentary Papers 1845* (Vol. XIV), at p.294-5.

Routine interrogation by an agency in charge of compiling the evidence and mounting the prosecution was viewed by almost all judges as an undesirable and improper practice. In 1885, in the case of *Gavin*[68], Smith J stated that 'a constable has no more right to question than a judge has to cross-examine - for it is practically a cross-examination.' In 1893, in the case of *R v Male*[69], Cave J ruled that 'it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him.'[70] In another case in the same year,[71] he stated 'I always suspect these confessions, which are supposed to be the offspring of penitence and remorse and which nonetheless are repudiated by the prisoner at the trial.'[72] In 1905, Channel J stated in *Knight and Thayre*[73] that once a policeman has 'taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.'

Despite agreement on this point, there was considerable disagreement on how a confession extracted by such improper questioning ought to be treated for the purposes of evidence at the trial. Those judges who viewed police interrogation as illegal because it lacked constitutional authority adopted the approach of excluding such confessions.[74] There were, however, other judges who argued

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[68] 15 Cox C.C 656.

[69] 17 Cox C.C 689.

[70] *Ibid.* at p.690.

[71] *R v Thompson* [1893] 2 QB 12.

[72] *Ibid* at p.18.

[73] (1905) 20 Cox C.C 711.

[74] *R v Bodkin* (1867) 9 Cox C.C 628; *R v Gavin* (1885) 15 Cox C.C 656; *R v Male* (1893) 17 Cox C.C 689.

that a confession could be excluded only under the voluntariness principle; in other words, it had to be shown that it had been extracted by the use of threats or promises.[75] This latter approach was rejected by some judges on the ground that police interrogation was by its very nature coercive, and therefore, by definition, any answers given in response to police questions must be deemed involuntary.[76]

It was the second of these three positions which came to find favour with most judges. The stance which was adopted, therefore, was that although police interrogation of suspects in custody was improper, confessions extracted by this method would not automatically be excluded. Henceforth, exclusion would be at the discretion of the judge. Whether or not the suspect was cautioned prior to questioning (i.e warned that he not say anything unless he wished to),[77] and the duration of the questioning, were held to be factors which had to be taken into consideration by the judge when exercising his discretion.[78]

V. CONCLUSION

Responsibility for charging, interrogating and prosecuting offenders lay, before 1750, with the aggrieved citizen, or was entrusted to men of status, who held the relatively high public office of Justice of the Peace and were subject to close

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[75] See *Brackenbury* (1893) 17 Cox C.C 628; *R v Miller* (1895) 18 Cox C.C 54.

[76] An opinion voiced by O,Brien J and Pigot C.B in the Irish appeal case of *R v Johnston* (1864) 15 Ir. C.L Rep. 60. See also the earlier case of *Toole* (1856) 7 Cox C.C 244, where Richards B expressed the view that '(f)rom the mere circumstance of being in custody, the prisoner was not on equal terms with her interrogator.'

[77] In *R v Baldry* (1852) 2 Den. 430 Pollock C.B had stated that the caution had the effect of leaving it to the prisoner 'as a matter of perfect indifference whether he should open his mouth or not' (at p.573).

[78] *Knight and Thayre* (1905) 20 Cox C.C 711 and *Best* [1909] 1 KB 692.

supervision by the judiciary. Despite these checks on the Justice of the Peace, judges were concerned for the integrity of the common law and took the view that the Marian style preliminary inquiry resembled too closely a form of inquisitorial coercion. In order to safeguard the dignity of judicial office, they sought, successfully, to introduce procedural safeguards at the preliminary inquiry. The long term effect of such safeguards was to elevate the Justice of the Peace to quasi-judicial status.

In Jervis's Act, the legislature codified existing magisterial practice, and simultaneously accepted the emerging police practice of prosecuting suspected offenders. Responsibility for charging and prosecuting citizens now passed to law enforcement agents, and away from the direct supervision of the courts. This was accepted in the interests of efficiency, but continued to be cloaked under the veil of private prosecution.

The issue of what powers of questioning and detention ought to be conferred upon the police to complement their power of prosecution was left unresolved. This created an opportunity for the police to seize powers which they thought appropriate, and questioning of suspects moved into the private domain of the police station. As predicted by some of the early critics of police questioning and prosecution, attempts later made by the law to keep police powers within bounds were ignored by these new upholders of the law. The courts, like the legislature, were left to respond to police *practice*, and this set a dangerous precedent for the future.

CHAPTER THREE

POLICE POWERS OF INTERROGATION UNDER THE JUDGES' RULES 1912-1984

The previous chapter traced the way in which, over a relatively short period of time, the task of constructing the prosecution brief passed to the police. The present chapter will concentrate on the development of police powers to interrogate persons in custody.

This will entail some legal analysis of the Judges' Rules and the subsequent judicial decisions relating to them. The purpose of this analysis will be to show that, as in the previous century, the law operated to endorse rather than regulate the practices of actors in the criminal justice process. The consequence was that there was a gradual increase in the scope for pre-trial detention and interrogation of suspects by the police.

This will be followed by a discussion of the two major factors which persuaded the judiciary to give recognition to police practices. The first of these was the judicial view that the police were neutral and impartial investigators, and as such they could be trusted to act with the utmost fairness towards those whom they suspected of crime. The second was the argument, put forward in many quarters, that crime was on the increase because the police were hindered in their task of investigation and prosecution by the procedural and evidential protections afforded to suspects. With the help of case law and research findings dating from the 1970s, I will demonstrate that both the judicial theory of police behaviour and the argument which linked crime to procedural protections were unsustainable in light of the then known facts.

I. THE JUDGES' RULES

As discussed in the previous chapter, there was in the last decades of the nineteenth century considerable disagreement amongst judges regarding the admissibility of confessions secured through police interrogation.[79] These conflicting judicial decisions led to confusion, and in 1906 the Chief Constable of Birmingham wrote to the Lord Chief Justice, Lord Alverstone, requesting guidance on what form the caution should take and when it should be given.[80] Pursuant to this correspondence, and a request from the Home Office,[81] the judges issued in 1912 four *Rules for the Guidance of Police Officers.* A further five Rules were added in 1918, and an explanatory Home Office Circular was issued in 1930.[82] In 1964 the Rules were re-drawn,[83] and this version remained in force until the passing of the Police and Criminal Evidence Act in 1984.

The 1912 Rules made no break with the existing common law position regarding the admissibility of confessions extracted by police interrogation. This much can be inferred from the fact that no mention was made of them in any court decision until the case of *Voisin* in 1918,[84] six years after they were first

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[79] *Supra.*, at pp.22-3.

[80] Abrahams, G. (1964) *Police Questioning and the Judges' Rules*, at p.16.

[81] That there was a request from the Home Office is mentioned by Lawrence J in *R v Voisin* (1918) 13 Cr. App. R. 89.

[82] H.O Circular 536053/23.

[83] H.O Circular No. 31/1964. This version of the Rules included an introduction in which it was stated that the Rules did not affect certain 'principles'. These were then listed (a) to (e), and included the principles that 'every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor', and that only those statements are admissible in evidence which are voluntary and have not been obtained by the use of 'oppression'.

[84] 13 Cr. App. R. 89.

issued. Furthermore, a study of all Home Office and Lord Chancellor's Department files and correspondence for the period gave no indication that any debate had taken place before the promulgation of the Rules. In the case of *Knight and Thayre*,[85] Channel J had stated that exclusion was at the discretion of the trial judge, and Lawrence J in *Voisin* was at pains to stress that the Rules did not alter this position: '... statements obtained from prisoners contrary to the spirit of these Rules *may* be rejected as evidence by the presiding judge at the trial', (emphasis added).[86] McBarnet, therefore, credits the common law with too much when she writes that the Rules abandoned 'a common law approach which had drawn the line between police powers and citizens rights *firmly and clearly* in favour of civil liberties'[87] (emphasis supplied).

There can, however, be no doubt that the promulgation of the Rules was a further, and important, step in legitimising police interrogation of persons in custody. Whilst the common law had accepted into evidence confessions procured by police questioning, it had nonetheless described police interrogation as improper and without authority. In contrast,Rules 2[88] and 3[89] clearly conveyed the impression that custodial questioning, even after charge, was permissible so long as a caution was delivered. Although a small minority of judges continued to condemn custodial questioning throughout the 1920s,[90] the

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85 (1905) 20 Cox C.C 711.

86 *Opt. cit.*, at p.96.

87 McBarnett, D. (1981) 'The Royal Commission and the Judges' Rules', *The British Journal of Law and Society* (Vol.8 No.1, pp.109-117) at p.110.

88 'Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions, as the case may be.'

89 'Persons in custody should not be questioned without the usual caution first being administered.'

90 See *Mathews* (1919) 14 Cr.App.R. 23; *Grayson* (1921) 16 Cr.App.R. 7; *Taylor* (1923) JP 87 104 and *Brown and Bruce* (1931) 23 Cr.App.R. 56.

Report of the Royal Commission on Police Powers and Procedure in 1929 stated that a large number of police officers had interpreted the Rules to mean that such questioning was allowed, and added that the Rules had in fact directly contributed to increased reliance being placed on confession evidence at trial.[91] The privilege against self-incrimination, designed as a protection for the accused, was used in the Rules to establish the police right to question and to facilitate the acceptance into evidence of incriminating statements.[92]

Whilst they were later to be presented as a form of protection for suspects,[93] the following points demonstrate that the content of the Rules was such that they could provide no real protection at all.

Firstly, the Rules were extremely limited in scope, merely stating that a suspect should be cautioned, and that care should be exercised when taking down voluntary statements. The 1918 Rules made no mention of what style or manner of questioning was permissible, and neither did they say anything in relation to the duration of questioning. The 1964 Rules, other than introducing a prohibition on 'oppression', went no further in this respect than simply reiterating the common law prohibition on threats and promises.[94]

Secondly, the Rules lacked any automatic enforcement mechanism: if the Rules were breached it merely meant that the judge *could* exclude any resulting

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[91] Cmd. 3297, paras. 266-7 at p.100.

[92] Devlin, P. (1960) *The Prosecution Process In England*: '... to make it easy and simple for the prosecution to discharge the burden of proving that the confession was voluntary, the practice grew up of telling the prisoner that he need not say anything unless he wanted to - that is, of administering the caution' (at p.32).

[93] *Ibid.*, at p.27; Abrahams (1964) op. cit., at pp.10-13.

[94] Compare *Ibrahim v R* [1914] A.C 599 to H.O 31/1964 Note (e).

confession, not that he *must.*[95] So the Rules did not provide a suspect with any 'rights': he had no right to be cautioned, he had no right to have a solicitor present, and he had no right not to be cross-examined when telling his story to the police. The Rules simply stated that this is what the police *ought* to do, but they did not guarantee the suspect a remedy if the police failed to do what they ought to have done.

In fact, throughout the period in which they were in force, the Court of Appeal was very keen to make it clear to trial judges that a breach of the Rules should only very rarely lead to the rejection of evidence. In *R v Voisin*, where a suspect was questioned in custody without a caution being administered, Lawrence J stated that the absence of a caution was immaterial so long as the statement was voluntary.[96] In *R v Pattison*[97], the Court of Appeal described the trial judge's decision to exclude answers to questions asked without a caution as having been done '*ex abundtia gratioe* and not as a matter of law.' In *Praeger*[98], a submission by the defence that a breach of the Rules must lead to the exclusion of evidence unless there was some 'compelling reason why the breach should...(be) overlooked', was described by the Court of Appeal as 'manifestly unsound'. In *Greaves v D and P,*[99] Donaldson LJ emphasised that if a judge felt that the suspect's statement was voluntary, he should not decline to admit it into evidence simply because of some breach of the Rules.

Finally, the Rules were far too vague, and thus much too open to police manipulation, to operate as an effective check against improper questioning. Rule 3, for example, stipulated that the caution was only to be administered to suspects in custody, since only custody was thought to bring about an

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[95] *Voisin* (1918) 13 Cr.App.R. 89, *opt. cit.*

[96] *Ibid.*, at p.95.

[97] (1929) 21 Cr.App.R 139.

[98] [1972] 1 WLR 260.

[99] (1980) 71 Cr.App.R 232.

unacceptable element of coercion.[100] Not only does this give the lie to claims that the Rules were an effective safeguard against self-incrimination,[101] but more importantly it was a rule which relied for its effective operation on something which was missing: a concrete definition of 'custody'. From the police viewpoint, this was an open invitation to deny that an arrest had taken place or been contemplated at the time of questioning.[102]

II. RELAXING THE RULES

Although a concern with the law enforcement utility of police interrogation is evident even in some of the early cases,[103] as time went on the courts were to become increasingly convinced that this type of questioning was essential if crime was to be kept in check. This led the judiciary, especially in the period following the second world war, to interpret the Rules in such a way as to allow the police the maximum opportunity possible to interrogate persons held in custody. The law reports provide numerous examples, but for our purposes

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[100] In *Lewis v Harris* (1913) 110 LT 337; *Crowe and Mysercough* (1917) 81 JP 288 and *R v Cook* (1918) 34 TLR 515 the police were held to have acted correctly in not administering a caution on the ground that the suspect was not in custody at the time of questioning.

[101] As was pointed out by the *Royal Commission on Police Powers 1929* (Cmd.3297), 'it is difficult to appreciate the value or ethics of a caution which is deliberately with-held until the suspect has succeeded in incriminating himself sufficiently to justify his arrest' (at p.27 para.69).

[102] *Booth and Jones* (1910) 5 Cr.App.R 177 and *R v Wattam* (1952) 36 Cr.App.R 72 are two examples of where the police resorted to this tactic and were supported by the court.

[103] So, for example, in *Booth and Jones* (1910) 5 Cr.App.R. 177 the court said of police questioning, '(i)f this sort of investigation were not to be allowed very few criminals would ever be discovered' (at p.179). A similar comment was made in by Atkin J in *Lewis v Harris* (1913) 110 LT 337, and in *Voisin* (1918) 13 Cr.App.R 89 Lawrence J was concerned about the possibility of the caution leading to crime investigation becoming 'cramped' (at p.95).

a handful of cases will suffice to illustrate this drift towards relaxing the restrictions on interrogation.

Firstly, since Rule 3 stated that only persons in custody had to be cautioned, the courts became reluctant to find that a person was in fact in custody at the time of questioning. So, for example, in *R v Wattam*[104] the defendant was approached by the police at his home and asked to accompany them to the police station, where he was interrogated, without caution, on suspicion of murder. He was not informed that he was under no obligation to attend the station,[105] and in fact the police admitted at trial that they would have 'arrested' the defendant had he refused to accompany them. So the reality of the situation was that the defendant was under arrest from the moment that he was approached by the police, and indeed the defendant considered himself at that point to be under arrest. The court held that there had been no breach of Rule 3 since the defendant had not been in custody. The reasoning appeared to be that '(t)he police must investigate matters of this kind or there will be no protection for anybody.'[106]

Secondly, there developed a routine failure to attach any degree of importance to the caution even in those cases where the fact of custody could not be denied. In *R v Smith*[107] the failure to give a caution was said not to have affected the admissibility of the confession. The decision was upheld on appeal, in spite of the court being referred to previous authorities, such as *Brown and Bruce*,[108] where such questioning had been categorically condemned.

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[104] (1952) 36 Cr.App.R. 72.

[105] See *Rice v Connolly* [1966] 2 QB 414, where it was held that although there may be a moral duty to assist the police, there is no legal duty to do so (per Parker CJ at p.419).

[106] *Op. cit.*, at p.77.

[107] (1961) 46 Cr.App.R. 51.

[108] (1931) 23 Cr.App.R.56.

Massey[109], *Sergeant*[110] and *Houghton and Franciosy*[111] provide further examples of cases in which the courts failed to exclude confessions despite the absence of a caution. In fact, there is not one reported case in which the Court of Appeal quashed a conviction on the ground that the judge should have refused to admit a confession because no caution had been given. If a conviction was quashed, it was usually because the judge had failed even to consider the possibility of exclusion.[112]

Thirdly, the Rules were eventually changed so as to allow the police to question *before* administering the caution. Rule 1 in the 1964 circular made it permissible to question persons in custody so long as they had not been charged or informed that they may be prosecuted. The new Rule 2 stated that a caution was to be given at the point at which 'a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence'.

With regard to Rule 1, the courts gave short shrift to any defence submission which stated that since a person is informed of the possibility of prosecution as soon as he is arrested, there should be no interrogation after this point.[113] Rule 2 was interpreted in *Osbourne and Virtue* to mean that an officer 'is not bound to caution until he has got some information which can be put before the court as the beginnings of a case.'[114] In *Greaves v D and P*, Lord Donaldson stated that even if the police had such *prima facie* evidence, they could continue

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[109] [1964] Crim.LR 43.

[110] [1963] Crim.LR 848.

[111] (1979) 68 Cr.App.R 197.

[112] See *Bass* (1953) 37 Cr.App.R 51 and *Conway v Hotten* (1976) 63 Cr.App.R. 11.

[113] See *Brackenbury* (1965) 49 Cr.App.R. 189 and *R v Collier, R v Stenning* [1965] 1 WLR 1470.

[114] (1973) 57 Cr.App.R. 297, per Lord Lane at p.308. See also *R v Halford* (1978) 67 Cr.App.R. 318

to question without giving a caution if they felt that there was a possibility that someone else might have been the guilty party.[115] The courts were saying,in effect, that a suspect should 'be told of the right to silence only when the police have the case against him virtually wrapped up.'[116]

Finally, the courts took a very lax attitude towards aspects of the Rules designed to safeguard suspects during interrogation. For example, the courts had sought, previously to the case of *Bass*[117], to protect suspects being 'verballed' by prohibiting the practice of two or more police officers collaborating when making a record of the interrogation. The theory was that if police officers were forced to write individual versions of what the suspect was supposed to have said the court could check the accuracy of the record by comparing the two versions.

The Court of Appeal in *Bass*, however, decided to give its sanction to the practice of collaborative report-writing:

> 'This court has observed that police officers nearly always deny that they have collaborated in the making of notes ... it seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.'[118]

The court recognised, therefore, that police officers had regularly committed perjury. Its response was not to condemn police illegality, but to change the rules so as to make it unnecessary in future for the police to lie on oath.

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[115] (1980) 71 Cr.App.R. 232, at p.236.

[116] Zander, M. (1978) 'The right to silence in the police station and the caution', in P. Glazebrook (ed.) *Re-shaping the Criminal Law*, at p. 356.

[117] (1953) 37 Cr.App.R. 51.

[118] *Ibid.* at p.59.

The courts were also prepared to allow the police to question a suspect whilst he was making a voluntary statement, despite the prohibition on this practice contained in Rule 4(d). For example, in *Williams*[119] the defence had alleged that due to the large number of questions put, the eventual statement did not fairly and accurately record what the suspect had been attempting to say. The court ruled that where a suspect keeps 'drying up', the police can put questions to get him to speak. This attitude was also apparent in the approach taken to Principle (c) of the 1964 Rules, which had sought to protect suspects by laying down that 'every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor'. Whilst reiterating time and again that suspects had a right to see their solicitor, the courts were not prepared to exclude evidence when the police unlawfully denied suspects this right.[120] The line taken by the judges was that it was not their task to discipline the police: the function of the court was simply to ensure that the confession was voluntary and reliable.[121]

The judicial tendency to be supportive of police interrogation was made most apparent by the reluctance of the courts to exclude evidence even in cases where the police had been shown to have engaged in gross improprieties. The way in which the courts responded to such cases, and the dicta of the Court of Appeal, betrayed an attitude of mind which, rather than viewing suspects as the victims of police illegality, saw the police as the victims of impractical laws.

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[119] (1978) 67 Cr.App.R. 10.

[120] See *Lemsatef* (1977) 64 Cr.App.R. 242. The only exception was the decision of McKenna J in *R v Allen* [1977] Crim. LR 163.

[121] Judgment of Kilner-Brown J in *R v Elliot* [1977] Crim.LR 551.

Take, for example, the case of *Houghton and Franciosy*[122]. The defendant was unlawfully arrested[123], detained incommunicado for five days in violation of S62 of the Criminal Law Act 1967, and was then questioned without caution. There was further illegality in that the defendant had not been presented before a magistrate as soon as was practicable, as stipulated by S38 of the Magistrates Courts Act 1952. The court refused to exclude the resulting confession. It merely acknowledged the impropriety of the arrest and noted that it was 'a cause for grave concern'.[124] The concern could not have been that grave, for the court failed to do anything about it. The omission of the caution seemed to cause the court no concern whatsoever. As for the violation of the Criminal Law Act and Magistrates Courts Act, it seemed content to let the police know that the court 'appreciate(d) that these rules can hinder the police in bringing criminals to justice'. The court added, in what can only be viewed as a thinly veiled call for greater police powers, that 'perhaps the police should have powers to detain for inquiries in cases such as the present'.[125]

In the case of *Stephen King*[126], the police admitted that they had failed to inform the suspect of his right to consult with a solicitor. This amounted to a violation of the Rules, which stated that 'persons in custody should not only be informed orally of the rights and facilities available to them, but in addition

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[122] (1979) 68 Cr.App.R. 197.

[123] He was not told why he was being arrested, an omission which, according to the decision in *Christie v Leachinsky* [1947] A.C 575, is sufficient to render the arrest unlawful.

[124] *Op. cit.*, at p.205.

[125] The case of *Mackintosh* (1983) 76 Cr.App.R. 177 provides another example of this attitude. The court refused to exclude the confession despite illegal interrogation and a breach of the Magistrates Courts Act. It did urge the police to comply with the Rules in future, however, because their breach provided the 'criminal' with an 'excuse to put up a defence' which, 'given the attitude of some members of the public who serve as jurors', might be believed.

[126] [1978] *Crim. LR* 632.

notices describing them should be displayed...'.[127] The judge was loath to exclude the defendant's statement, and placed a perverse construction on the clear wording of the Rules to justify his ruling: 'in the absence of a person in custody himself first raising the matter, Paragraph 7 places no obligation on an officer to inform the suspect that he may, before answering questions, speak with a solicitor.'

The judicial belief in the necessity of interrogation was given full expression in the case of *Holgate-Mohammed v Duke.*[128] The police had arrested a suspected shoplifter and interrogated her at the police station. The trial judge found that the sole reason for arrest was to subject her to 'the greater stress and pressure involved in arrest and deprivation of liberty in the belief that if she was going to confess she was more likely to do so in a state of arrest'.[129] The Divisional Court of the Queen's Bench Division of the High Court held this to be a totally legitimate and reasonable exercise of the power of arrest.[130] In less than eighty years, therefore, judges moved from condemning interrogation of persons in custody to encouraging the use of custody to enhance the effectiveness of interrogation.

At the same time as broadening police powers of questioning, the Court of Appeal undermined the suspect's right to remain silent. In *R v Chandler* it stated that silence in the face of accusations could, in circumstances where the police

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[127] 1964 Rules, Para. 7(b) Appendix B.

[128] [1983] 3 WLR 598.

[129] *Ibid.*, at p.600.

[130] The initial question of whether an arrest had to be 'reasonable' (i.e appropriate and necessary) in order to be legal was not decided by the court, but disposed of by assertion and acceptance (*ibid.* at p.600). Zellick has argued that the law does not require reasonableness as a necessary ingredient of a lawful arrest. An arrest will be lawful so long as (a) the officer has reasonable suspicion that an offence has been committed, and (b) the officer informs the suspect of the offence for which he is suspected (Zellick, G. (1984) 'The purpose behind an arrest' *Crim.LR* (pp.94-96).

and the suspect are on 'equal terms', be put to the jury as evidence suggestive of guilt. This could take place, the court argued, in cases where the suspect has his solicitor present during questioning.[131]

A year later, in the case of *Gilbert*,[132] the Court of Appeal ruled that the trial judge was within his rights to tell the jury that, although the defendant had a right to remain silent, 'there are ... those who think that the law should be altered in that it operates to protect the guilty.'[133] The court added, '(a) right of silence is one thing ... but it is another thing to say that if he chooses to exercise his right to silence, that must not be the subject of any comment adverse to the accused'.[134] This statement represented a comprehensive attack on the right of silence, because the very essence of the right is that the suspect's failure to answer questions cannot be used against him at trial.

III. UNDERSTANDING THE DRIFT TOWARDS GREATER POLICE POWERS

This drift towards greater police powers of interrogation was, I believe, the product of a concern amongst judges about rising crime, combined with a particular judicial view of police behaviour and the police role in the investigative and prosecution process. These two factors together resulted in laying the ground for the police, together with its supporters, to lobby for a system of criminal process informed by an ideology of crime control as opposed to one built around a model of adversarial fairness.

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[131] (1976) 1 W.L.R 585, per Lawton LJ at p.590.

[132] (1977) 66 Cr.App.R. 237.

[133] *Ibid.*, at p.243.

[134] *Ibid.*, at p.245.

i. The Judges and Law and Order

Remarks made by judges in the period after the second world war leave no doubt that the vast majority of them believed crime to be rapidly on the increase, and felt that tough measures were needed to avert the drift towards lawlessness.

Although the number of recorded crimes had been rising for much of this century, the official crime statistics showed that in the period 1955-65, there was a record growth rate of 10 per cent a year.[135] In the same decade, crimes of violence against the person increased by over two hundred per cent.[136]

Devlin J felt that this rise was due specifically to 'diminution in the respect for authority', as well as to the climate of permissiveness in general.[137] His sense of urgency was evident when he added that the perpetrators of The Great Train Robbery had done more than simply reject social obligations, they had 'declared war on society'.[138] The Lord Chief Justice, Lord Parker, was perhaps guilty of similar exaggeration when in 1971 he stated that 'There can be no doubt today that the criminal classes think "Why shouldn't we kill?"'[139]. Sir R. Hinchliffe, a High Court Judge, told a Justices' Clerks' Society meeting that he deplored the way in which 'past tolerance and kindness' had been

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[135] McClintock, F. and Avison, N. (1968) *Crime in England and Wales*, p.19).

[136] *Ibid.*, at p.37. See Hall, S., Critcher, C., Jefferson, T., Clarke, J. and Roberts, B. (1978) *Policing the Crisis*, where the authors draw attention to the inadequacies of official statistics as indicators of the'true' increase in the rate of crime (at p.10).

[137] Devlin, P. (1966) 'The police in a changing society', *Journal of Criminal law, Criminology and Police Science* (57 pp.123-129), at p.123.

[138] *Ibid.* at p.126.

[139] *The Times* 8 April 1971, at p.4.

replaced by 'unkindness, intolerance, greed and no faith in anyone or anything', and called for a crack down on organised, professional crime.[140] In *Chic Fashions v Jones*, Lord Denning put forward rising crime as the sole reason for his decision to increase substantially police powers of search and seizure: '(i)n present times, with the ever increasing wickedness there is about, honest citizens must help the police and not hinder them in their efforts to track down criminals.'[141]

Many of the judicial pronouncements on the subject of crime gave the impression that judges felt themselves responsible for the efficient administration of criminal justice. If crime was getting out of hand, the 'public' wanted to know what the 'system' was doing about it. The Lord Chief Justice, Lord Parker certainly saw it in these terms: on his retirement he told *The Times* that it was important, 'as a matter of public relations', to convince people that serious offenders were not being released early.[142] Similarly, it is evident from Lord Hailsham's complaint that 'the climate of permissiveness generally has ... a far bigger influence ... on crime and the criminal than the courts or police put together' that he saw the judges and the police as joint allies against crime.[143]

ii. Judicial Theory of the Police Role

It is theoretically inconsistent to allow the police to question the accused. As O'Brien J pointed out in *R v Johnston*[144] in 1864, under the adversary system all criminal tribunals are barred from questioning the accused. This being the rule, he asked,

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[140] *The Guardian* 20 May 1972, at p.8.

[141] [1968] 2 Q.B 299, at p.313.

[142] 8 April 1971, at p.4.

[143] *The Times* 13 May 1972, at p.3.

[144] (1864) 15 Ir.C.L.Rep. 60.

> 'would it not be strikingly inconsistent to hold that the inferior officers of justice, in their proceedings before the trial, are exempted from it? - that they may do what the highest tribunal could not; and endeavour to secure the prisoner's conviction by eliciting, previously to the trial, answers to questions which could then not be put?'.[145]

There is no obligation on the defendant to give evidence at the trial. If he chooses to do so, the type of questions that the prosecution can put to him are tightly controlled.[146] Not surprisingly, therefore, the critics of police questioning have argued that there is no theoretical justification for allowing the prosecution, in the form of the police, to interrogate suspects prior to the trial.[147]

In the judicial mind, however, the police were seen as fulfilling a dual role: they were not just agents of the prosecution, but also impartial and neutral investigators.[148] Whilst there was some concern in the late nineteenth century that this dual role may put suspects at risk,[149] the history of criminal justice in the present century has been marked by immense judicial trust in the 'professionalism' of the police. This was probably due to a number of organisational reforms which helped to increase the respectability of the police

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[145] *Ibid.*, at p.88.

[146] The accused was granted the option of giving evidence on his own behalf by S1 of the Criminal Evidence Act 1898 ch.36 61&62 Vict. If he chooses not to take the stand, this cannot be made the subject of adverse comment (S1(b)); if he does give evidence, the general rule is that he cannot be questioned about previous convictions (S1(f)). Furthermore, like all other witnesses, he is protected from questioning which the judge feels is irrelevant and/or unfair.

[147] Kamisar, Y. (1980) *Police Interrogation and Confessions*, paper entitled 'Equal justice in the gatehouses and mansions of American criminal procedure', first published in 1965.

[148] Devlin (1960) *op. cit.*

[149] See *supra.*, at pp.18-19.

in judicial eyes. The 1919 Report of the Desborough Committee[150] had resulted in the introduction of greater standardisation and central direction of administration, all of which no doubt added to the image of a disciplined and professional force. The *Report of the Royal Commission on Police Powers and Procedure* in 1929[151] also contributed to this image, finding as it did that incidents of police misconduct were isolated affairs. The incorporation of the police into policy-making (in 1918 the Home Office instituted the practice of holding a conference with Chief Constables, sometimes up to three times a year)[152] was a step towards casting the police in the role of 'experts' on law enforcement.

Judges, especially in the period after the second world war, increasingly emphasised the investigative aspect of the police role. They were convinced that it was possible for the police to investigate crimes in a neutral fashion and to treat the suspect with the utmost fairness; to play the role of 'both prosecutor and judge, both player and umpire'.[153] The judicial view of the police was clearly informed by a large dose of blind faith. Lord Devlin admitted that it was not possible for the police to be totally independent or dispassionate, but argued that,

> 'what has to take the place of that is the ordinary layman's sense of fairness; the feeling that however deeply a man's interests or even his passion may bring him down on one side, he still has got to be fair to the other side. This is an English ideal; and because the Englishman admires this quality of fairness and wants to have it, he does in fact manage to have a good deal of it. I think that the English

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[150] Cmd. 574 (1919).

[151] Cmd. 3297, at para. 87.

[152] Reiner, R. (1980) 'Fuzzy thoughts: the police and law and order politics', *The Sociological Review* (Vol. 28 No.2 pp.377-413), at p.390.

[153] Devlin, P. (1979) *The Judge*, at p.46

> policeman has it; and the English system is so designed to bring all the best of it out.'[154]

This belief in the integrity of the police led the judges to be less than open to suggestions of police impropriety. In *R v Northam* Winn LJ stated that the way in which the voluntariness principle was applied was a consequence of

> 'earlier times when the police was not to be trusted, as they are now to be trusted in almost every single case, to behave with complete fairness towards those who come into their hands'.[155]

Despite a defendant's right not to give evidence at trial, in *O'Neil and Ackers*[156] Lord Goddard CJ ruled that,

> 'It is ... entirely wrong to make suggestions ... that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them.'[157]

He went on to add that if the defendant was not going to testify, counsel should not make such allegations. In 1975, three Queens Counsel who attacked police evidence were accused by Mr.Justice Melford-Stevenson of mudslinging, and shortly afterwards the Court of Appeal urged action to be taken to cut down on such attacks.[158]

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[154] *Ibid.*, at p.66.

[155] (1968) 52 Cr.App.R. 97, at p.102.

[156] (1950) 34 Cr.App.R 108.

[157] Taken from *Callaghan* (1979) 69 Cr.App.R. 88 at p.111, where the court approved of this rule and urged counsel to abide by it.

[158] *The Times* 25 March 1975, at p.2.

More importantly, this faith in the police led judges to have a particular notion of the way in which the police went about their task of investigation, a notion which was wide of the mark. Lord Devlin, writing in 1960 about the role of police interrogation in the criminal process, had a tendency to equate the ideal of the 'completely fair minded and disinterested'[159] investigator with the reality of police behaviour. He seemed to be operating with the idea that statements were 'volunteered', that once a suspect had refused to make a statement he was not pressed further, that persons were never cross-examined by the police, and that a request for a legal adviser would naturally be granted by the police.[160] By this period,

> 'the police had become to be regarded as the embodiment of impersonal, rule bound authority, enforcing democratically-enacted legislation on behalf of the broad mass of society rather than any partisan interest, and constrained by tight legal requirements of due process.'[161]

Operating with this view, the judges called on all to pay greater respect to the police.[162]

The nature of police questioning, as well as police attitudes towards the notion of suspects' rights, are issues which will be dealt with at length at a later stage. For the present, I want simply to point out a more general and fundamental flaw in the judicial theory of the police role. This can be done in no better way than to quote Lord Devlin himself:

> 'The role we have assigned the police is theoretically unsound. There is a great difference between playing fair with an opponent, which the police are rightly required to do, and holding the balance even between him and yourself ... The

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[159] Devlin (1979) *op. cit.*, at p.65

[160] *Ibid.*, at pp.33-35.

[161] Reiner, R. (1985) *The Politics of the Police*, at p.61.

[162] Devlin (1966) *op. cit.*, p.129.

face of the police officer is not "sicklied o'er with the pale cast of thought", and once he finds a reasonable quantity of pros, he will act decisively without too much anxiety about the cons. When a police officer charges a man it is because he believes him to be guilty, not just because he thinks there is a case for trial.'[163]

When the police arrest, they do so because they think that the person in question is the culprit. They realise that they will be required to prove that at trial, and to do so beyond reasonable doubt. Consequently, from that point onwards the police work to anticipate the trial; the evidence which they put forward, and the way in which they marshall that evidence, is designed to show guilt. They do not see it as their role to point out to the tribunal of fact, or indeed to the defence, anything which could point towards innocence. This approach does not spring from any malice on the part of the police towards the suspect; it springs from the fact that police become genuinely convinced that all which points to innocence must be mistaken.[164]

It may be argued that knowledge about the way in which the police construct cases against individuals has only recently come to light due to the exposures concerning the cases of the Birmingham Six, the Tottenham Three, the Guildford Four and the case of Judith Ward. This is not so; the approach taken by the police in these cases was similar to the one taken in miscarriages of justice which came to light in the 1960s and 1970s. Take, for example, the famous case of Timothy Evans, who, in 1950, was convicted of the murders of his wife and daughter. Evans confessed to the murders, and gave the police a detailed account of the way in which he disposed of the bodies. This account was rendered highly improbable in light of testimony later received by the police from independent witnesses. The police were so convinced of Evans's guilt that they persuaded the witnesses to change their statements. The original statements were suppressed.

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[163] Devlin (1979) *op. cit.*, at pp.71-1.

[164] McConville, M. (1984) 'Prosecuting criminal cases in England and Wales: Reflections of an inquisitorial adversary', *Liverpool Law Review* (Vol. vi(1) pp.15-32).

It was later to be revealed that the murderer was not Evans, but Christie, one of the main prosecution witnesses.[165] Furthermore, the convictions in the cases of Laslo Virag (1969) and Maxwell Confait (1972), two notorious miscarriages of justice, were secured by similar techniques of suppressing vital evidence or persuading expert witnesses to change their testimony.[166]

iii. The Ideology of Crime Control

The somewhat hysterical, though no doubt sincerely held, belief that the moral fabric of society was threatened by lawlessness, combined with the view that the citizen had nothing to fear from the police and police power, led senior police officers, judges, legal commentators and newspaper editors to contest the necessity and desirability of affording procedural protections to those accused of criminal activity. This lobby emphasised, in opposition to due process, many of the concerns and priorities which Packer ascribed to the 'crime control model': a presumption that those whom the police bring to court must be guilty, that a high conviction rate is necessary in order to provide effective deterrence, and that procedures should aim to achieve maximum speed and finality.[167]

In 1966 Devlin J argued that the caution was a hangover from the time when a defendant could not give testimony at his trial, and that the rules should be

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[165] A full account of this case is provided by Ludovic Kennedy in *Ten Rillington Place* (1961). See also *Report of an Inquiry by Scott Henderson Q.C into Certain Matters Arising Out of the Deaths of Mrs Beryl Evans...* (1953, Cmd.8896 and 8946), and *Report of an Inquiry by Mr Justice Brabin...* (1966, Cmnd. 3101).

[166] See, respectively, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, H.M.S.O (1976), and *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road*, London SE6 H.M.S.O (1977).

[167] Packer, H. (1968) *The Limits of the Criminal Sanction*, at p.158-9.

changed so that a suspect who remains silent at the interrogation should have his 'silence used strongly against him'.[168] In 1971 Lord Parker stated that not only must the caution be abolished, but it should also become compulsory for the defendant to testify at the trial.[169] In the same year, Lord Widgery, who had just been appointed Lord Chief Justice, told a Conference of the American Bar Association that the caution was unnecessarily hampering the police in their investigations, and that the calls being made for a solicitor to be present at the interrogation were totally unacceptable.[170] Lord Fraser, writing in *The Justice of the Peace*, called for the defendant's previous convictions to be revealed to the jury. He accepted that this may result in a small number of wrongful convictions, but argued that this was a price well worth paying in return for convicting greater numbers of the guilty.[171]

Contributors to the mainstream legal periodicals, at least up until the early 1970s, spoke with one voice on the need to give the police greater powers of detention and questioning. The overwhelming belief amongst legal commentators was that the Judges' Rules were unnecessary, and this no doubt played a part in persuading the judiciary to widen the scope for police interrogation and to overlook breaches of the Rules.

Leonard Hoffman, later Lord Justice Hoffman, supported the greater freedom to interrogate conferred upon the police by the 1964 Rules, stating that they showed 'a more realistic approach to the problems of detection than had been apparent under the previous regime.' He went on to criticise the Rules for not having abolished the caution, which in his view did nothing but help the guilty

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[168] Devlin, P. (1966) *Op. cit.* at p.127. A similar argument had been put forward earlier by Lord Porter, (1949) 'English procedure and practice', *Current Legal Problems* (Vol.II;pp.13-26) at p.23.

[169] *The Times* 8 April 1971, at p.4.

[170] *The Times* 17 July 1971, at p.3.

[171] *The Times* 29 November 1972, at p.4.

and prevent the innocent from offering an explanation. He argued that by making the accused a competent witness, the Criminal Evidence Act 1898 had rendered the caution obsolete. Hoffman concluded by asserting that judicial supervision of the police can only be achieved at the cost of hampering the prosecution of offenders, and that in view of this it is best simply to let the police get on with the job.[172]

Glanville Williams, the distinguished Professor of Law at Cambridge University and editor of the *Criminal Law Review*, argued that the Rules were unrealistic and that what was needed was a full-blown power of detention for questioning.[173] Prohibiting police interrogation, he wrote, was bad for police morale, and added that proposals to allow a solicitor to be present during interrogation were unacceptable.[174] Discussing some of the tactics of interrogation suggested by Inbau and Reid[175] (such as sleep and sensory deprivation, bullying interspersed with shows of sympathy, and misinformation), Williams put forward the view that these were justified since they helped in the apprehension of serious criminals, even if they did sometimes lead to the conviction of the innocent.[176] Professor John Smith, renowned as a liberal jurist, accepted Williams's argument regarding the presence of a solicitor at the interview, stating that it 'would cramp the style of the police too much to be acceptable.' He suggested that the way forward was to ask the police 'just what

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[172] Hoffman, L.(1964) 'The Judges' Rules', *Lawyer* (Vol. 7 pp.23-27) at pp.23-6.

[173] Williams, G. (1960) 'Questioning by the police: some practical considerations', *Crim. LR* (pp.325-346), at p.332.

[174] *Ibid.*, at p.340-44.

[175] Inbau, F. and Reid, J. (1962) *Criminal Interrogation and Confessions*. The United States Supreme Court, in the case of *Miranda v Arizona* 384 U.S 436 (1966), was later to condemn such tactics as coercive.

[176] *Op. cit.*, at pp.336-337.

powers they really require in order to obtain the evidence they need.'[177] Even the secretary of Justice, the late Tom Sargant, supported proposals to abolish the caution, to give the police a power to arrest for questioning, and to punish those who kept silent by revealing their past convictions to the jury.[178]

Powerful judicial and academic opinion coalesced in 1972 to produce the *Report of the Criminal Law Revision Committee on Evidence.*[179] Lord Edmund-Davies was the Committee chairman, and members included Lord Justice Lawton, Professors (later Sir) Rupert Cross and Glanville Williams, and Mr (later Sir) David Napley. The Committee accepted the police argument that increased sophistication on the part of criminals, together with improved access to legal representation and greater rights of appeal, necessitated changes in the law of evidence so as to make it 'less tender to criminals generally.'[180]

The Committee made three main recommendations regarding police interrogation and confession evidence. Firstly, that it should be permissible for a jury to draw adverse inferences from silence where a defendant fails to mention to the police a fact upon which he later seeks to build a defence.[181] Secondly, it argued that, where relevant, silence in the face of police questioning should be capable of constituting corroboration.[182] Thirdly, the committee

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[177] Smith, J. (1960) 'Questioning by the police: some further points', *Crim. LR* (pp.347-52), at p.351;352.

[178] Sargant, T. (1966) 'Police powers - a general view' *Crim. LR* (pp.583-593). The judicial opinion on the trustworthiness of the police found regular support in the legal periodicals: Elmes, F. (1964) 'The police 1954-1963', *Crim. LR* (pp.505-520); Thomas, D. (1966) 'Arrest: a general view', *Crim. LR* (pp.640-63); 'Questioning - a comment by a barrister' (1967) *Crim. LR* (pp.91-4).

[179] Eleventh Report Cmnd. 4991.

[180] Ibid para. 21, pp.10-12.

[181] Para. 29.

[182] Para. 40.

sought to do away with the common law rule that a confession made after threats or inducements is automatically inadmissible.[183] A confession, it proposed, should only be rejected where the judge is of the view that it is in fact unreliable, or likely to be unreliable.[184] The Committee argued that the implementation of these proposals would make it easier for the prosecution to prove its case, without unduly increasing the risk of a wrongful conviction.[185]

The most important factor in explaining the growth of police powers of interrogation has to be the efforts of the police themselves. Not only did they push out the boundaries of the law by daily illegality, but in the 1970s the police as an institution made a determined effort to influence the structure of criminal procedure through political lobbying. The police reiterated, at every possible opportunity, the argument that the rules of criminal procedure afforded unnecessary protection for the suspect, and acted unduly to hamper the police in their fight against crime.

Robert Reiner has defined the police activity of the 1970s as 'overt intervention into the *public* arena in order to change the content of rules both within the police organisation and at the societal level.'[186] Although Reiner is right in describing Sir Robert Mark's 1973 Dimbleby Lecture[187] and the

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[183] *Fennel* [1881] 7 QBD 147.

[184] Para. 65.

[185] These recommendations caused fierce controversy, and consequently they were never implemented. See Cross, R. (1973) 'The Evidence Report: Sense or nonsense - A very wicked animal defends the Eleventh Report of the Criminal Law Revision Committee', *Crim. LR* (pp.329-40); Mackenna, B. (1972) 'Criminal Law Revision Committee's Eleventh Report: Some comments', *Crim. LR* (pp.605-21). Zander found that, on the whole, the Report was not well received: See Zander, M. (1974) 'The CLRC Evidence Report - A survey of reactions', *Law Society Gazzette* 71 (pp.954-55).

[186] Reiner (1980) *op. cit., at p.379.*

[187] *B.B.C Television* November 1973.

launch of the Police Federation's 'Law and Order Campaign' in 1975 as the crucial turning points, the police lobbying had began earlier. Delivering a lecture at London University in 1970, a year prior to his appointment as Commissioner of the Metropolitan Police, Mark told his audience that, unless the public were prepared to give the police greater powers, crime would continue to be a profitable enterprise. He asserted that 40 percent of all those prosecuted were acquitted, adding that 'practically all of them have committed to a greater or lesser extent the wrongdoing with which they were charged'. He put forward the argument that this dangerous state of affairs was the result of professional criminals taking advantage of safeguards designed to protect suspects from wrongful conviction, and that such criminals would not be deterred unless there was a rise in the number of convictions.[188]

Too many acquittals, the rise of professional crime, the unreasonable restrictions placed on the police by such safeguards as the caution, and the activities of 'bent lawyers' - these were to be the favourite themes of Sir Robert over the next decade. The police aim was to convince judges, magistrates, politicians and the public that crime could only be controlled by cutting back on the safeguards that the system provided for suspects at the police station and at the trial.[189] The rules of procedure as they stood, he argued, were 'effective only against the compliant, the weak, the stupid, the illiterate and the spontaneous wrongdoers.'[190] The safeguards provided by the system were a hangover from the days when courts routinely ordered convicts to be hanged or flogged. Since the penalties had been relaxed, the safeguards should also be

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[188] *The Times* 19 March 1970, at p.3.

[189] See 'The Dimbleby Lecture' *B.B.C Television* November 1973; Royal Society Lecture, reported in *The Times* 22 June 1972, at p.3; *The Times* 17 November 1973, at p.3; *The Times* 7 January 1980, at p.3. See also Mark, R. (1977) *Policing a Perplexed Society*.

[190] *The Times* 22 June 1972, at p.3.

relaxed.[191] On the subject of defence lawyers, Sir Robert was adamant that there could be 'no doubt that a minority of criminal lawyers do very well from the proceeds of crime', that this minority achieved success 'by persistent lack of scruple in the defence of the most disreputable', and that such lawyers were 'more harmful to society than the clients they represent.'[192]

Such views were widely held in the police force and were regularly reported, and supported, by the press.[193] *The Times*[194] reported the Assistant Chief Constable of Northumberland as saying that 'people should realise that at present in this country the dice are loaded against the forces of law and order', and the Police Superintendents Association complained of regular and unwarranted attacks on police evidence in relation to confessions.[195] The most vociferous and passionate attack on the inadequacies of the criminal justice system came from the Police Federation, which, in November 1975, launched a campaign 'to harness the public's growing concern about the state of crime and public order in Britain into a programme for positive action.'[196] Demands included harsher

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[191] *The Times* 17 November 1973, at p.3.

[192] Mark, R. (1973) *Minority Verdict*, at p.12.

[193] It has been argued that Mark forged links with Fleet Street as soon as he was made Commissioner, and persuaded journalists from papers such as the *Daily Express*, *Daily Telegraph* and *News of the World* to accept a deal whereby they would be given greater information in return for favourable coverage of police views on the subject of criminal justice reform (Chibnall, S. (1979) 'The Metropolitan Police and the news media', in S. Holdaway (ed.) *The British Police*). The editorials in *The Times* were also generally supportive of police arguments for greater powers: see 29 March 1971, at p.13; 13 May 1972, at p.15; 28 June 1972, at p.15 and 3 October 1978, at p.15.

[194] 27 June 1972, at p.5.

[195] *The Times* 26 January 1973, at p.4.

[196] *Police* (Nov. 1975), at pp.13-14 (cited in Reiner (1980), *Op. cit.*, at p.397).

sentences, abolition of the caution and restrictive bail conditions.[197] The Federation chairman told *The Times* that they were forced to abandon their policy of non-involvement because government policies were making the police task more difficult. They were 'fed up with a situation of being vilified in courts of law by members of the legal profession and, above all, not being able to rely on whole hearted support from all magistrates and judges'.[198]

On the subject of police questioning and the Judges' Rules, the police made no secret of the fact that the Rules were regularly disobeyed. Sir Robert Mark told the *Observer* newspaper that some CID officers believed that there was a 'moral justification for getting round the rules if it increases the likelihood of getting men convicted whom they believe to be guilty.'[199] Sir David McNee, appointed to succeed Mark as Metropolitan Commissioner in 1977, told the Royal Commission on Criminal Justice that unless powers of detention and questioning were increased, the police would continue to break the Rules.[200]

Despite the passion and frequency with which the above arguments were put forward, an examination of the empirical evidence which was available at the time shows that many of them were without factual foundation.

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[197] Police Federation Annual Conference, reported in *The Times* 19 May 1976, at p.5.

[198] 20 November 1975, at p.5. See also *The Times* 22 January 1976, at p.2; 19 February 1976, at p.5; 19 May 1976, at p.5 and 3 August 1978, at p.1.

[199] 16 March 1975, at p.23. See also the views of the Assistant Chief Constable of Northumberland, reported in *The Times* 27 June 1972, at p.5, and those of Antony Judge, the editor of *Police*, reported in *The Times* 17 August 1978, at p.12.

[200] 'Police powers vs criminal liberties' (1978) 128 *New Law Journal* (pp.769-70).

IV. SUSPECTS' RIGHTS AND THE POLICE: THE EMPIRICAL DATA

The aim of this section is to review the empirical data which were available at the time when many of the above arguments were being put forward. These research findings showed that the provisions of the Judges' Rules meant very little to the mass of suspects who had gone through police hands, and shattered the myth, conjured up by the law and order campaign, of a police force rendered helpless against crime due to safeguards which, designed to protect the innocent, were having a negative impact on the ability of the system to convict the guilty.

As shown above, it was an oft-repeated argument that the right of silence routinely allowed guilty individuals to escape conviction at trial.[201] It was an argument which could not be sustained because only a tiny proportion (4 per cent) of suspects actually exercised their right to remain silent.[202] In his criticism of the caution, Sir Robert Mark had referred specifically to those whom he called 'professional', thereby implying 'serious', criminals. In 1979, Zander took a random sample of 150 cases tried at the Old Bailey and found that only one of the 27 defendants in his sample who received a sentence of imprisonment of four or more years had remained silent when questioned by the police.[203]

The same point can be made in relation to solicitors: they were present at so few interrogations that it is difficult to see how the police could blame them for the supposedly high rate of acquittal. Zander took a random sample of 134 convicted persons and found that whilst 123 of these had been taken to the police station, only 57 of them had asked to speak with a solicitor. In 74 percent (n = 42) of these cases the police had refused to allow access. All of those who were

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[201] This is different from saying that some guilty individuals escape being charged by the police by exercising the right of silence. This argument will be addressed in Chapter Eight.

[202] Zander, M. (1979) 'The investigation of crime: a study of cases tried at the Old Bailey', *Crim. LR* (pp.203-19).

[203] *Ibid.*, at p.213.

refused access told a similar story: that their request was either ignored totally, or that they were mocked by the police for their supposed audacity.[204] Baldwin and McConville found a similar pattern when they questioned 352 defendants entering not-guilty pleas at Birmingham Crown Court. Only about one third of defendants had asked to contact a solicitor, and 77 percent of these had been refused access. This meant that a mere 7.1 percent of the sample as a whole (25 defendants) managed to contact a solicitor, and six of these complained that access was only grudgingly allowed after extensive questioning had already taken place. Those who were refused access complained of being ignored, mocked and even of having been given dead telephones.[205] The authors found that 8.5 per cent of those acquitted had spoken with a solicitor, as compared to 6.3 per cent of those who were convicted. This hardly supported the police claim that those who consulted with a solicitor had a far greater chance of acquittal.

Research also indicated that police allegations of 'bent', 'shady' and 'corrupt' defence lawyers (allegations which *The Times*,[206] amongst others, either supported or gave credence to) were groundless. Following allegations by the National Council for Civil Liberties that the police had compiled a blacklist of supposedly corrupt lawyers, which it claimed had been issued to all CID officers complete with instructions to debar all the named solicitors from police stations,[207] *The Sunday Times*[208] carried an article in which a

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[204] Zander, M. (1972) 'Access to a solicitor at the police station', *Crim. LR* (pp.342-50).

[205] Baldwin, J. and McConville, M. (1979) 'Police Interrogation and the right to see a solicitor', *Crim. LR* (pp.145-152), at p.148.

[206] 28 June 1974, at p.3, and 3 October 1978, at 15.

[207] 'Mark's Ripples' (1973) *New Law Journal* 123 (pp.1030-29).

[208] 13 March 1977, at p.3.

representative of the Metropolitan Police confirmed that the list had been circulated as part of a Consolidated Instruction to the London police.

Baldwin and McConville, having obtained a copy of the list, decided to investigate the police allegations. Solicitors on the list appeared on behalf of 227 defendants out of a sample of 2,000 cases heard in London over a three month period. The researchers actually found that the proportion of defendants pleading guilty was higher amongst those defended by listed than unlisted solicitors. Although these solicitors managed to secure more acquittals, the difference was by no means substantial (53 percent as compared to 47 percent).[209] Neither did 'professional' criminals (as defined by the Metropolitan police for the benefit of the researchers) turn to these listed solicitors with any great frequency: of 72 such criminals, only 10 had turned to a listed firm or solicitor.[210]

The authors then took a random sample of 24 acquittals which had been secured by listed solicitors, and discussed the outcome with the police. In 18 of these cases the police described the verdict as correct; in cases where they disagreed with the verdict, they put the blame on the judge, the jury or on the ambiguous nature of the facts.[211] Only in four cases did the police allege that the lawyers had been corrupt, but they put forward no evidence to support this.[212]

Sir Robert Mark, no doubt seeking to give statistical credence to his assertion that juries were regularly being duped into acquitting guilty defendants, stated that there was an acquittal rate of 50 percent. This assertion was, at best, highly

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[209] Baldwin, J. and McConville, M. (1978) 'Allegations against lawyers: some evidence from criminal cases in London', *Crim. LR* (pp.741-49), at p.744.

[210] *Ibid.*, at p.745.

[211] *Ibid.*

[212] *Ibid.*, at p.747.

misleading. Although the *Judicial Statistics* for 1979[213] showed an overall acquittal rate of 48 percent, in almost half of these cases the acquittal had nothing to do with the jury. Nearly a quarter of the acquittals were directed by the judge, and in a further 19 percent the judge ordered an acquittal because the prosecution offered no evidence.[214] McConville and Baldwin took a sample of 116 defendants who were acquitted by direction or order of the judge, and asked the police officers involved for their views on the outcome. Disagreement was voiced in only 13 percent of the directed acquittals, and police quibbling was minimal with regard to the ordered acquittals.[215] Furthermore, whilst Sir Robert had indicated that it was serious criminals who were being acquitted, McCabe and Purves found that most acquittals in the higher courts were for minor offences.[216]

Implicit in some of the arguments presented for relaxing the restrictions on the police power to interrogate was the belief that interrogation is vital for effective and efficient law enforcement. Lord Devlin wrote that 'The high degree of proof which English law requires...often could not be achieved by the prosecution without the assistance of the accused's own statement.'[217] The police used similar arguments when they asked the Royal Commission on Criminal Justice to increase police powers of detention and questioning. If one turns to the research data, however, confession evidence is quickly shown to be overrated. In fact, the whole idea that the police, by the use of investigative skills, help to discover and solve the vast majority of criminal incidents is shown to be a myth.

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[213] Cmnd.7977

[214] McConville, M. and Baldwin, J. (1981) *Courts, Prosecution and Conviction*, at p.31.

[215] *Ibid.*, at pp.32-3.

[216] McCabe, S. Purves, R. (1972) *The Jury at Work*, at p.43..

[217] Devlin (1960) *op. cit.*, at p.48.

Working with a random sample of 133 cases, Zander discovered that in 44 percent of them the police knew the name of the ultimate defendant at the very outset of the inquiry, and that in 78 percent of these cases the police had been given this information by the victim or members of the public. In a further 38 percent of cases the police, mostly by chance, had caught the defendant red-handed at or near the scene of the crime.[218] So, as Zander concludes, 'the problem of the identity of the offender appear(s) to solve itself relatively easily in the great majority of cases.'[219] McConville and Baldwin found that in only 7.6 percent of cases did interrogation play a part in identifying the offender.[220] Similarly, Bottomley and Coleman showed that not only were 86 per cent of recorded crimes discovered by the public,[221] but also that the vast majority of crime was cleared up without very much 'detection' work at all.[222]

Turning specifically to interrogation and its supposed necessity, Baldwin and McConville, working with a sample of 1,476 cases, found that only a quarter of the defendants managed to get to the courtroom without making some sort of incriminating statement. However, in the opinion of two highly experienced assessors, the confession was vital to the prosecution case in a minority of instances. The assessors calculated that 20 percent of prosecutions would have collapsed without the confession of the defendant, and that in a further 10 per cent of cases the absence of the defendant's statement would have made

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[218] Zander, M. (1979) 'The investigation of crime: a study of cases tried at the Old Bailey', *Crim.LR* (pp.203-19), at p.205.

[219] *Ibid.*, at p.207.

[220] McConville and Baldwin (1981) *op. cit.*, table 8 at p.149.

[221] Bottomley, A. and Coleman, C. (1976) 'Criminal statistics: the police role in the discovery and detection of crime', *International Journal of Criminology and Penology* 4 (pp.33-58) at p.43.

[222] *Ibid.*, at p.48-51.

conviction unlikely.[223] This 30 percent of cases 'involved (even in the view of the police) almost exclusively petty offences'.[224]

The utility of interrogation is sometimes defended on the basis that it helps the police to gather criminal intelligence. Yet, whilst the police often question suspects about accomplices and the whereabouts of stolen property, Baldwin and McConville discovered that only one interrogation in every twelve yielded information about accomplices.[225]

In short, a study of the factual material would have served to contradict all the assertions and assumptions on which the law and order group based their calls for change. Police interrogation was having little influence on the number of suspects who were eventually convicted; for the vast majority of suspects under interrogation, the right of silence was an irrelevance; there had been no rise in the number of acquittals; the number of suspects requesting and gaining access to a solicitor was so small that, even if there had been a rise in the number of acquittals, it could not have been blamed on access to legal advice. Finally, there was no evidence of corruption in the legal profession on the scale indicated by Sir Robert Mark.

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[223] Baldwin, J. and McConville, M. (1980) 'Confessions: the dubious fruits of police interrogation', *New Law Journal* 130 (pp.993-95), at p.995.

[224] *Ibid.* Research in the United States on confession evidence similarly indicates that it is relatively unimportant: See Wald, M., Ayres, R., Hess, D., Schantz, M. and Whitbread, T. (1967) 'Interrogations in New Haven: the impact of Miranda', *Yale Law Journal* 76 (pp.1519-1648), who found confessions to be vital in only 24% of cases, and Witt, J. (1973) 'Non-coercive interrogation and the administration of criminal justice: the impact of Miranda on police effectuality', *International Journal of Criminal Law and Criminology* 64 (pp.326 -332), who found them to be vital in only 13% of all cases.

[225] Baldwin, J. and McConville, M. (1982) 'The role of interrogation in crime discovery and conviction' *British Journal of Criminology* (Vol.22 no.1 April; pp.165-75) at p.168.

V. CONCLUSION

Despite initial reservations about allowing a prosecution agency to interrogate suspected persons in private, the judges were quickly won over to the idea of a police 'right' to interrogate. The Judges' Rules, by giving the appearance that there were some legal controls over police questioning, served to legitimate the practice. The judiciary viewed notions of adversarial combat as irrelevant to the regulation of police station procedures, because these procedures were not seen as part of the legal proceedings against a citizen. Judges viewed police questioning as part of the investigative process, carried out by officers whose task was to search for the 'truth', and who could be trusted to go about that task in a manner which was fair to the suspect.

The police refused to abide by the few restrictions which the law placed on their powers of detention and interrogation, and the courts, far from punishing police illegality, sympathised with the argument put forward by the police that their investigative powers had to be increased if they were to effectively combat crime. Although this argument was clearly refuted by the available research, the courts chose to accept police assertions and to give legal sanction to police practices.

Glanville Williams, one of the key figures in the law and order lobby, was of the view that the police station provided the ideal location at which to force the suspect to defend himself, 'while he is still in the dark about the details of the prosecution's case.' To let the accused know of the charge against him would allow him simply 'to adjust his tale to fit the known facts.'[226] In this respect, the police station came to replicate the Marian style preliminary inquiry, one of the key features of which was that suspects were interrogated without being told of the case against them.[227] There was, however, an important difference

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[226] Williams (1960) *Op. cit.*, at p.341.

[227] See *supra.*, at pp.11.

between the Marian style preliminary inquiry and the format of police station procedures. The former had been carried out by quasi-judicial officers of the court, whereas control now lay in the hands of law enforcement officials who showed a marked reluctance to respect the Rule of Law.

The process of legalising police coercion over citizens was to involve one further step. The legislature was to show recognition of changed judicial and police practices by giving them clear legal validity in the Police and Criminal Evidence Act of 1984.

CHAPTER FOUR

THE CURRENT REGULATORY FRAMEWORK: THE ROYAL COMMISSION ON CRIMINAL PROCEDURE AND THE POLICE AND CRIMINAL EVIDENCE ACT 1984

It was argued in the previous chapter that the Judges' Rules, supplemented by judicial decision-making, served to legitimate the practice of police interrogation and case construction. The failure of the Rules to secure procedural fairness for suspects was traceable to a number of reasons, the main one of which can be identified as the hostility of both police and judiciary towards granting pre-trial rights to suspects. This hostility arose from their belief that such a move would interfere with the task of crime investigation.

Police treatment of suspects is currently governed by the Police and Criminal Evidence Act 1984, which came into operation on the first of January 1986. The provisions of this Act were, broadly speaking, based upon the recommendations contained in the *Report of the Royal Commission on Criminal Procedure.*[228] The Commission had been set up by the Labour government in 1977 under the chairmanship of Sir Cyril Philips and, after taking evidence from a wide range of interested parties and conducting several research studies of its own, published its recommendations in 1981.

This chapter will examine the recommendations which the Commissioners put forward in their *Report*, and set out the provisions of PACE which gave effect to them. The Commissioners argued that their *Report* struck a 'balance' between the right of the individual to be protected from unfair treatment and the right

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[228] 1981 Cmnd. 8092.

of the community to be protected from crime.[229] I shall demonstrate that, in actual fact, their recommendations represented nothing short of a capitulation to the 'law and order' lobby.

The general approach of the Commissioners was to view existing police practices as 'necessary', and then to extend police powers in order to bring the law into line with those practices.[230] As McConville pointed out at the time, the approach of the Commission was similar to that which the judiciary had adopted in relation to the interpretation of the Judges' Rules, namely one of legitimating police practice by crude appeals to crime control, backed up by reference to examples dealing with hypothetical worst case scenarios.[231]

A second notable feature of the Commission's general approach was that it ignored many of its own research findings, preferring instead to proceed on the basis of value judgements and assumptions.[232] This resulted in the Commissioners recommending safeguards and protections for suspects which, *on*

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229 'We have striven to produce a coherent and logically integrated set of arrangements, and one which displays an appropriate balance between the individual's rights and the community's interest, manifested in its fairness, openness and workability' (Para. 10.1). The theoretical weaknesses of this 'balancing test' will be discussed in the concluding chapter.

230 'Over and over again, the Commission's discussion of the evidence laid before it endorses the police practice of using powers they do not have - flouting the law - only to have the law extended to legitimise the practice': McBarnett, D. (1981) 'Balance and clarity: has the Royal Commission achieved them?' *Crim. LR* (pp.445-453) at p.452.

231 McConville, M. (1985) 'The legal impact of the Police and Criminal Evidence Bill', in E. Alves and J. Shapland (eds.) *Issues in Criminological and Legal Psychology No.7 Legislation for Policing Today: The Police and Criminal Evidence Act* (pp.21-36) at p.30.

232 Irving, B. (1985) 'Research into policy won't go', in E. Alves and J. Shapland (eds.) *Issues in Criminological and Legal Psychology No.7 Legislation for Policing Today: The Police and Criminal Evidence Act* (pp.58-67), at p.65.

the basis of evidence put before the Commission, were unlikely to prove effective.

Both these factors can be seen at work with regard to almost all the recommendations of the Commission, despite a style of writing and presentation which can easily mislead the unwary reader into viewing the recommendations as not only reasonable, but practically the only ones which were open to the Commissioners.[233]

I. POWERS FOR THE POLICE

i. Powers of Stop and Search

Prior to PACE, the police had only a limited power to stop and search individuals. The power emanated from specific statutes, and the application of these statutes was often confined to a certain geographical locality. The police could stop to search for 'prohibited articles' (as defined in the statute, i.e drugs, birds' eggs etc.) and stolen goods.[234]

The argument was put to the Commission that powers of stop and search were unnecessary: if there is reason to suspect that an individual is committing, has committed or is about to commit an offence, the police have power to arrest, and the power to search arises on arrest. It was undesirable to grant powers falling short of arrest, especially since there was evidence to suggest that the police abused existing powers by targeting their use against blacks and certain out-groups.[235] The Commission was supplied with statistics showing that only

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[233] McConville, M. and Baldwin, J. (1982) 'Recent developments in English criminal justice and the Royal Commission on Criminal Procedure', *International Journal of the Sociology of Law* 10 (pp.287-302), at p.290.

[234] Para. 3.12

[235] Para. 3.16

13 percent of searches for stolen goods were successful, and that searches for drugs proved unsuccessful in eight stops out of every ten.[236]

The police complained to the Commission 'that they frequently (had) to lay themselves open to the risk of civil action by stopping and searching in circumstances where they have no power to do so but where equally they will be criticised for failing to act.'[237] The Commissioners decided to put a stop to this police illegality, and recommended that the police should have a nationwide power to stop and search any individual whom they reasonably suspect to be in possession of prohibited articles or stolen goods. They further recommended that the police should have power to stop and search any individual whom they reasonably suspect to be in possession of an offensive weapon.[238] Despite adherence to the principle of reasonable suspicion against *individuals*, the Commissioners were prepared to permit *generalised* stop-searches, stating that where 'the police, from experience, believe that criminal offences are likely to result from a group's activities, because, for example, one or more of them may be carrying offensive weapons, the power to stop and search which we propose should be available.'[239]

The government accepted the Commission's recommendations, and PACE confers uniform powers to stop and search for stolen goods, prohibited articles and offensive weapons.[240] Offensive weapons are defined to mean not only those articles which are offensive *per se*, but any article which the police believe is intended to be used to as such.[241]

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236 *RCCP Law and Procedure Volume*, Appendices 2 and 3.

237 Para. 3.15

238 Para. 3.20

239 Para. 3.23

240 Section 1.

241 Section 1(9).

The effect of the Act is that the police now possess extremely wide powers of stop and search. These powers operate in circumstances of low visibility, thus making it difficult, if not impossible, to regulate their use. As almost anything can be used as an offensive weapon (e.g keys, credit cards, combs), the Act makes it possible for the police to stop almost anyone. Although it is easy to imagine a set of circumstances where it would be reasonable for an officer to suspect that a person is in possession of stolen goods (carrying a bag at 2 a.m near the scene of a burglary), it is difficult to know what would lead an officer to suspect, for example, that an individual intends to use his comb as an offensive weapon.

The controls which the codes of practice seek to place on the use of these powers are weak. The statement that reasonable suspicion 'can never be supported on the basis of personal factors alone', such as 'a person's colour, age, hairstyle ... or the fact that he is known to have a previous conviction ...'[242], is undercut by the further claim that such factors, combined with others, may be relevant depending on the circumstances. The Act states that a reason must be given for the search[243] and a record made,[244] a copy of which must be made available, if requested, to the individual stopped.[245] However, if an officer fails to comply with any of these regulations the Act does not state that this will render the stop and search illegal.

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[242] Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (Code A) at para. 1.7.

[243] Section 2(3).

[244] Section 3(1).

[245] Section 3(7).

ii. Powers of Arrest

Prior to 1984, the police possessed a power of arrest on reasonable suspicion without warrant for all 'arrestable offences'. These were defined as offences which, under an enactment, carried a maximum sentence of five years imprisonment on conviction, or for which the penalty was fixed by statute.[246] In addition, there existed a limited number of non-arrestable offences for which the police could arrest, but the power could only be exercised in specific circumstances.[247]

As arrest involves the deprivation of liberty without charge or trial, the courts did at one time emphasise that it should only be used in exceptional circumstances.[248] The police continued to make routine use of arrest because they were well aware of the psychological advantage that they could gain by forcing a suspect into the threatening and unfamiliar territory of the police station. The Commission calculated that, in 1978, 76 percent of all those proceeded against for indictable offences had been brought to court by arrest as opposed to summons.[249] Furthermore, Gemmill and Morgan-Giles,[250] researchers employed by the Commission, estimated that the majority of the 24 percent who had been brought to court by summons had been subjected to arrest at some point during course of their case. All but 14 percent of the 76 percent that were arrested were released on police bail to appear at court. This indicates that, in the majority of cases, arrest is used, not to prevent the commission of

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[246] S2 Criminal Law Act 1967.

[247] *RCCP Report, Law and Procedure Volume,* Appendix 9.

[248] *Hussein v Chong Fook Kam* [1970] A.C 942.

[249] *Criminal Statistics (England and Wales) 1978* (Cmnd. 7670 H.M.S.O) Even for non-indictable offences, excluding motoring offences, 45 percent of all those proceeded against were arrested.

[250] Gemmill, R. and Morgan-Giles, R. (1980) *Arrest, Charge and Summons: Current Practice and Resource Implications* (RCCP study no.9, H.M.S.O).

further offences or to ensure attendance at court, but to afford the police an opportunity to interrogate.[251]

The Commissioners accepted that arrest was a *coercive* power, and argued that its exercise should be regulated by the criterion of *necessity*. They stated that the police should place greater reliance on the summons procedure, and arrest should never be resorted to as a matter of course.[252] In the light of this avowed commitment to gearing the system towards summons, one would have expected the Commission to recommend curtailment and tight control of the police power of arrest. What in fact it did was to argue for an increase in police powers of arrest: it recommended that all offences carrying a sentence of imprisonment should become arrestable offences[253] and that there should, in addition, be a power to arrest for *all* non-arrestable offences where a police officer has seen the suspect commit the offence and the suspect positively refuses to give his name and address.[254]

PACE did not extend the category of arrestable offences so as to include all imprisonable offences, although S24 does increase the overall number of offences now defined as arrestable offences.[255] This restraint on the part of the legislature was, however, more apparent than real. PACE gives the police far greater powers of arrest than those recommended by the Commission, but does so through the concept of the non-arrestable offence.

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[251] In *Holgate-Mohammed* [1984] A.C 437 the House of Lords accepted that it was legitimate for the police to use arrest for the sole purpose of placing greater stress on the suspect.

[252] Para. 3.75

[253] Para. 3.83

[254] Para. 3.86

[255] S25(1) converts all common law offences carrying a sentence of five years or more imprisonment on conviction into arrestable offences, and S25(2) converts a number of hitherto non-arrestable offences into arrestable ones.

A power to arrest for *all* non-arrestable offences is conferred by S25, regardless of whether or not the officer actually saw the offence being committed. This power arises if any of the 'general arrest conditions' are satisfied. These conditions are designed to give immense discretion to the arresting officer, who is permitted to arrest if he 'has reasonable grounds for doubting' the name given by the citizen is his real name, or has reasonable grounds for doubting that the address supplied by the citizen is a 'satisfactory' address for the service of a summons. Furthermore, the officer can arrest if he believes that the arrest is necessary to prevent the suspect causing harm to himself or others, or to protect a child 'or other vulnerable person from the person to be arrested'.[256]

iii. Powers of Detention

The Commission, ostensibly in an effort to ensure that suspects are not unnecessarily detained at the station, proposed that the arrestee, once at the station, should be presented before a custody officer. This officer would have power to authorise detention only where one or more of a number of stipulated situations could be said to exist. One of the situations in which the custody officer should have power to order detention, argued the Commissioners, is where he believes that it is necessary in order to 'secure or preserve evidence of or relating to (the) offence or to obtain such evidence from the suspect by questioning him'.[257]

Section 37 of PACE accepted this as one of the grounds on which detention can be authorised. If none of the stipulated conditions exist, the custody officer must release the suspect with or without bail. Both the Commission and

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[256] S25(3)e.

[257] Para. 3.112

Parliament, therefore, endorsed the judicial policy of encouraging the police to detain for the sole purpose of questioning.[258]

The procedure under section 37, as a mechanism for controlling police use of detention, was unlikely to work. The data available to the Commission on police detention should have alerted it to the fact that the police almost always consider interrogation to be 'necessary'. In fact, the procedure recommended by the Commission and adopted by PACE was very similar to that which already existed. This procedure involved the arresting officer taking the suspect before the charge sergeant, who would decide whether or not to accept the charge. As a constraint upon detention of suspects, this system could not work. Detention was routinely authorised because, as the Prosecuting Solicitors Society pointed out in its evidence to the Commission,

> 'It would be exceptional for the charging officer to have had time, by that stage of his investigation, to take formal written statements from the witnesses. The view of the charge sergeant or the other officer accepting the charge must therefore be gained from what he is told by the investigating officer. As an independent check this must be almost without value.'[259]

The Act sought to overcome this problem by promulgating a rule stating that custody officers should be independent of arresting officers.[260] Douglas Hurd, then Home Office Minister, stressed that this would ensure that detention took

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[258] Lidstone argued that such a provision is in contravention of Article 5 of the European Convention on Human Rights, which confines arrest to its original purpose of ensuring that the suspect commits no further offences and/or appears at court to answer the allegations against him (Lidstone, K. (1981) 'Investigative powers and the rights of the citizen', *Crim. LR* (pp.454-469),at p.463).

[259] Cited in McConville, M., Sanders, A. and Leng, R. (1991) *The Case for the Prosecution*, at p.41.

[260] S36(5)

place only if 'necessary - not desirable, convenient or a good idea but necessary.'[261] This failed to take into account two factors: firstly, it is not possible to make officers 'independent' of each other by a simple declaration to this effect and, secondly, 'independence' does not by itself deal with the problem that custody officers would remain reliant on the information given to them by arresting officers.

With regard to the duration of detention after arrest, the Commissioners declared that time limits must 'enable the police to do their job properly but must have due regard to the rights of the suspect.'[262] Despite this declaration, the Commissioners did not address what the suspect's rights ought to be, preferring instead to argue the case for police 'needs'. They wrote that because there was great variation in the 'pressures of work on the investigating officers, and in the nature of the case to be investigated', 'short and absolute time limits were not possible'[263].

The Magistrates Court Act 1980[264] had stipulated that a suspect had to presented before the court within 24 hours or released, except where arrested for a serious offence, in which case he had to be brought before the magistrates 'as soon as practicable'. Although long periods of custody were not unknown, and were frequently overlooked by the courts, in theory the duration of detention could always be challenged in court.[265] The Commission recommended that,

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[261] *Hansard's Parliamentary Debates* 1984 (Standing Committee E, 16 February Col. 1229).

[262] Para. 3.100

[263] Para. 3.99 - 3.100

[264] S43.

[265] Dixon has recently accused the critics of PACE of 'historical inaccuracy', arguing that they have failed to 'appreciate the true extent of police powers before PACE' (see Dixon, D. (1992) 'Legal regulation and policing practice' (*Social and Legal Studies* (Vol. 1) pp.515-41), at pp.530-1). He has confused police *powers*, which are legally sanctioned, with police *practices*, which can, and prior to PACE frequently were, illegal.

in the interests of greater certainty, existing provisions should be replaced with fixed time limits. The Commissioners had been told that 75 percent of suspects were processed within six hours or under, and that 95 percent within twenty-four hours. None were held for longer than 48 hours without charge.[266] Despite these findings, the Commissioners declared that a provision stipulating that a suspect had to be presented before the court within six hours would amount to an 'arbitrarily imposed mathematical norm'[267].

In keeping with its general approach of basing police powers on the exception as opposed to the norm, it recommended that the police should be able to detain without charge for twenty-four hours,[268] and in cases involving 'grave offences' should be allowed to seek magisterial approval to hold for a further 24 hours. Should the police need to question after this period, there ought to be provision to re-apply to the magistrate for a second extension of 24 hours. The Commission recommended that, if the magistrate gave his approval to this second extension, the suspect should be allowed to appeal.[269]

S41 of PACE accepts, as the basic rule, that a suspect cannot be detained without charge beyond 24 hours. However, under S42 an officer of the rank of superintendent or above can authorise a further 12 hours of detention where he feels that this is necessary for the effective investigation of a serious arrestable offence.[270] Section 43 allows the police to apply to a magistrate for a

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The argument put forward by the critics whom Dixon chastises is that PACE gave legal sanction to police practices which had either been clearly illegal, or the legality of which can be open to question.

[266] Para. 3.96

[267] Para. 3.100

[268] Para. 3.104

[269] Para. 3.106

[270] Section 116 of the Act defines 'serious arrestable offence' as one whose commission leads to 'serious harm to the security of the State or to public order'; or to 'substantial

warrant of further detention, the grant of which gives the police permission to hold the suspect for another 36 hours. Under S44 the police can apply to have this extended, and the Magistrate has the power to authorise detention for up to 96 hours without charge.

The Commission said of its detention recommendations:

> 'On the basis of the evidence available to us from the detailed research we commissioned on police practice and our own study of police procedures on the ground, we have concluded that these strike the right balance between fairness to the suspect and workability.'[271]

The research which is mentioned is that which highlights how the police operate; this is then equated with 'workability'. The phrase 'fairness to the suspect' is tagged on with no explanation as to what is fair about keeping a person in police custody for up to four days without charge. The psychological literature on confinement, which indicated that confinement measured in minutes can cause overwhelming stress, was ignored. PACE does not oblige the magistrate, when deciding whether or not to authorise further detention, to consider why the suspect was arrested, whether he wishes to answer police questions or the manner in which he has been treated by the police.[272] The magistrate is to ask the same question as the custody officer: is detention necessary for obtaining

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financial gain to any person', or to 'serious financial loss to any person'. The police are given immense discretion in applying this criteria: the section states, for example, that a loss is serious if, 'having regard to all the circumstances, it is serious for the person who suffers it'.

[271] Para. 3.105

[272] Baldwin, R. (1985) 'Police discretion and law reform', in Alves, E. and Shapland, J. (eds) *Issues in Criminological and Legal Psychology No.7 Legislation for Policing Today: The Police and Criminal Evidence Act*, at p.10.

evidence by questioning?[273] Police needs are built into the very criteria of assessment.

iv. Powers of Questioning

As demonstrated in the previous chapter, two central arguments in the police campaign for greater powers were, firstly, that interrogation of suspects was vital to the discovery and investigation of crime and, secondly, that confessions were necessary if convictions were to be secured. With the aid of data collected by Bottomley and Coleman, Zander and Baldwin and McConville, I have already shown these arguments to be without foundation.[274]

The findings of these researchers made three facts very clear. Firstly, it was shown that the majority of crime is discovered as a result of information from the public. Secondly, crime is very rarely 'investigated' in the manner made famous by crime novels and television. In most cases the identity and whereabouts of the offender is known to the police at the outset of the inquiry. This information is usually supplied by the victim; in cases in which the police discover it themselves, it is not as a result of 'detective work', but because, mostly by chance, the offender was apprehended red-handed. Finally, the research indicated that only in a minority of cases is confession evidence vital to the prosecution case.

Despite this evidence, the Commission concluded, 'our knowledge of other countries and the results of our research all lead us to the conclusion that there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime'.[275] The reference to 'other countries'

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[273] S43(4).

[274] *Supra.*, discussion at pp.57-8.

[275] Para. 4.1

is perplexing. Pauline Morris,[276] employed by the Commission to review the literature on police interrogation, reported that in other jurisdictions, notably in the United States, police interrogation was relatively unimportant in the investigation of crime. The claim that the conclusion was based on the results of its own research is equally confusing.

The research in question was carried out by David Steer.[277] He found that between 75 and 80 percent of crime is reported by ordinary members of the public[278]. Steer divided crimes discovered by the police themselves into two categories: those 'directly' discovered, and those discovered 'indirectly'. The latter were those discovered when suspects, having been arrested for one offence, were persuaded by the police to have other offences taken into consideration. The theory is that it benefits the defendant by removing the risk of prosecution in the future, and benefits the police by clearing their files of hitherto unsolved crime.[279]

This practice is far from uncontroversial, however, with some arguing that it achieves very little in the way of genuine law enforcement, whilst exposing innocent suspects to undue pressure and coercion.[280] This concern has proved to be well grounded: in 1986, an ex-police officer from the Kent Constabulary

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[276] Morris, P. (1980) *Police Interrogation: A Review of the Literature* (*RCCP* study no.3), at p.10.

[277] Steer, D. (1980) *Uncovering Crime: The Police Role* (*RCCP* study no. 7).

[278] *Ibid.* at p. 67

[279] In a sample study of guilty plea defendants at Birmingham Crown Court, researchers found 106 defendants who asked to have a total of 610 offences taken into consideration (Baldwin, J. and McConville, M. (1982) 'The role of interrogation in crime discovery and conviction', *British Journal of Criminology* (Vol. 22 no. 1 April pp.165-75), at p.168.

[280] See McConville, M. and Baldwin, J. (1981) *Courts, Prosecution and Conviction*, at p.153; Lambert, J. (1970) *Crime, Police and Race Relations*, at p.43.

told the press that not only were police officers 'clearing' crime by accepting admissions from persons who could not have possibly committed the offences in question, but that they had also been inventing offences for which admissions were then accepted.[281] In an investigation into the practices of Merseyside police, it was found that the police regularly visited persons already in prison in order to persuade them to admit to further offences. It was further discovered that, whilst almost all cases of domestic burglary and theft from vehicles in 1984 were 'cleared' in this way, fewer than one in ten detections of this type was followed by a prosecution.[282]

Even if this method of crime 'discovery' is taken at face value, Steer estimated that police questioning led to the discovery of only 14.5 per cent of the overall number of recorded crimes. If TICs are discounted, the police role in the discovery of crime drops to a mere 3.1 per cent of all recorded crime.[283]

Turning to the role of interrogation in identifying offenders, Steer showed, as had others in the past,[284] that, if offences 'taken into consideration' are excluded, it is extremely rare for the police to discover the identity of the offender through interrogation. Steer did find, however, that once the police had arrested an individual, questioning him was useful in that it sometimes helped to identify others who were also involved in the commission of the offence. Approximately 12 percent of suspects in his sample who were eventually prosecuted were identified in this way.[285]

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[281] *The Observer* 13 July 1986 and 20 July 1986

[282] Gill, P. (1987) 'Clearing up crime: The big "con"', *Journal of Law and Society* (Vol.14 no.2 pp.254-265).

[283] Steer (1980) *op. cit.*, table 3.3 at p.67.

[284] McConville, M. and Baldwin, J. (1981) *Courts, Prosecution and Conviction.*

[285] Steer (1980) *op. cit.*, Table 4.2 at p.97, discussion of figures at p.114.

On the issue of the extent to which confession evidence is necessary to secure convictions, research carried out on behalf of the Commission by Baldwin and McConville confirmed findings which have already been discussed above, namely that approximately 20 percent of cases would have collapsed, and a further 10 percent would have been dangerously weakened, had the police not secured a confession.[286] Paul Softley spoke to police officers on the ground, and discovered that investigators would have abandoned proceedings in only 8 percent of the cases in his sample had they not been able to obtain evidence by interrogating the suspect[287].

The Commissioners were, therefore, well aware that interrogation was unimportant in the majority of cases. However, considerations of efficiency led them to give support to the myth that without extensive powers of detention and questioning the police would find it virtually impossible to investigate crime and convict offenders. It is well known that those who make confessions or incriminating statements to the police during interrogation are less likely to contest the case at trial.[288] The Commissioners did not want an increase in the number of contested cases, emphasising that 'were there an increase in the proportion of cases being contested a lot more resources would have to be allocated to both the police and the courts.'[289] Once again, therefore, the Commissioners placed 'crime control' concerns before concern for those suspected of crime.

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[286] Baldwin, J. and McConville, M. (1980) *Confessions in Crown Court Trials* (*RCCP* Study no.5), at pp.27-33.

[287] Softley, P. (1980) *Police Interrogation: An Observational Study In Four Police Stations* (RCCP study no.4), at p.87.

[288] Supra., discussion at p.1.

[289] Para. 2.16

II. PROTECTIONS FOR THE SUSPECT

Consistent with the Commissioners' general approach of encouraging the police and courts to rely on confession evidence, the issue of safeguards for suspects was analysed in terms of 'ensuring that the maximum possible reliance for evidential purposes can be placed upon the suspect's statements in all cases where they are made'.[290]

i. Restraints on Interrogative Tactics

As has already been explained, the Commission accepted the police argument that interrogation is essential to the detection of crime and the conviction of offenders. The only question which remained, therefore, was how best to protect the suspect from unfair pressures which may be brought to bear upon him.

The Commission sponsored two research studies to look into the nature of police interrogation. The first of these, carried out by Irving and Hilgendorf, provided the Commission with a review of the extensive literature on the psychological effects of confinement and interrogation, as well as the methods which interrogators can deploy to secure confessions.[291] The authors concluded that the Judges' Rules were premised on a very crude understanding of the psychology of decision-making. They dealt only with utilitarian gains and losses, whereas the literature showed that decision-making can be affected by situational factors, social and individual approval and disapproval, and the supply and manipulation of information.

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[290] Para. 4.75

[291] Irving, B. and Hilgendorf, L. (1980) *Police Interrogation: The Psychological Approach* (*RCCP* study no.1). Many of the works cited below are taken from this review.

The second study, carried out by Irving, consisted of an empirical investigation aimed at establishing whether the police in England and Wales in fact make use of the various interrogation tactics described in British and American police interrogation manuals.[292] The author concluded, 'the kinds of techniques which were predicted from a review of the psychological literature, are in fact used',[293] and that 'most of the repertoire is widely used'.[294]

a. Situational factors.

The police station represents alien and threatening territory, and this alone will in many cases be sufficient to place immense pressure on the suspect. Inbau and Reid,[295] authors of the leading American authority on interrogation techniques, had recommended that the interrogation room should be furnished so as to make the physical environment as intimidating as possible. The interrogators should complement this by dressing, talking and acting in a way which exudes authority: the suspect should not even be allowed to talk of his innocence, because to allow him to express such a belief encourages him to develop conviction in it.[296]

Confinement gives rise to stress: Sells found that confined subjects quickly become restless, fatigued, irritable, disorientated, frustrated, anxious, and depressed.[297] The severe degree of psychological pressure induced by

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[292] Irving, B. (1981) *Police Interrogation: A Case Study of Current Practice* (*RCCP* study No. 2).

[293] *Ibid.*, p.150

[294] *Ibid.*, at p.151

[295] Inbau, F. and Reid, J. (1967) *Police Interrogation and Confessions*.

[296] Irving and Hilgendorf (1980), at p.50.

[297] Sells, S. (1973) 'The taxonomy of man in enclosed space', in Rasmussen, J (ed.) *Man in Isolation and Confinement*, cited in Irving and Hilgendorf (1980) *ibid*. The reluctance of the courts to attach sufficient weight to this factor of confinement

confinement is evidenced by the rate and speed at which volunteers for 'confinement studies' withdraw from the experiment. Zuckerman found that about 30 percent of subjects leave at the end of the first session (the first available opportunity), no matter how short the session or how severe the conditions.[298] Irving reported that the average waiting time between incarceration and first interview was four hours and fifteen minutes,[299] and he discovered in the cell blocks a more or less constant din of '(r)ythmic banging or hammering, shouting and cursing, groaning, screaming and crying'.[300]

Subjection to authority in an environment over which one has no control can give rise to an altered state of emotional arousal, which in turn brings about an overwhelming concern with such mundane matters as refreshments, rest, and toilet facilities. All the regulations relating to matters such as refreshments and rest miss the point: the anxiety that the suspect suffers cannot be reduced by providing that which it is feared will be withheld, because the anxiety is always about *control* over *future* provision.[301]

Irving stated that the authority of the police is established as soon as a person is obliged to hand over his property and is allocated a cell and locked in. Police authority becomes overwhelming and intimidating at the point of interview. He

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was perhaps made most explicit in the case of *Rennie* (1982) 1 All E.R 385. The defendant alleged that he confessed because he had psychiatric problems, including claustrophobia. The defence intimated that they would substantiate this by calling a consultant psychiatrist. The trial judge stated that if he ultimately formed the view that such evidence was unnecessary or irrelevant, he would refuse to allow the fees of the psychiatrist to be paid from the legal aid fund.

[298] Zuckerman, M. (1964) 'Perceptual isolation as a stress situation: a review' (*Arch. of Gen. Psychiat.* 11 pp.225-276) cited in Irving and Hilgendorf at p.33.

[299] Irving (1981) *op. cit.*, p.102

[300] *Ibid.*, at p.122.

[301] Bandura, A. (1977) *Social Learning Theory*, cited in Irving and Hilgendorf at p.30.

noted that interrogating officers wore a shirt and tie, whilst suspects even lacked belt and shoes. The police have absolute physical control to the point of having authority to order a suspect's clothes to be removed,[302] and Irving observed that in some cases the suspect was without any clothing at all apart from a blanket.[303] Although requests for refreshments or to use toilet facilities were always allowed, Irving reported that the police without exception made a point of indicating to the suspect that this was a 'favour'.[304]

The police were fully prepared for the interview, and in serious cases it was observed that meetings were held to discuss tactics.[305] In contrast to the readiness and composure of the police, it was found that a large number of those interviewed were in an 'abnormal state'. 'Abnormality' ranged from severe physical injury to a suicidal level of emotional disturbance.[306] The number of suspects suffering from mental abnormalities (through drugs or illness), combined with those who were sufficiently frightened to show visible symptoms (trembling, shivering, sweating, hyper-ventilation, frequent urination and verbal incoherence)[307] added up to nearly half the sample.[308] Interviewing techniques were designed to impose maximum pressure upon suspects, with styles ranging from cold, brusque and business-like, to befriending and sympathetic, to overtly authoritative, aggressive, and cynical. 'Suspects (were) discouraged from initiating conversation, asking questions, answering back or demonstrating any kind of outright rejection of the interviewing officer's authority'.[309]

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[302] Irving (1981) *op. cit.*, at p.146

[303] *Ibid.*, at p.122.

[304] *Ibid.*, at p.123.

[305] *Ibid.*, at p.125.

[306] *Ibid.*, at p.101.

[307] *Ibid.*, at p.133.

[308] *Ibid.*, at p.136.

[309] *Ibid.*, at p.123.

Irving informed the Commissioners that whilst a skilled observer at the scene would perhaps be able to assess a suspect's mental state and the influence of certain factors on him, 'it seems unreasonable to suggest that the state of the suspect can be evaluated *post hoc* in court simply by eliciting from police officers general factors about the conditions of interrogation and their naive perceptions of the suspect's mental state at the time'[310] Police officers were themselves incapable of knowing when the rules had been broken.[311]

b. Utilitarian gains and losses.

Although the Judges' Rules stated that it was impermissible for the police to attempt to threaten or bribe the suspect, Irving found that officers frequently resorted to such tactics. The police drew upon their discretion over such matters as the duration of detention, the seriousness of the charge, recommendations to the court for bail, and the general way in which investigations are conducted. Police discretion can be used for or against the suspect, and this fact does not have to be expressly communicated since most suspects are already aware of it.[312]

Irving observed suspects being told that cooperation would lead to speedier release from the station, or a less serious charge, or that the offence would be taken into consideration rather than being charged separately. Suspects were promised that cooperation would make for a 'hassle free' life, i.e that friends and family would not be arrested or questioned, and premises would not be searched. The police also told individuals that a confession would lead to a lighter sentence.[313]

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[310] *Ibid.*, at p.135.

[311] *Ibid.*, at p.152

[312] *Ibid.*, at p.139.

[313] *Ibid.*, at pp.139-40.

c. Social and individual approval and disapproval.

It has been shown that deliberate and consistent application of social pressures helps to secure a confession more effectively than does the use of physical torture and privation.[314] Mildly voiced approval or disapproval of a small social group can persuade a subject to do anything from doubting his own senses on such a simple matter as the relative length of two lines,[315] to accepting untrue statements and rejecting true ones.[316]

The effectiveness of social pressures can be increased by isolating the subject from his peers, increasing the relative status of the interrogator, and by bringing to bear on the subject a mild state of stress (by inducing mild fear, uncertainty through deprivation of information, confusion by information overload or conflict). The interrogator can assist himself by exuding confidence and by initially putting forward statements with which it is known the subject will agree. Psychologists have warned that manipulations of this type can persuade innocent suspects to make convincing but completely false confessions.[317]

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[314] Biderman, A. (1960) 'Social psychological needs and involuntary behaviour as illustrated by compliance in interrogation' *Sociometry* 23:120, cited in Irving and Hilgendorf at p.15.

[315] Asch, S. (1956) 'Studies of independence and submission to group pressure: a minority of one against a unanimous majority' *Psychol. Monog.* 70:416, cited Irving and Hildgendorf at p.15.

[316] Bem, D. (1966) 'Inducing belief in false confessions' *J. Pers. and Soc. Psychol.* 3:707, cited in Irving and Hilgendorf at p.16.

[317] Gudjonsson, G. and MacKeith, J. (1988) 'Retracted confessions: legal, psychological and psychiatric aspects', *Medicine, Science and the Law* 28 (pp.187-194) who refer to this as the 'coerced-internalised confession' (at p.190).

In addition to social approval and disapproval, the subject will be very concerned with the way in which a particular decision will affect his own evaluation of himself. Some people suffer from a guilt complex so acute that they are prepared to confess to crimes which they quite clearly have not committed.[318] The self-esteem of others can be manipulated in order to make them more amenable to viewing themselves as criminals.

The existence of manuals in the United States advising police officers on the techniques of interrogation proves that the police are well aware of the importance of the above factors.[319] Articles and books advising similar techniques have appeared in British police literature.[320] Interrogators are instructed to manipulate the way in which the suspect perceives the social and individual consequences of confessing by, for example, telling him that his conduct was understandable, skilful or even heroic.[321]

Such ploys were observed by Irving during his fieldwork. He reported individuals being told that the offence was trivial and not worth bothering about. Others were told in a sympathetic manner that what they had done was understandable and would be understood by family and friends, that they were foolish to deny everything when it would be seen as far more reasonable, graceful even, to confess.[322]

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[318] Reik, T. (1959) *The Compulsion to Confess: On the Psychoanalysis of Cure and Punishment*, cited in Irving and Hilgendorf at p.17.

[319] The most notorious of these, to which reference has already been made, is that by Inbau, F. and Reid, J. (1967) *Police Interrogation and Confessions*.

[320] Goodsall, J. (1974) 'The professional interviewer', (*Police Review* no.4241); Firth, A. (1975) 'Interrogation' (*Police Review* no.4324); Walkley J. (1987) *Police Interrogation*.

[321] Irving and Hilgendorf (1980), *op. cit.*, at p.19.

[322] Irving (1981), *op. cit.*, at pp.142-3.

d. The supply and manipulation of information.

A suspect who is forced to make a decision on the basis of inadequate information cannot be said to have been allowed to make a free and rational decision. During interrogation it is not only the adequacy of information which is at issue but also the way in which information is presented to the suspect. Information relating to bail, charge, length of detention and sentence is in the hands of the police and the interrogation manuals advise that it should be structured and supplied in a manner designed to ease the task of the interrogator. Furthermore, as Irving and Hilgendorf point out,[323] if the police can give a consistent and compelling version of what happened, and the suspect's role in it, it becomes very difficult for an individual who is starved of information, and whose intellectual capability has been impaired through stress, to reject it and offer a persuasive alternative version.

This insight has very important implications for the way in which questioning and confessions are normally understood. It shakes the assumption that the suspect is a rational individual making voluntary choices between what he perceives to be alternative courses of action. As Irving pointed out to the Commission:

> 'If the suspect can be persuaded that no matter what he says, the inevitable outcome of the interview is that he will be charged and probably convicted, then relatively trivial arguments (such as a request to make life simple for the investigating officer by admitting the offence) will be sufficient to obtain an admission'.[324]

Irving observed the police utilising a number of ploys to impress upon the suspect that, realistically, there was simply no decision to be made. It was

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[323] *Ibid.*, at p.150.

[324] Irving (1981) *op. cit.*, at p.144.

suggested, for example, that incriminating forensic evidence was or would shortly be available; 'information' was or would shortly be available from criminal records, or 'the computer'; aspects of the suspect's *modus operandi* had been matched with the offence in question; the suspect had been identified and witnesses had provided real evidence linking him with the crime, or that accomplices in custody, or outside, had told all.

According to Irving, the police were quite prepared to give false information in order to convince the suspect that 'the game was up'. He was informed by detectives that 'they try to stick as close to the truth as possible, and if they do use informational bluffs, they try to do so in such a way that the suspect cannot know them for what they are'. He noted that officers showed great skill 'in judging how much knowledge to claim and the type of knowledge that will be impressive'.[325]

Overall, Irving calculated that in only 16 of the 60 observed interviews did the police *not* use one or more of the various tactics described above. The reason why the police did not use such tactics in these 16 cases was either because it was unnecessary, for example where the suspect confessed straightaway, or because it was impossible to do so, for example where the suspect's English was inadequate.[326]

Irving and Hilgendorf's overall conclusion was that the legal definition of 'oppression', as provided by the *Priestly*[327] and *Praeger*[328], failed to protect those suspects who, in psychological terms, had not made a voluntary statement:

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[325] *Ibid.*, at p.145.

[326] *Ibid.*, at p. 147.

[327] (1967) 51 Cr. App. R. 1.

[328] [1972] 1 WLR 260.

> '(the) tenor of these statements (in *Priestly* and *Praeger*) does not suggest a concern with the manipulation of decision making but with some more extreme sort of collapse of the machinery of the mind, following which decision making or other types of skilled performance are seriously impaired'.[329]

The Commissioners clearly appreciated the full significance of these findings. They wrote:

> 'What our research suggests is that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which, in Lord MacDermott's words, so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent. Those forces do not fall within the legal definition of factors that would render a confession involuntary and therefore unreliable ... legal and psychological "voluntariness" do not match'.[330]

The Commissioners, instead of investigating strategies to protect suspects from routine manipulation, responded to these findings by stating that in their view it was neither 'practicable or desirable' to regulate the nature of police questioning.

The line taken by the Commission was to argue that since police interrogation was inherently coercive, the notion of 'voluntariness' as the criterion of admissibility should be abolished. It decided to put nothing in its place, arguing that the question of whether or not the confession was reliable should be left not to the judge but to the jury to determine.[331] In the Commission's view, a confession should be automatically excluded only if the suspect has been subjected to violence, threats of violence, torture or inhuman or degrading treatment.[332]

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[329] (1980) *op. cit.*, at p.27.

[330] Para. 4.73

[331] Para. 4.75

[332] Para. 4.132

These recommendations were less favourable to the defence than those put forward by the discredited Criminal Law Revision Committee, which was in favour of exclusion where the judge felt that the confession was unreliable.[333] Under the proposals put forward by the Commissioners, the prosecution would have been allowed to give in evidence confessions which had been extracted by long periods of interrogation, sleep deprivation, or promises of bail. They simply accepted as inevitable that suspects are regularly coerced, frightened and 'conned' into confessing.[334]

The Commissioners sought to justify their stance on voluntariness by arguing that protections for suspects could only be provided by developing police training in interviewing in a way 'which will not only improve their interview techniques but also bring home to them the powerful psychological forces that are at play upon the suspect and the dangers that are attendant upon these.' Yet the Irving and Hilgendorf research had made clear to the Commission that the police were well aware of the psychological pressures operating on suspects, that their practice was to increase and take advantage of such pressures, and that they were firmly of the view that they knew of the dangers but had sufficient skill to avoid them.

The Government followed the Commission's recommendations both in ignoring the implications of the research on the psychological effects of confinement and interrogation and in abandoning the voluntariness rule. Unlike the Commission, however, it accepted that 'unreliability', even in the absence of violence, threats

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333 *Supra.*, discussion at pp.48-9.

334 This acceptance was very similar to the position which the courts had come to occupy: 'Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible.' *R v Rennie* [1982] 1 All E.R 385, per Lord Lane at pp.388.

of violence, and torture, should result in automatic exclusion. The area is governed primarily by section 76 of PACE, which contains a mandatory exclusionary rule: it stipulates that if a confession was or may have been obtained by oppression, or 'in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession made by him in consequence thereof', the judge *must* exclude it from the evidence. Furthermore, the Codes of Practice prohibit the police from informing the suspect, unless in response to a direct question, of the consequences of speaking or remaining silent. If a suspect does ask, the police cannot threaten him with consequences which are improper or unwarranted.[335] 'Oppression', as under the common law, remains a ground for exclusion.

ii. The Right of Silence

The Commission recommended that a suspect's right not to answer police questions should be preserved.[336] It accepted the argument of principle that the burden of proof in a criminal case should rest with the prosecution, and that to require a suspect to rebut 'unspecific and unsubstantial allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty.'[337] The right of silence at common law is left unaltered by PACE.[338]

It is difficult to take at face value the Commissioners' avowed support for this fundamental principle. They did nothing to ensure that suspects could genuinely exercise the right of silence, despite their opening declaration that they would ensure fairness by recommending that suspects be informed of their rights and

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[335] Code C, Para. 11.3

[336] Para. 4.53

[337] Para. 4.35

[338] Code C, para. 10.

given an adequate opportunity to exercise them.[339] The Commissioners ignored Irving's clear finding that 'to remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on this activity requires an abnormal exercise of will'.[340] In fact, they recommended an increase in police powers of detention, and failed to deal with interrogative tactics which increase the psychological pressures on suspects to speak.

iii. The Right Not to be Held Incommunicado

The Commissioners recommended the retention of the suspect's right under S62 of the Criminal Law Act 1967 to have someone informed of his arrest and whereabouts. They recommended that refusal to notify could only take place on specific grounds, on the authority of the custody officer, and that a written record should be made of the reason for refusal.[341]

This recommendation has been incorporated into PACE[342], which states that the suspect must be informed of this right as soon as he arrives at the station. Notification can only be delayed on the authority of an officer of at least the rank of superintendent, the offence must be a serious arrestable offence, and the power can only be exercised if one or more of the reasons listed in the Act is in operation.

iv. The Right to Legal Advice

The Commissioners sought to strengthen the suspect's right to legal advice by laying down detailed rules about the circumstances in which access could be

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339 Para. 2.19

340 Irving (1981), *op. cit.*, at p.153.

341 Para. 4.80

342 S56 and Code C, para. 3.1-3.2

refused. The Government accepted the Commission's recommendations on the issue.[343]

Section 58(1) states that a person in police detention shall be entitled, 'if he so requests', to consult with a solicitor in private at any time. The Act attempts to make the right to legal advice more effective by ensuring that suspects are informed of it[344] and by allowing the police to refuse access only when it is justified by the particular circumstances of the case. Paragraph 6.3 of the Code states that police stations should display posters in charge rooms informing suspects of their right to free legal advice. The suspect may ask to see his own solicitor or a duty solicitor under the 24 Hour Duty Solicitor Scheme, which is a system established under the Act to ensure that solicitors are readily available.[345]

If a suspect requests access to a legal advisor the custody officer must secure one, and in the meantime the suspect is put in the cells and nothing is allowed to happen. Interrogation before the solicitor arrives can only take place if (a) a senior officer has reasonable grounds for believing that delay will involve risk of harm to persons or serious loss of or damage to property, (b) where waiting for a solicitor will cause unreasonable delay to the investigation or (c) where the suspect agrees to be interrogated before the solicitor arrives.[346] When the solicitor arrives he must be allowed to sit in on the interrogation,[347] but he may be required to leave 'if his conduct is such that the investigating officer is unable properly to put questions to the suspect.'[348]

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[343] See S58 and Code C, paras. 4.86-4.91

[344] Paras. 3.1 and 3.2

[345] S59

[346] Code C, para. 6.6

[347] Code C, para. 6.8

[348] Code C, Para. 6.9

Thus the police can no longer refuse a suspect's request for legal advice. Access to a solicitor can be delayed, but only in cases where a person is suspected of a serious arrestable offence, has not yet been charged,[349] and the delay is authorised by an officer of at least the rank of superintendent.[350] The maximum period of delay is 36 hours.[351] For delay to be authorised the officer must have reasonable grounds for believing that access to a solicitor will (a) lead to the loss of evidence or result in physical injury to persons, or (b) lead to the alerting of persons connected with the offence who have not yet been arrested or, (c) will hinder the recovery of property obtained as a result of the offence.[352] Under no circumstances can access be delayed on the ground that a solicitor might advise the suspect to remain silent.[353] When delay is authorised the suspect has to be told the grounds for the delay. Access must be allowed as soon as the reason or reasons for delay have ceased to exist.[354]

The point to note about these provisions is that they leave the police with a large degree of discretion. Interrogation can take place before the solicitor arrives if the police believe that certain eventualities will arise if questioning is delayed. Access can be delayed if the police believe it to be in the interests of 'crime control' concerns. In other words, the Commission's recommendations concerning access to legal advice were minimal; a suspect's right to legal assistance was moulded so as to fit within perceived police investigative needs.

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[349] Annex B Code C para 1

[350] S58(6)

[351] S58(5)

[352] S58(8)

[353] Annex B to Code C para. 3

[354] S58(11)

v. Contemporaneous Recording of Interviews

At the time when the Commissioners reported, it was unusual for police interrogations to be witnessed by anyone other than the police and the suspect. This often led to disputes as to the reliability of any admissions made, with defendants alleging that they had been pressurised into making incriminating statements or that they had been 'verballed', i.e falsely accredited with having made incriminating statements.[355] Sir Henry Fisher had suggested that the problem might be overcome with the introduction of tape-recording[356], and an official report in 1976 had found that at it was feasible to carry out an experiment into the possibility of tape-recording.[357]

The obvious flaw with tape-recording as a protective mechanism is that the police can change their behaviour so as to neutralise its impact. Even if the law stated that only those admissions made on tape would be admissible in evidence, the police could easily pressurise suspects before switching on the tape.

The Commissioners totally side-stepped the issue of verbals, talking only of 'inaccuracies' in the record which, in their view, could be overcome by improving note-taking practice.[358] They believed it would be impracticable to insist that the police make a verbatim, or even a full contemporaneous, record of all interviews. Whilst this would be ideal, argued the Commissioners, it should still

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[355] JUSTICE (1979) *Pre-Trial Criminal Procedure: Police Powers and the Prosecution Process*, Evidence submitted to the RCCP; Vennard, J. (1984) 'Disputes within trials over the admissibility and accuracy of incriminating statements: some research evidence' *Crim. LR* pp.15-24.

[356] *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* (1977 H.M.S.O), at Para. 2.24.

[357] *The Feasibility of an Experiment in the Tape Recording of Police Interrogations* (1976 H.M.S.O Cmnd.6630).

[358] On this point see McConville and Baldwin (1982), *op. cit.*, at p.296.

be possible for the police to give in evidence a summary of the main points covered in the interview. The Commissioners thought that suspects could be protected by a requirement that they be given a chance to look at the summary, make corrections if necessary and sign it.[359] They recommended only limited use of tape-recording: the police officer should orally summarise the main points on tape at the conclusion of the interview, and the suspect should be given an opportunity to record his observations on the summary, as well as anything he may wish to say about his treatment in general.[360] The Commission rejected suggestions that only those statements recorded on tape should be admissible in evidence.[361]

The strategy recommended by the Commission is adopted in PACE. Code C states that a 'record must be made during the course of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it'.[362] This requirement is subject, however, to the proviso that a note can be made after the completion of the interview if, in the view of the investigating officer, a contemporaneous note would not be practicable or would interfere with the conduct of the interview. Under S60 of the Act the Home Secretary was empowered to introduce tape recording of suspect interviews and to issue a code of practice detailing the procedure for such recording.[363]

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[359] Paras. 4.12 - 4.13

[360] Para. 4.27

[361] Para. 4.30

[362] Para. 11(b)c

[363] The Code of Practice On Tape Recording (Code E) came into effect in 1988, and the aim was to install recording equipment in all police stations by 1991.

vi. Improving Police Behaviour

The findings of the Fisher inquiry indicated that rules designed to protect suspects were being flouted by the police.[364] Clearly, something had to be done to regulate and improve police behaviour. The Royal Commission was aware of police attitudes on the issue of protections for suspects. Sir David McNee, at the time Metropolitan Police Commissioner, had argued in his evidence to the Commission that it was no good thing that the public was becoming more conscious of its rights. Indeed, the Association of Chief Police Officers had bluntly stated that 'No further safeguards to the rights of suspects need be given'.[365] Softley's research demonstrated that a clear link existed between the attitudes of the police and their actions: in over 80 percent of cases the police did not inform suspects of their right to legal advice, and in 29 percent of cases the police failed to inform suspects of their right to have someone notified of the fact of their arrest.[366]

Despite this evidence, the Commission sought to improve police behaviour and protect suspects through the promulgation of rules which would rely for their effectiveness on the propriety and good will of the police themselves.

It recommended a Code of Practice in order to ensure that suspects are 'fairly interviewed and properly cared for'.[367] This recommendation was adopted by the legislature,[368] and there now exists a Code of Practice to regulate such

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[364] (1977) *Op. cit.*, in which Sir Henry Fisher found that the police had carried out questioning which was 'unfair and oppressive' (para. 2.13).

[365] Kettle, M. (1980) 'The politics of policing and the policing of politics', in P. Hain (ed.) *Policing the Police* (Vol.2; pp.9-62), at p.24 and p.26.

[366] Softley, P. (1980) *An Observational Study in Four Police Stations* (*RCCP* Study no. 4), at p.68 and p.66.

[367] Para. 4.77

[368] PACE S66

matters as cautioning, contemporaneous recording of interviews, breaks, refreshments, heating, lighting and ventilation.[369] The Commissioners argued that suspects can be protected by entrusting certain tasks to senior officers, or officers who are independent of the investigation. PACE gives effect to this recommendation. So, for example, the custody officer is given responsibility for deciding whether the suspect can be detained at the police station,[370] and he must also ensure that suspects are informed of their rights and generally treated in accordance with the provisions of the Act and codes of practice.[371] The Act provides for a senior officer periodically to review detention in order to ensure that investigations are being carried out expeditiously,[372] and detention beyond 24 hours can be authorised only by a senior officer.[373]

On the recommendation of the Commissioners, PACE requires the custody officer to keep a custody record for each suspect.[374] Every decision taken in relation to the suspect has to be noted on the custody record, together with the reasons for the decision.[375] The Commissioners had stated in their *Report* that the keeping of such a record would make it easier for defence lawyers to challenge police decisions.[376]

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[369] Code C: Code for the Detention, Treatment and Questioning of Persons by Police Officers.

[370] S38

[371] S39 and Code C para. 3.1.

[372] S40

[373] S42

[374] S39(b) and Code C para. 2.1.

[375] Reasons for detention (S38(2)); reasons for continued detention (S42(5)b); reasons for postponement of review of detention (S40(7)); reasons for refusal to allow representations to be made before continued detention authorised (S42(9)b iv).

[376] Para. 2.20

The first point to make about these provisions is that they are hedged around with wide exceptions, thereby making it relatively easy for the police to render them more or less ineffective in practice. So, for example, review of detention under S40 can be postponed if, 'having regard to all the circumstances prevailing...it is not practicable', or if a review officer is not 'readily available'. If a senior officer is asked to authorise continued detention, he must, under S42, allow the suspect or his legal adviser to make representations to him about the detention. However, this is immediately followed by an exception: the officer can refuse to hear representations from the suspect if the officer 'considers that he is unfit to make such representations by reason of his condition or behaviour'.

Secondly, the provisions are based on assumptions about police attitudes towards legal rules designed to regulate their behaviour, as well as assumptions about the nature of supervision in the police force. The Commissioners assumed that custody officers would become independent of investigations simply because the rules stated that they ought to be; they assumed that independence from a particular investigation makes a given officer independent of general policing concerns; and they assumed that a hierarchical rank structure necessarily entails an ethos of scrutiny and control of junior officers by senior officers. These assumptions were extremely problematic in view of the existing literature on the culture of police work.

Some twenty years ago, Cain noted in her study of the British police that senior officers very rarely applied sanctions for breaches of rules aimed at protecting suspects. This was primarily because police officers had a shared view of how the job should be done, and frequently pointed out that it could not be done 'to the book'. She found that junior officers both expected and relied upon senior officers to overlook legal infringements, and that senior officers usually provided such cover because they thought that the infringements were justified and because they were aware that such support was necessary if their PCs were

going to work hard for them.[377] These findings were confirmed in a later study by Mannning, who reported that in the Metropolitan Police 'it was thought or assumed that rigid enforcement of internal rules would have been excessive in the sense that PCs were expected to violate them in order to do the job'.[378]

It appears that there had been few changes in police attitudes by the time the Commissioners came to frame their recommendations. Holdaway, drawing upon research carried out in the early 1980s, gave in his book examples of situations where superiors had ignored physical brutality against suspects.[379] He wrote,

> 'The use of techniques which border on, and sometimes cross, lines of illegality leads to supervisory officers' knowledge of what is taking place in private space...Any account of action within this space is a matter for as few officers as possible; error and contradiction are thus avoided, and the front of legality and managerial control is maintained'.[380]

He also found that charge officers, far from protecting suspects against wrongful arrest, overlooked or encouraged 'verballing' by arresting officers.[381]

Thirdly, it was naive of the Commissioners to assume that record-keeping could enhance openness. Existing research into the role of paper-work in the police force indicated that police records are problematic as sources of unbiased

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[377] Cain, M. (1973) *Society and the Policeman's Role*, at pp.160-7.

[378] Manning, P. (1977) *Police Work*, at p.170.

[379] Holdaway, S. (1983) *Inside the British Police*, at p.32.

[380] *Ibid.*, at p.34.

[381] *Ibid.*, at pp. 115-16. He quotes a charge sergeant as saying, 'if a PC wants to come to me with full evidence, then that's it. As far as I am concerned, my jobs are straight.' Another stated, 'I never tell the PC to verbal them. I just say, "Did he say anything?" If they don't, O.K.'

information about a given incident or decision. Records can be used by officers to *conceal* certain aspects of a case from superior officers, as well as to *manipulate* the dynamics of an encounter or incident in order to *justify* the action taken. As Manning expresses it: 'Rules and written records are, at least at times, a tactical means of defending oneself against accusation and a basis for counter-attack.'[382]

There was available to the Commissioners, therefore, a large body of research pointing to the conclusion that the police abused their powers because of collusive supervision, which in turn was the result of a police ethical code which lacked concepts such as the rule of law and rights for suspects. In view of this it is difficult to disagree with Irving when he states that the introduction of 'a new rule book which depends for its effect on just those elements of supervision and discipline which are most problematic cannot be seen as a reliable attempt to deal with the issue.'[383]

vii. Remedies Under the Act

The major problem with the Judges' Rules had been the lack of an effective enforcement mechanism. A suspect who was not informed of his right to silence had no automatic redress. A suspect illegally denied access to a solicitor had no automatic remedy. There was only the *possibility* that, if such breaches could be shown to have occurred, the court would exclude a resulting confession. The approach adopted by the judiciary was to exclude evidence only if satisfied that departure from the rules had rendered the evidence unreliable, as defined by a narrowly drawn criteria. Violation of procedural rights *per se* gave rise to no remedy, other than possibly a complaint against the police. In this regard,

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[382] (1977), *op. cit.*, at p.188.

[383] Irving (1985) *op. cit., at p.64.*

suspects at the police station had no rights at all because, as Sanders correctly points out, a 'right' without a remedy is in law no right at all.[384]

The Commissioners, writing about the rules which they had recommended regarding notification of rights, access to legal advice, reviews of detention, and contemporaneous recording of interrogations, stated that the 'duty to see that these rules are obeyed should rest in the first instance where it does now, with the police service itself.'[385] This argument was accepted by the Government.

There is thus no automatic and totally effective remedy to which the suspect is entitled in the event of his being wrongly denied access to a solicitor. The same applies if he is not informed of his rights, or it is made impossible for him to stay silent, or if the police do not abide by the recording provisions, or any of the other provisions of the Codes. A police officer who breaches a provision of the Code does not, by that action alone, commit a criminal offence, and neither does he incur any civil liability.[386] The idea has been mooted that a breach of the Act, as opposed to the Codes,[387] may give rise to an civil action for breach of statutory duty.[388] There does not appear to be any case in which this submission has been put to a court.

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[384] Sanders, A. (1988) 'Rights, remedies and the Police and Criminal Evidence Act', *Crim. LR* (pp.802-12), at p.811, where he cites Lawson, F. (1980) *Remedies of English Law*: 'just as a remediless right is not regarded by lawyers as a right, so also a wrong which cannot give rise to a remedy is not properly speaking a wrong', at p.2.

[385] Para. 4.118

[386] S67(10).

[387] So, for example, a breach of S56 (right not to be held incommunicado), or a breach of S58 (right to legal advice).

[388] Clayton, R. and Tomlinson, H. (1988) 'Safeguards and sanctions under the Police and Criminal Evidence Act', *New Law Journal* (Vol 138; pp.216-218), at p.217.

A suspect who has his 'rights' violated can make a complaint against the police. Breach of the Codes of Practice constitutes a disciplinary offence.[389] This can hardly be described as a satisfactory remedy. The burden of proof that a complainant must discharge is higher than that in civil proceedings, and, as demonstrated above, the police records on which a complainant would be forced to rely are not constructed in favour of the suspect. The hearing is held in private, there is no legal aid, no right to be represented, no right to give evidence and no right of appeal. The Police Complaints Authority makes its decision on a report which is prepared by the police, and one which the complainant has no right to inspect. In 1986, the P.C.A heard 1,787 complaints against the police regarding irregularities of procedure, which includes alleged breaches of the Codes. Only in a mere 13 cases did the P.C.A take disciplinary action.[390] No compensation or damages are provided even if a complainant is successful. It is hardly any wonder that there is a lack of confidence by the public in the whole police complaints procedure.[391]

Finally, there is the possibility that the court may exclude evidence where the police have breached the Act or Codes of Practice. Section 78 of the Act gives the court a discretion to exclude evidence if it is of the view that the admission of the evidence would render the proceedings unfair. Section 67(11) states that the Codes are admissible in evidence, and should taken into account if it appears to the court that they are relevant to any question arising in the proceedings. The combined effect of these sections is to vest the court with the power to

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389 S67(8).

390 Clayton and Tomlinson (1988) *op. cit.*, at p.217.

391 Brown, D. (1987) *The Police Complaints Procedure - A Survey of Complainants Views* (H.M.S.O). See also Maguire, M. and Corbett, C. (1991) *A Study of the Police Complaints System* (H.M.S.O), in which the authors write, 'our interviews with people who had experienced the complaints system produced a clear majority of negative views. Over two thirds of the full sample of 100 interviewees (74 percent) were dissatisfied with the outcome of their complaint, and most of these were 'very' dissatisfied', at p.58.

ensure that the police comply with all provisions of the Act and Codes which are designed to protect the suspect. As with the Judges' Rules, however, exclusion of evidence is at the discretion of the court, and thus judicial attitudes to police impropriety remain all important.

III. CONCLUSION

PACE has increased police powers to stop and search, and to arrest and detain. Controls on interrogative tactics have been relaxed, and the Act sets up 'designated police stations', specially equipped to hold persons for the purpose of interrogation. PACE encourages greater reliance on interrogation as an investigative strategy, thereby making the police station the adjudicative forum in a still larger number of cases.[392] Bunyan and Bridges have argued that these measures reflect a political ideology which accepts the permanent alienation of certain elements in the social order, and seeks greater control over them.[393] Whilst this approach may help to explain the precise form taken by some of the legislative provisions, an interpretation which emphasises continuity as opposed to change provides greater insight.

The Commission's recommendations represented a culmination of the process which began in the late nineteenth century. With the demise of the Marian magistrate, pre-trial procedure began to escape direct control and scrutiny by the courts. The Judges' Rules legitimated police control over suspects by providing a veneer of regulation. The police, however, demanded a free hand, and the judges, reacting to police practice, began gradually to relax guidelines

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[392] Baldwin, R. (1989) 'Regulation and policing by Code', in M. Weatheritt (ed.) *Police Research: Some Future Prospects*, (pp.157-168), at p.162. For similarities with what has been happening in Northern Ireland for decades, see Walsh, D. (1988) 'Arrest and interrogation', in A. Jennings (ed.) *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland*.

[393] Bunyan, T. and Bridges, L. (1983) 'Britain's new urban policing strategy: The Police and Criminal Evidence Bill in context', *Journal of Law and Society* (Vol. 10; pp.85-107).

designed to protect suspects. The Commissioners sought to confer upon the police powers of stop and search, arrest, detention and interrogation so wide that it would become unnecessary for the police to break the law.

The scheme of rights and protections which PACE puts in place represents nothing but a more detailed version of the Judges' Rules, the primary purpose of which is to lend false credibility to confession evidence. The 'rights' of suspects are minimalist in conception, moulded so as not to interfere with police control over the suspect and over the process of evidence creation, and they lack an effective enforcement mechanism. The extent to which the police abide by the regulations contained in the legislation will be the subject of discussion in Chapter Seven, where I will seek to demonstrate that PACE has not succeeded in stopping the police from seeking to push out the boundaries of legality, and that the courts continue to lend their support to this project.

CHAPTER FIVE

UNDERSTANDING THE POLICE/POLICED RELATIONSHIP

The previous three chapters traced the development of police control over pre-trial process. The next two chapters will describe the nature of current police practices, and assess the implications these have for the fairness of police station procedures.

As both chapters will draw upon the interview and observational data collected through my fieldwork, it is appropriate at this point to give some details about the way in which the data were collected.

In marked contrast to the situation in the United States, no attempt has so far been made in England and Wales systematically to seek out and report the views of defendants, to estimate what proportion of them feel that they are fairly treated, or to investigate what criteria or framework they use to evaluate fairness.[394] In an attempt to fill this gap in socio-legal research, I sought the consent of the Midsouthern Vale Police to interview a sample of defendants about their experiences of arrest and custody.

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[394] See Tyler, T. (1990) *Why People Obey the Law*; Lind, E. and Tyler, T. (1988) *The Social Psychology of Procedural Justice*; Tyler, T., Rasinski, K. and Spodick, N. (1985) 'The influence of voice on satisfaction with leaders: Exploring the meaning of process control', *Journal of Personality and Social Psychology* (Vol.48; pp.72-81).Tyler, T. (1984) 'The role of perceived injustice in defendant's evaluations of their courtroom experience', *Law and Society Review* (Vol.18; pp.51-74); Casper, J., Tyler, T. and Fisher, B. (1988) 'Procedural justice among felony defendants', *Law and Society Review* (Vol.22 pp.483-507); Casper, J. (1978) 'Having their day in court: Defendants evaluations of the fairness of their treatment', *Law and Society Review* (Vol.12; pp.237-51); Casper, J. (1972) *American Criminal Justice: The Defendant's Perspective*.

A meeting was held with the Chief Superintendents of Nasherford and Grimeston, the cities which were to be the research sites.[395] It was explained to the police that the purpose of the research would be to try to discover whether suspects considered themselves to be fairly treated by the police when detained at the police station. Whilst somewhat sceptical about the relevance of such research, these senior officers kindly agreed to give whatever assistance they could.

In order to minimise problems of recollection, mistake and confusion it was important for the interviews with defendants to take place as soon as possible after their police station experience. For this reason I located myself at the station, and approached suspects as soon as the police had made a decision on disposition (i.e when they had either been charged, refused charge or bailed for further inquiries). The police had no influence on who was approached. The purpose and nature of the research was explained, the individuals concerned were told that it was being conducted totally independently of the police, and were asked whether they would be willing to cooperate.

Every effort was made to ensure that those individuals whom the police were not remanding in custody understood that their detention was over and that they were free to leave the station at any time. They were told that it was totally up to them whether they wished to spend time talking to me. A small interview room was made available for me in both stations in order to question those individuals who were free to leave. I ensured that these interview rooms were not those used to interview suspects but those used to take witness statements from members of the public. I further sought to minimise the coercive nature of the environment by ensuring that the rooms used were close to the door leading out of the police station so that persons could easily leave whenever they wanted.

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[395] The name of the constabulary and the names of the two cities are fictitious. I felt that to name the police force would be to unnecessarily increase the possibility of individual defendants or police officers being identified.

Naturally, this was not possible in relation to those individuals who were remanded in custody, and they were interviewed in the police cells.

It was originally intended that the project would seek to ascertain whether evaluations of treatment are affected by characteristics such as the race, gender and age of the defendant. Practical considerations meant that this objective could only be partially realised.

Firstly, it became clear that it would be difficult for a single male researcher to interview women on their own. Understandably, the police were concerned about the complications which would arise should any female interviewee make allegations of misconduct against the researcher. They stated that they would only be willing to allow me to interview female defendants if I was prepared to allow a WPC to be present. Clearly, this would have been totally inappropriate in a situation where a successful interview depended on winning the trust and confidence of the defendant by demonstrating my independence from the police. Consequently the final sample was composed solely of men.

Secondly, it was difficult to persuade juveniles to take part in the study because, due to current legal provisions, it meant that they were usually accompanied by parents and/or juvenile workers who were often eager to leave the station as soon as possible. This meant that I managed to interview only eight juveniles.

Finally, problems were encountered in attempting to ensure that a sizeable number of Afro-Caribbeans and Asians were included in the sample. The ethnic population in both Nasherford and Grimeston is fairly low. This meant that I managed to speak only to a few individuals (12 Afro-Caribbeans and 11 Asians) from each of these communities. In order to boost these figures I would have had to spend more time at the police station than was available. An attempt to identify and trace Afro-Caribbeans and Asians through police custody records failed because these have no note of ethnicity.

A total of eighty persons were interviewed (57 whites, 12 Afro-Caribbeans, 11 Asians). Twenty-nine (36 percent) of these had been processed at Nasherford police station and 51 (64 percent) at Grimeston. It was decided at the outset to exclude from the sample several types of case which would yield little information about reactions to the experience of arrest, custody and questioning. Motoring offences (driving without documents, drink-driving etc.) were excluded: in such cases there is unlikely to be any dispute over guilt and therefore little likelihood of the police carrying out an interrogation. Offences of drunk and disorderly and drunk and incapable were not included because it was improbable that individuals would remember much of what took place. Those whom the police suspected of suffering from mental illness[396] were not questioned because it was feared that they would not have an adequate grasp of the purpose of the research and have difficulties understanding the questions.

A search of custody records stretching back over the previous four months at each station revealed that, after excluding the above case types, the offences dealt with could be divided into five broad categories: offences of dishonesty (e.g burglary, theft, deception etc.), offences against the person, public order offences, drug related offences and offences involving interference with property short of actual appropriation (e.g taking without consent, criminal damage etc.). The sample was compiled so as to reflect the percentage of cases falling within each of these categories. This meant that of those questioned, 51 percent had been arrested for offences of dishonesty, 18 percent for public order offences, 15 percent for offences against the person, 9 percent for offences involving interference with property and 8 percent for drug related offences.[397]

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[396] I encountered only a handful of such cases during the course of the research. In each case the police called a doctor, and I asked him to confirm that the individual was not in a balanced state of mind.

[397] Numbers were rounded up to the nearest whole.

The overall aim was to discover whether suspects felt that they had been fairly treated whilst detained and interrogated at the police station. The method adopted was to devise a questionnaire which would draw out the necessary information, but to use this only to *direct* what were essentially conversations with defendants. Every effort was made to establish an informal, relaxed and conversational atmosphere.

The questions were designed to explore whether evaluations of treatment are influenced by such factors as the outcome (i.e how the police disposed of the case); existing attitudes towards the police; individual characteristics (i.e race and age); type of offence involved; the politeness or otherwise of interviewing officers; the degree of opportunity to explain matters and, finally, access to material benefits (i.e refreshments). I also wanted to discover the degree of importance attached by suspects to their legal rights, and therefore asked suspects whether they were told of their rights, whether they understood them, whether they asked to exercise them (and if not, why not) and, finally, whether they had managed to secure legal advice, and, if so, whether they found such advice helpful.

Individuals were encouraged to talk about their attitudes towards the police, and about policing and the law in general. They were also asked if they had ever had any dealings with the police before and, if so, how they had been treated on those occasions. A supportive attitude was adopted when defendants recounted incidents in which they thought they had been unfairly treated. If this had not been done defendants may have got the impression that they were not being believed, which would have been fatal to any chances of establishing rapport. Needless to say, whilst providing a supportive atmosphere I meticulously avoided any form of prompting.

All interviewees were given a guarantee of anonymity, thereby encouraging trust and openness. The need to protect defendants from any unfavourable police response has also meant that the names of streets and areas have been disguised.

Defendants were informed that what they told me could not affect the way in which their case would subsequently be handled. It was made clear to each individual that I could not and would not make any attempt to influence the police, and neither was I a lawyer who could offer them legal advice. It was hoped that if defendants could be persuaded that I could do nothing for them they would be more likely to give me a truthful account of their encounter with the police.

The interviews, which were usually of 30 to 40 minutes duration, were tape-recorded and later converted into transcripts. Answers to the main questions were extracted from these transcripts and graded for ease of analysis and comparison. Clearly, subjective judgement is involved in framing categories and deciding under which category a certain response or answer should appear. In order to allow the reader to challenge this judgement, I will, where possible, provide verbatim interview extracts as exemplifications of any given category.

Before embarking upon the task of interviewing suspects, I arranged to visit both police stations in order to familiarise myself with their layout and to observe the procedures utilised by the police to process suspects. This 'observational phase' of the project took 20 days to complete, during which time I spent long hours, both in the day and at night, in the custody area. Compilation of the interview data took approximately 3 months to complete. Since I had no idea as to when someone would be arrested or released, and no idea as to whether they would agree to be interviewed, very long hours were spent simply waiting in custody areas and station canteens. As in the observational phase, I took every opportunity to speak to officers, solicitors and juvenile workers and record their views in the observational log-book.

It must be emphasised at the outset that the interview data represent the *uncorroborated* accounts of defendants. They illuminate how defendants themselves interpret the dynamics of their encounters with the police. Some of

these accounts contain allegations of serious police misconduct; it is important to remember that these are *allegations* only.

Despite this caveat, which in an important one, it is submitted, firstly, that the defendant's perspective is a valid one and one which has to be taken seriously. It would be wrong to reject what defendants had to say about the police or police station procedures on the ground that they were suspected criminals.[398] A person cannot be designated as untrustworthy for all purposes merely on the ground that he has been suspected, or even convicted, of a criminal offence.[399] Neither can what defendants said be rejected on the basis that they were interested parties. Police officers, lawyers and judges all have interests in the criminal justice system, but their views are regularly sought and considered by politicians, government departments and Royal Commissions.

Secondly, although what defendants told me is admittedly uncorroborated in any immediate way, the broad thrust of their complaints are in line with the findings of researchers who have investigated related issues. Data from these research studies will be used to strengthen many of the conclusions drawn from the interview material.

In this Chapter I will aim to demonstrate that the police have a large degree of discretion in how they enforce the law, and that consequently the method of enforcement is frequently influenced by certain police defined objectives. These objectives arise from police perceptions of criminality and its location in society,

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[398] Many of the officers to whom I spoke registered extreme scepticism on precisely these grounds about the relevance of asking 'criminals' what they thought about the police.

[399] Baldwin and McConville, in their study of the defendant's perspective on plea-bargaining, discovered assumptions and prejudices of this type to be rife in the legal profession: see Baldwin, J. and McConville, M. (1981) 'The English legal profession and the politics of research: A case study', in R. Luckham (ed.) *Law and Social Enquiry: Case Studies in Research*, at pp.154-5.

and from police ideas about what their job should entail. Such perceptions and ideas have led to the adoption of policing strategies which ensure that the majority of defendants are no strangers to the police station, and in fact arrive with a store of knowledge which informs their expectations of police behaviour and influences the way in which they themselves behave whilst at the station. In other words, there exists a long-term relationship between police and 'policed', and police actions both inside and outside the station aim to re-create the norms of that relationship.

In order to elaborate this argument fully, it is necessary to identify who is policed, explain how they are policed, and describe the attitudes of the police and policed towards each other.

I. TARGETED POLICING AND POLICE ATTITUDES TOWARDS THE POLICED

At each of the two stations studied, the police repeatedly said that they dealt with 'the same dross', 'the same losers' again and again. This was supported by the findings of the study: 89 percent (n = 71) of those spoken to stated that they had been the subject of police suspicion in the past, and most of them (n = 65) had actually been arrested and detained at the station on previous occasions. In fact, some individuals were arrested more than once even in the short space of time that it took to complete the study.

The police argued that the explanation for this lay in the simple fact that the individuals whom they arrest are habitual criminals; they frequently find themselves at the police station because they frequently break the law. The findings of a long line of research studies indicates that the picture is more complex: individuals who come from certain segments of society are more likely to be arrested than others not necessarily because they violate the law to a

greater degree than others,[400] but because those segments of society from which they are drawn are subject to more stringent criteria of law enforcement. This observation, first made by researchers in the United States,[401] has since been supported by a number of empirical studies conducted in this country.

Differential, or targeted, policing begins with the selective use of police stop and search powers. Brogden, in a study of policing in Liverpool, found that 'stop and search powers were used more widely ... amongst the young, and unemployed, and especially amongst the young black population of the inner city.'[402] Willis discovered that in all four police stations visited, 'blacks were stopped the most frequently of all ethnic minority groups' and that this was especially true of black males between the ages of 16 and 24.[403]

These findings are further supported by those of the Policy Studies Institute[404], Skogan,[405] and McConville and Shepherd.[406]

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[400] Whether or not they do violate the law more frequently is very difficult to determine in view of the fact that other sectors of society are not policed in the same way.

[401] Skolnick, J. (1966) *Justice Without Trial*; Bittner, E. (1967) 'The police on skid-row: A study of peace-keeping' *American Sociological Review* 32:5 (pp.699-715). The latter identified those receiving differential treatment as 'people who do not lead normal lives...This group includes residents of ethnic ghettos, certain types of bohemians and vagabonds, and persons of known criminal background' (at p.703).

[402] Brogden, A. (1981) '"Sus" is dead: but what about "Sas"?' *New Community* 9 (pp.44-52), at p.47.

[403] Willis, C. (1983) *The Use, Effectiveness, and Impact of Police Stop and Search Powers* (Home Office Research and Planning Unit Paper No. 15), at pp.13-14.

[404] Smith, D. and Gray, J. (1983) *The Police in Action* (The Policy Studies Institute, *Police and People in London*, vol.iv).

[405] Skogan, after analysing the results of a crime survey report involving 10,500 randomly selected households, concluded: 'A clear picture emerges from the factors examined here: the police are more likely to stop and question young, single, unemployed, Afro-caribbean males'. See Skogan, G. (1990) *The Police and Public in England and Wales: A British Crime Survey*

The evidence also shows that blacks are over-represented in the arrest figures. Although blacks accounted for only 5 percent of London's population in 1986, 17 percent of those arrested in the capital were black.[407] It appears that the situation in the provinces is similar: a study in Leeds revealed that although only 3 percent of the city's population, blacks accounted for 7 percent of all those arrested.[408] Finally, frequent presence at the police station is assured for those who have been the subject of suspicion or criminal proceedings in the past by the police strategy of making this, in itself, a grounds for stop and search and/or arrest.[409]

The responses elicited in the present study support the finding of the Policy Studies Institute which, after extensive research into many aspects of policing, concluded:

Report (Home Office Research Study 117), at p.31.

[406] McConville, M. and Shepherd, D. (1992) *Watching Police, Watching Communities* (see p.165 for evidence of differential policing of working-class communities; p.175 for evidence of Afro-caribbeans experiencing more frequent stop and searches). As regards the question of whether blacks are stopped more frequently than whites when socio-economic determinants are taken into account, see Tuck, M. and Southgate, P. (1981) *Ethnic Minorities, Crime and Policing* (Home Office Research Study No.70), at pp.27-28, and Jefferson, T., Walker, M. and Seneviratne, M. (1992) 'Ethnic minorities, crime and criminal justice: A study in a provincial city', in D. Downes (ed.) *Unravelling Criminal Justice*.

[407] Home Office (1989), *Crime Statistics for the Metropolitan Police District, Analysed by Ethnic Group* (*Statistical Bulletin* 5/89)

[408] Jefferson *et al*, *op. cit.*, at p.141.

[409] PSI Report vol.iv (1983) *op. cit.*, at p.345; Skogan (1990) *op. cit.*, who found that 'Having a record of past criminal encounters with the police also put one at substantially greater risk of being stopped', at p.31. For a review of the literature on differential policing, see Reiner, R. (1985) *The Politics of the Police*, at pp.124-136).

> 'the weight of police activity bears much more heavily on sections of the lower working class and others whom the police tend to lump with them than on other grounds; much police activity is a way of "dealing with" the most petty offences committed within this social milieu'.[410]

The interview extracts cited below demonstrate that those on the receiving end of policing are not unaware of the targeted nature of policing, and many harbour a deep sense of injustice.

i. The Permanently Suspect

Falling in this category are those individuals who have been convicted or even suspected of criminal activity in the past. A third (n = 26) of those questioned complained about the way in which they were constantly stopped and searched, and routinely arrested for trivial matters. As the following interview extracts make clear, these individuals were of the view that they were persecuted solely because their face was known to the police.

Case 2/07/W/A/OAP

> Def: 'If I'm stopped on the street and they CRO me and find that I've got a criminal record, I'm a criminal whether I am or not... there's a lot of discrimination in that way ... You're guilty whether you are or not. All they want at the end of the day is another body - if they've got a body to charge they're happy.

Case 2/25/W/A/POO

> Def: 'Once you got a record or anything they're always trying to catch you on something'. Complained of excessive stop and searches.

Case 1/48/B/A/POO

> Def: 'You walk the streets, yea? And the copper will say, "Where you come from?", "Why you running?", "What you running for?" Then they turn your pockets out ...

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[410] (1983) *Op. cit.*, at p.166.

these fucking coppers, they nick you 'cos they wanna get promotion ... once you're a criminal yea, you don't count for *nothing*' (original emphasis).

Case 1/62/B/A/Dis.

Def: 'If they see me on the street they come straight over, pull my jacket off and start searching me, being rough with me. They ask me a lot of questions about my mates, who I've been with, what's happening - "What can you tell me?", "What can you tell us today?", that's what they say - "Or we might have to take you down the station". You say you don't know, that you don't associate with the people they think you do, but they don't listen.'

Case 1/64/B/A/Dis.

Def: 'They stop you and search you, just for stupid things - just 'cos you're known to them.'

It was a common theme in conversations with police officers that those with 'previous' were more than likely to be 'at it', and therefore good policing required that a close watch be kept on them. These police attitudes are similar to those encountered by McConville *et al*, who were told by an officer that 'when you get to know an area, and see a villain about 2 a.m in the morning, you will always stop him to see what he is about.'[411]

This is an approach to policing which, rather than investigating a crime in order to identify the offender, begins with the targeting of an individual who has been guilty of violations in the past, or has merely been suspected of violations. Anyone falling in this category stands in danger of achieving the status of 'permanent suspect', and becoming the subject of continued scrutiny even after having left the police station. There is evidence to suggest that surveillance on this basis alone is sanctioned by the highest sources in the police force: in 1983 the then commissioner of the Metropolitan police initiated a project whereby

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[411] McConville, M., Sanders, A. and Leng, R. (1991) *The Case For The Prosecution*, at p.24.

'known criminals' were to be kept under surveillance by Area Intelligence Units.[412]

It would appear that this type of targeting, whatever its utility as a method of crime control, alienates those who are subjected to it. Almost all (n = 22) of those who complained of targeting fell in the category of persons who felt that their overall treatment had been unfair.

ii. The lower working-class

An attempt was made to gauge the class origin of those interviewed by asking questions about their place of residence, their employment situation, and any contact they may have had with the law or lawyers other than *qua* suspects. Nothing more is claimed for the results than an approximation: answers were sometimes not forthcoming, and at other times they were extremely vague. The evidence which did emerge, however, overwhelmingly indicated that those arrested were usually the economically deprived.

This was shown most dramatically by the fact that 78 percent (58 of the 74 who answered) stated that they were unemployed. It was further indicated by the finding that over 62 percent (48 of the 77 who answered) had never had any contact with the police, or sought legal help or advice in relation to any matter, other than in their capacity as suspects. A further three defendants stated that their only contact with the law other than as arrestees had been when threatened with legal action for debt by banks, shops or mail order firms. Finally, a significant minority (n = 10) indicated that they were living on the streets or in night shelters, or otherwise of no fixed abode.

One reason why the poor are over-represented in the suspect population is because the homeless, together with those too poor to afford the variety of in-

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[412] *The Times* 25 January 1983, at p.1.

door entertainment available to the affluent, are more liable to attract police attention due to their greater use of public (and therefore policed) space.[413] The following two homeless suspects were well aware that they attracted police attention not because of what they did, but because of who they were:

Case 2/09/W/A/Dis.

> (Interview notes): Def. said that he realised that the police had a job to do, but complained about the way in which he was constantly stopped, searched and questioned simply because he was walking around the streets. He felt that 'walking the streets' should not attract this type of police attention - it was not his fault that he was homeless and had nowhere to spend his time other than on the streets.

Case 2/03/W/A/POO

> (Def. described himself as a 'traveller'). 'I haven't been arrested by them that many times, but I've been intimidated by them loads of times, you know, I've seen a lot of riot police, been pushed around, usually been evicted off camp sites by them . . . I've been arrested before, just for hanging around the street, brought me in and kept me here for a few hours and then cautioned me and kicked me out at five in the morning.'

The way in which these individuals were often policed had more to do with police perceptions of worth and worthlessness than with the criminal law. The following extract provides an example of views which I regularly heard from police officers:

Field-Note (Nasherford).

> An elderly man, shabbily dressed and slightly drunk, was led into the custody area by a PC. The Custody Officer was informed that the man had been arrested for being 'drunk in a public place.' The man's details were taken, he was searched and placed in a cell. From talking to the PC it emerged that the man had been asleep on a park-bench, the officer had awakened him and arrested him. I told the

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[413] Stinchcombe, A. (1965) 'Institutions of privacy in the determination of police administrative practices', *American Journal of Sociology* 69 (pp.150-88).

> Custody Officer the circumstances of the arrest and asked him whether he considered it worthwhile to spend public money processing such trivial cases. He replied, 'Of-course it is! I mean just look at him... he's more than just a blot on the landscape, he's taking up a park-bench where members of the public may want to sit... Would you want to walk through the park with your wife and kids with the likes of him around?'

The contempt of the Custody Officer in this example was not aimed solely at the individual arrested, but 'the likes of him' generally. Similarly, a sergeant at Grimeston explained that the force would not tolerate any peddlers or beggars on the streets: 'Where', he demanded to know, 'would we all be if everyone started begging?' It was imperative, he explained, that 'the public' should not be 'intimidated by these people'. This attitude of seeing whole categories of people as 'undesirable' or criminal-minded is similar to that which views entire working-class districts as lawless. The study of policing carried out by McConville and Shepherd shows that the police view affluent areas as 'responsive', 'thoughtful' and appreciative of policing, whilst poor and decaying inner city areas, especially those with large council estates, are seen to contain the 'anti-police faction', the 'criminogenic families' and the 'rough' element of society.[414]

This negative attitude to certain localities can lead to strategies of policing which are aggressive and antagonistic. Skogan found that an analysis of data uncovered by the British Crime Survey showed that,

> 'Young, unemployed, lower status individuals were substantially more likely to be stopped repeatedly. Many of the same groups - plus Afro-Caribbeans - were more likely to be searched and less likely to think they were treated politely. The most

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[414] (1992) *op. cit.*, at p.165. John Lambert, writing nearly 25 years ago, made a similar observation about police attitudes towards working-class areas: 'Policemen as citizens aspire to a generally middle-class orientation and life-style. Their value system, particularly in terms of housing standards and areas of residence, will lead them to hold in low esteem the areas where their professional duties are most intense' (*Crime, Police and Race Relations* (1970), at p.183).

> common complaints about policing concerned rude, arrogant, and racist behaviour, along with unjustified stops and undue use of force'.[415]

Foster, in her study of two London inner-city areas, found some officers to be of the view that, since whole areas were lawless, those who lived in them could never be considered wholly innocent and were, therefore, 'not deserving of the same rights and privileges as the "respectable public"'.[416] Consequently, officers who patrolled these areas adopted a style of policing which was not conducive to peaceful relations. Foster was told by one PC, 'you have to talk to some of these people as they talk amongst themselves.'[417] In their survey of residents, McConville and Shepherd found that complaints of over-policing, rude and abrasive behaviour, intimidation and aggression were made far more frequently by those living in poor inner-city areas.[418]

Similar views were encountered during the course of the present study. Officers at both stations stated that certain areas of each city were 'lawless', inhabited mainly by 'losers' and 'social security scroungers', and that these areas contained a significant 'obnoxious' element which hated the police. In both cities these were the poorer areas, containing a significant non-white population. I was informed that because some of these areas were 'sensitive' (i.e prone to erupt in anti-police riots), it was important for the police to enter them in large numbers and make a show of force. Any other strategy, it was argued, would involve an unacceptable risk to the personal safety of officers. Some of the

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[415] Skogan (1990) *op. cit.*, at p.43. He also found that whilst more likely to be searched once stopped, individuals from these groups were least likely to be given reasons for the stop (at p.37).

[416] Foster, J. (1989) 'Two stations: an ethnographic study of policing in the inner-city' in D. Downes (ed.) *Crime and the City*, at p.131.

[417] *Ibid.*, at p.130.

[418] (1992) *op. cit.*, at p.38-9.

residents of these areas, however, viewed the police as adding to their problems, not solving them.

Case 2/19/W/J/Dis.

> Father of defendant: 'What you have here is a situation like South Africa. These kids can go to work, but they can't go out in the evening. They've got to stay in the township, and the riot van comes round to keep them in the township ... there's no reason why they should "move on" - it's their estate and they can stand around, there's nothing else for them to do. One of the coppers once said to me, "you *keep* him in!" I mean, what can you say to that?'[419]

iii. Ethnic Minorities

Finally, some of those spoken to were of the view that they were targeted by the police because of their colour. The sample included 23 non-whites (11 Asians and 12 Blacks) and 39 percent of them (5 Asians and 4 blacks) stated that they were treated unfairly on the streets by the police because the police were racist.[420] A greater proportion of blacks and Asians as compared to whites complained of past unfair police treatment on the street. Whilst only a quarter (n = 14) of the white sample made such complaints, the figure for Asians was 45 percent (n = 5) and for blacks it was even higher at 50 percent (n = 6). The

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[419] The remark allegedly made by the officer in this case is reminiscent of that made by David McNee, then commissioner of the Metropolitan police, who, when asked by a reporter what action he was taking regarding the large number of complaints that had been made against SPG officers, replied: 'If you keep off the streets and behave yourself, you won't have the SPG to worry about'! (reproduced in Rawlings, P. (1985) '"Bobbies, "aliens" and subversives: The relationship between community policing and coercive policing', in J. Baxter and L. Koffman (eds.) *Police: The Constitution and the Community*).

[420] Also, one white suspect, an Irishman, accused the police of discriminating against all ethnic minority groups. He alleged that when he was brought into the station one of the arresting officers had pushed him through the door and said 'I bet you had something to do with the bombings, you fucking Irish bastard' (Case 1/69/W/A/OAP).

following interview extracts provide examples of the conviction on the part of blacks and Asians that they are subjected to differential policing.

Case 1/52/A/A/OAP

> Def: 'Everywhere that us Asians or blacks go, we get picked up by the police. They won't let us live in this town; even when we go into town just to do a bit of shopping they just come up to us and start saying "What you doing?", "Where you going?", "What you been nicking?". If you go out after about eight in the evening, they'll just come and start searching you, and if you question what they do, they throw you around and arrest you, they'll just make something up, burglary or something. Then they'll let you out five hours later and say there was no evidence and you can go.'

This particular defendant felt that not only were Asians and blacks treated badly as suspects, but also that the police were not interested when a non-white became the victim of a crime. He recounted an incident in which 'a large Scottish man' had driven into his car and when he, the defendant, climbed out of his car to assess the damage, the man had attacked him with a flick-knife, 'trying to kill' him. The defendant said he was badly injured and reported the attack to the police, giving them the car registration number of the assailant. A few weeks later he was summoned to the police station, and was threatened by plain clothes officers:

> 'They said if you don't drop this complaint we're gonna fuck you up. I shit meself; I just thought, forget it man, it's not worth it. I just signed this piece of paper, saying that I had agreed to withdraw the complaint ... I can only think, right, that a white person to these guys is far more valuable than me or you, Asian people, yea.'

Case 1/47/A/A/OAP

> (The defendant, a taxi-driver, had reported an incident in which he claimed he had been attacked by two white male passengers when he had requested that they pay their taxi fare. Three weeks later he found himself summoned to the police station, arrested for GBH and interrogated).

Def: 'You don't ask me, you go to the (railway) station and our community will answer your questions . . . we are third class citizens, we get no protection . . . The police here are against us, they will come to you outside and start saying do this and do that, they check your tyres fifty times a day. They are the bosses, you do what they say or they will make it difficult for you.'

Case 1/54/B/A/POO

Def: 'Once I came down the station because two of my friends had been arrested, and I was waiting out in the reception area with another friend of mine trying to get some information about them. These policemen walk in . . . and one of them said to me, "I didn't recognise you with your new haircut". I was wearing this hat wrong way round, yea?' (defendant had a multi-coloured leather baseball cap). That's what he said to me, and I've never seen that man before in my life! That really gets me, you know, I really find that so offensive, so damn rude!' (Defendant explained that he had demanded an apology, at which point all the officers began to tell him that he was over-reacting, that the officer had been 'joking'. Defendant said that despite his objections to what he viewed as their 'racist joke' he did not get an apology from the officer who had made the remark). 'They would never apologise to a coloured folk.'

Case 1/57/A/J/Dis.

Def: 'Once the police know you, they don't leave you alone, especially if you're black or Asian... I get arrested guaranteed once a month, *guaranteed*... they don't like our people or blacks...'.

Case 1/58/A/A/Dis.

Def: (Very angry about what he viewed as blatant police racism, stating that stop and search powers were used far more frequently against blacks and Asians. He complained of racist comments from the police:) 'PC X, *and this guy's Asian himself*, he said to us, "Why don't all you Pakis fuck-off to your own country". I'd love to tell him, well if you want us to fuck-off to our country, why don't you fuck-off as well, you cunt!' (original emphasis).

Case 1/61/B/A/Dis.

Def: (Said that he 'most definitely' believed that non-whites were policed in an altogether more aggressive manner, and were stopped and searched, and arrested,

more frequently than whites) 'If a man goes to the casino every day, he's going to get lucky more times than the person who only goes occasionally. If they keep bringing people like you and me in, one day they're bound to find something for us.'

Case 1/76/A/J/Dis.

Def: 'I always get stopped, searched, told to go back to my own country: "you blacks, you're all a disgrace", "you're all just criminals"...'.

Case 1/49/B/A/OAP

Def: 'The uniform must go to their heads: they're violent, they're rude and harass for no reason. It's a fact, a fact that I have discovered through personal experience and from what my friends have told me - and they've always been non-white.'

The allegations made by these black and Asian suspects are similar to those made by respondents in other studies. A PSI study found that over one fifth of Londoners felt that 'ethnic minorities' were unfairly treated by the police.[421] An NOP survey, carried out in conjunction with the Runnymede Trust, found that 48 percent of whites, 75 percent of blacks, and 45 percent of Asians thought that non-whites were treated worse by the police than whites.[422] Jefferson and Walker conducted a survey in Leeds and found that over two-thirds of blacks and whites, and over 40 percent of Asians, thought the police discriminated against non-whites when it came to stops and searches.[423]

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[421] Smith, D. (1983) *A Survey of Londoners*, at p.243 (The Policy Studies Institute, *Police and people in London*, vol.1)

[422] *The Independent On Sunday* 7 July 1991, at p.3.

[423] Jefferson, T. and Walker, M. (1993) 'Attitudes to the police of ethnic minorities in a provincial city', *British Journal of Criminology* (Vol.33;pp.251-66), at p.255.

McConville and Shepherd, in carrying out their study of community policing, were met with spontaneous accusations, by both white and non-white residents, of the police engaging in discriminatory behaviour against blacks.[424] Thirty-four percent of residents in inner-city London and 39 percent in inner-city Bristol complained of unjustified stopping, searching and arresting of black people. As one white resident expressed it, 'There does seem to be a scale of attention or trust they give to people and black people do seem to be at the bottom of the scale.'[425]

The complaints made by black and Asian suspects in the present study are also given credence by the fact that most researchers who have investigated the matter have reported that racist attitudes within the police force are widespread. These were first documented by Lambert in 1970,[426] and his findings have since been confirmed by Cain,[427] Reiner,[428] Southgate,[429] Gordon,[430] Holdaway,[431] Smith and Gray,[432] Foster,[433] and McConville and Shepherd.[434]

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[424] (1992) *op. cit.*, at pp.173-174.

[425] *Ibid.*, at p.175.

[426] *Op. cit.*, at p.186 and p.190.

[427] Cain, M. (1973) *Society and the Policeman's Role*, at p.117 and p.119.

[428] (1978) *Op. cit.*

[429] Southgate, P. (1982) *Police Probationer Training in Race Relations*, Home Office Research Unit Paper 8 (at pp.9-15).

[430] Gordon, P. (1983) *White Law*, at pp.71-72.

[431] Holdaway, S. (1983) *Inside the British Police*, at pp.66-9.

[432] (1993) *op. cit.*, at p.109.

[433] (1989) *op. cit.*, at p.144.

[434] (1992) *op. cit.*, at p.166.

Smith and Gray reported that: 'Our first impression after being attached to groups of police officers in areas having a substantial ethnic minority population was that racialist language and racial prejudice was prominent and pervasive...'.[435] They go on to state that although this racism did not manifest itself in actions as often as they would have expected from hearing the views of officers, their first impression was more or less confirmed as their research progressed. In the Metropolitan Police, to refer to blacks as 'wogs', 'coons', 'spooks', 'niggers', 'sooties', 'spades' and 'monkeys' was 'expected, accepted, and even fashionable'.[436]

Although they did not solicit officers' views on the issue of race relations, McConville and Shepherd report that almost 'one third of Metropolitan relief officers and almost two fifths of those in Avon and Somerset advanced negative views of black people in the course of taped interviews.'[437]

As with McConville and Shepherd's study, there was no direct questioning of officers in the present study about their attitudes towards ethnic minorities in their areas. It was noted on a few occasions, however, that when discussing general problems of law enforcement, officers at both stations commented that those locations which had a large West Indian population were 'problem areas', and that one would 'never go up there without back-up'. Such views were voiced more frequently at Grimeston than at Nasherford, but this was most likely due to the larger non-white population of the former city. I was informed that 'most blacks' were engaged in organised crime and drug dealing, and possessed a propensity for violence. The following extracts provide an illustration of some of the views which were voiced:

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[435] (1983) *op. cit.*, at p.109.

[436] *Ibid.*, at p.110.

[437] (1992) *op. cit.*, at p.166.

Field-Note Extract (Grimeston).

PC: 'What the West Indians do is that they have white girlfriends for show, and black ones for keeps. This is because they get the white girls to go out and do all the cheque book fraud, because it looks less suspicious. We get a lot of cases with these girls being beaten up by these guys when they get caught.'

Field-Note Extract (Grimeston).

PC: 'We get a lot of guys for possession, but we never get the big black guys at the top. The little guys are too scared to talk because I mean these guys are not to be messed with - I mean they'd probably get knee-capped or something.'

Field-Note Extract (Grimeston).

Officers in the custody area were discussing an incident which had occurred earlier that evening. The story was that a black man, being arrested for drink-driving, had assaulted one of the arresting officers. At this point the interviewing officers arrived, and the defendant was brought out from the cells. He was a rather small, elderly man. As soon as he was taken up to interview, a PC commented to the Custody Officer, 'I thought he was a young bloke - you know, big guy.' This PC was later heard explaining to another PC, 'Well, it seems he just went wild, you know, the usual.'

As noted by the 1983 PSI study,[438] negative racial attitudes need not necessarily contaminate police behaviour. However, in the face of research establishing the existence of widespread racist attitudes within the police, in conjunction with projects which show that large sections of both the white[439] and non-white community feel that the police discriminate against non-whites, it stretches credulity to suppose that no such discrimination takes place.

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[438] (Vol.iv) *op. cit.*, at p.125.

[439] Some of the white defendants interviewed in this study told me that the police treated blacks worse than they treated whites.

Targeted policing of this type is refracted through police typologies. Although the police frequently state that they see their duty as one of serving the public, researchers such as Shearing,[440] Reiner[441] and Cray[442] have shown that a sharp distinction is drawn by the police between those sections of the public who deserve protection, and those who deserve to be made the subject of control, surveillance and punishment. These latter elements are, in the phrase coined by Cray, 'police property': differential treatment of these elements is, in the police view, part and parcel of their task of serving the public. The division between these two publics is made, according to Reiner, by reference to the concepts of the 'rough' and the 'respectable': 'those who challenge or those who accept the middle-class values of decency which most police revere'.[443]

The roots of this approach lie deep in the history of policing, and it is an approach which was and continues to be encouraged by the substance of the law itself. The primary reason for the acceptance of the police in the last century was the concern of the dominant classes with 'order'. The poor could no longer be controlled by the system of squirearchy and paternalism which had sufficed the dominant classes of the eighteenth century,[444] and yet control was as essential to the new ruling class as it had been to the old. The dominant classes of the nineteenth century became concerned that the new slums, with their mass of unemployed and seasonally employed, could provide the agitator with rebels

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[440] Shearing, C. (1981) 'Deviance and conformity in the reproduction of order', in C. Shearing (ed.) *Organisational Police Deviance: its Structure and Control.*

[441] (1985) *op. cit.*

[442] Cray, E. (1972) *The Enemy in the Streets*, cited in McConville, M. and Shepherd, D. (1992) *op. cit.*, at pp.88-9.

[443] (1985) *Op. cit.* at p.94.

[444] Hay, D. (1975) 'Property, authority and the criminal law', in D. Hay, P. Linebaugh and E.P Thompson (eds.) *Albion's Fatal Tree.*

and the criminal with a safe-haven.[445] More importantly, as Cohen has argued, they needed to discipline the poor into providing the commodity of labour, which could only be done by 'policing their usage of social space and time so that it did not obstruct the traffic of industry.'[446]

This led the Victorians to construct a social and legal system, in which the police played by no means a minor part, aimed at propagating the values of industry, subordination and religion, and eradicating vagrancy, drunkenness, gambling and idleness.[447] Order in the streets became a priority; it was viewed as the means by which to organise the lives of working-class people. Henceforth, the Rule of Law was no longer seen to be threatened solely by riot and rebellion, but by every crime, no matter how trivial.[448]

The result was a gradual growth in criminal legislation aimed at the regulation of working-class leisure and the control of 'undesirables': vagrants,[449]

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[445] A study of middle class anxieties and concerns relating to crime and potential working class rebellion is provided by Gareth Stedman Jones (1971) *Outcast London: A Study in the Relationship between Classes in Victorian Society*.

[446] Cohen, P. (1979) 'Policing the working-class city', in J. Lea, S. Piccioto and J. Young (eds.) *Capitalism and the Rule of Law*, at p.120.

[447] Donajrodzki, A. (1977) '"Social police" and the bureaucratic elite: A vision of order in the age of reform', in A. Donajrodzki (ed.) *Social Control in Nineteenth Century Britain*, at p.56.

[448] Gatrell, V. (1990) 'Crime, authority and the policeman state', in F. Thompson (ed.) *The Cambridge Social History of Britain 1750-1950: Social Agencies and Institutions* (Vol.iii), at p.254. This sentiment was given clear expression in the *Fifth Report of the Royal Commission on the Criminal Law*, which reported,'(i)t is manifest that all specific laws for the security of persons or property would be unavailing, unless the due operation of such laws were protected by imposing efficient restraints upon forcible violations of public order', (*Parliamentary Papers* (1840) Vol. XX at p.90).

[449] For a detailed study concentrating on the persecution of this social outcast, see Radzinowicz, L. and Hood, R. (1986) *A History of the English Criminal Law: The Emergence of Penal*

prostitutes, the sick, the immigrant Irish, and the beggars who filled the streets of the great cities. The Metropolitan police were given powers, later to be extended by law or practice to most city forces,[450] to prevent obstructions of the highway, to control coffee-houses and public-houses, to suppress gambling, cock-fighting, and all other 'idle and sedentary games', to punish drunken behaviour and to prohibit soliciting.[451] Control over ex-convicts was facilitated by legislation aimed at expediting their passage through the criminal justice system.[452] Jones has estimated that, in addition to arrests for soliciting and begging, one-third of arrests in the Metropolis in the second half of the century were for drunk and disorderly conduct.[453]

Whilst much of this legislation was, at root, dictated by the circumstances of a new economic structure, it was perceived by many of its supporters as necessary to control the 'criminal classes'. Crime amongst the lower working-class was thought to be genetically inbred, and control of this section of the populace was considered paramount if they were to be stopped from infecting the respectable working-class. Considerable pressure was placed upon the police not

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Policy (Vol. 5) Ch.11. A more local study is provided by Jones, D. (1982) *Crime, Protest, Community and Police in Nineteenth Century Britain*, Ch.7 'The vagrant and crime in Victorian Britain...'.

[450] The process by which these powers were extended is described, with special reference to Liverpool, by Brogden, M. (1985) 'Stopping the people - crime control versus social control', in J. Baxter and L. Koffman (eds.) *Police: The Constitution and the Community*.

[451] See 10 Geo.IV C.44 and 2 & 3 Vic. C.94. Concern about licensed premises was to result in ever-more rigorous measures: see Licensing Act 1872; Licensing Act 1902.

[452] Habitual Criminals Act 1869. The issues surrounding this legislation are discussed in detail by Radzinowicz, L. and Hood, R. (1986) *op. cit.*, ch. 8.

[453] (1982) *Op. cit.* at p.129.

to use their wide-ranging powers and immense discretion[454] against the 'respectable',[455] and in any case, as Davis[456] has pointed out, the Metropolitan police lacked the man-power to patrol all locations and communities evenly. From the very beginning, therefore, coercive police power was directed at the slums because that was where the criminal classes were thought to reside.

What the observer witnesses in the targeted policing of modern-day Britain is a search by the police for the 'criminal classes'. It is this which explains their surveillance of those with 'previous': these individuals, as one Custody Officer explained to the researcher, have a 'criminal mentality. It shows that (they) can't be trusted - that (they're) liar(s)'. Aggressive and heavy policing of run-down areas, and stereotyping of black youths as street robbers and drug-dealers, stems from a belief that these sections of the community house the 'naturally criminal'.

In actual fact, what 'policing by typology' achieves is not crime control but social control.[457] Use of stop and search powers leads to very little crime

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[454] Examples of this discretion include the Metropolitan Police Act 1829, which gave a constable the power to arrest 'all loose, idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs.' The Metropolitan Police Act 1839 S.54 gave the police power to arrest anyone 'using threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned'. Police power was increased by this section by grafting powers of arrest onto earlier legislation, such as the vagrancy statutes.

[455] Jones (1982) *op. cit.*, at p.135.

[456] Davis, J. (1989) 'From "Rookeries" to "Communities": Race, poverty and policing in London 1850-1950', *History Workshop* 27:66-85 at p.70.

[457] 'Unravelling the history of street powers demonstrates that social control of particular, troublesome populations, not crime control, has always been the primary feature of the legal mandate of the city police in England and Wales': Brogden (1985) *op. cit.*, at p.108.

discovery,[458] but what these discretionary powers do provide is a tool which the police use to impose their control and authority upon those whom they have categorised as criminal or potentially criminal.[459] The attempts of the Royal Commission to regulate stop and search powers through the undefined criterion of 'reasonable' suspicion[460] have failed. The elasticity of the law has allowed police working-rules, informed by stereotype and ideas of incongruity, to dominate.[461]

The police do not exist in a social vacuum: their views as to where the criminals in our society are located are shaped by a wider political discourse,[462] and reflect the economic divisions inherent in society. It is, however, a two-way process and current policing policies reproduce and confirm wider prejudice[463]. More importantly, for the purpose of understanding police attitudes, these policing strategies provide the police with 'proof', in the form of negative encounters and arrests, that they have correctly identified the

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[458] McConville, M. (1983) 'Search of persons and premises: New data from London', *Criminal LR* (pp.605-14). Only 4 percent of the respondents in the British Crime Survey who reported being stopped said that they had been arrested, and only 3 percent said they had been prosecuted (see Skogan (1990) *op. cit.*, at p.32.

[459] Egon Bittner was one of the first to show that the police frequently use the law simply as a 'resource' to achieve their own objectives: Bittner (1967) *op. cit.*, at p.710. I will go on to illustrate this point with examples from my own observations.

[460] *Supra.*, discussion at pp.63-5.

[461] Dixon, D., Bottomley, A., Coleman, C., Gill, M. and Wall, D. (1989) 'Reality and rules in the construction and regulation of police suspicion', *International Journal of the Sociology of Law* (17; pp.185-206); McConville *et al* (1991) *op. cit.*, at p.16; Foster, J. (1989) *op. cit.*, at p.133.

[462] Reiner, R. (1978) *The Blue-Coated Worker*; Rawlings (1985) *op. cit.*

[463] *Police Against Black People* (1979) (Institute of Race Relations).

criminal classes.[464] Armed with this 'proof' that criminality is inbred in those coming from certain sections of society, the police feel that targeted policing is justified: 'In every urban area there's a large minority of people who are not fit to salvage. The only way in which the police can protect society is quite frankly by harassing these people.'[465]

It was noted, without much surprise, that the above views inevitably led most officers to adopt an extremely negative attitude towards those whom they processed. Defendants were variously referred to as 'the world's dross', 'losers', 'toe-rags' and 'obnoxious shits'. What did come as a surprise was that, as these derogatory epithets suggest, the contempt very rarely arose out of police disgust at the heinous nature of the defendant's crime or crimes. On the contrary, it arose from what many police officers termed the 'pathetic' nature of the infractions with which they had to deal.

At both police stations, offences such as breach of the peace, drunk and disorderly, drunk and incapable, shoplifting, public order offences and offences of minor criminal damage were normally viewed as 'rubbish', and persons who engaged in this type of behaviour were described as 'rubbish.' The essential worthlessness of those brought to the station was a constant theme in police conversation.

It is submitted that these attitudes of the police towards the 'non-public' are central to understanding the extent to which legal rights can ensure fairness for suspects, both out on the street and inside the police station. A combination of observing police mannerisms towards defendants at the station, listening to police officers talk about suspects and hearing defendants relate their

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[464] McConville and Shepherd (1992) *op. cit.*, at p.202.

[465] Inspector Basil Griffiths, speaking at the 1982 Police Federation Conference (reproduced in Rawlings (1985) *op. cit.*).

experiences left little doubt that legal rights were seen by most officers to attach only to those individuals who have 'worth':

Field-Note Extract (Nasherford).

> Custody Officer: '...And the other thing which really gets my goat is the amount of money we spend on these, these - these (contemptuously) *persons* with solicitors, doctors, meals and all that!'

It should be noted that these officers were not putting forward the familiar 'crime control' argument, i.e that legal rights were obstacles to convicting the guilty. The attitude related more to the perceived contradiction of according rights, with their connotations of 'respect', to persons who were seen as worthy of nothing but contempt.

The view constantly encountered was that law attached too much significance to the rights of suspects. Stop and search, arrest, being placed in the cells for hours on end - these were events, the researcher was told, which may cause distress to 'someone like you or me', but were everyday occurrences in the lives of 'these people' and *did not bother them.*[466] The implication was that the grant of rights to suspects could not succeed in converting insignificant 'losers' into significant citizens. The anger and resentment clearly present in some of the interview extracts cited above should be enough to demonstrate that the views of suspects themselves differed markedly on this matter from those of the police.

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[466] Bittner discovered a similar attitude amongst American patrolmen: 'It is difficult to overestimate the skid-row patrolman's feeling of certainty that his coercive and disciplinary actions towards the inhabitants have but the most passing significance in their lives' (Bittner (1967) *op. cit.*, at p.713).

II. POLICE-CITIZEN ENCOUNTERS ON THE STREET

Twenty percent (n = 16) of those questioned complained that their arrest had been accompanied by unnecessary violence or threats of violence.[467] Almost 70 percent (n = 27) of the 39 who judged their overall treatment to have been unfair stated that the unfairness had began outside the station. Hostilities outside the station can have a direct impact on the behaviour of both suspects and the police when inside the station. Complaints of unnecessary police violence inside the station were made in six cases, and in each of these cases the arrest was alleged to have been unfair. In one case, for example, the defendant said he refused to give his details to the custody officer because he was angered by the violence which had been used against him by the arresting officers. He alleged that his refusal to cooperate influenced the police decision to refuse him a blanket, and that when he objected to this he was assaulted in his cell by two officers.

In view of these findings, it is important to identify the type of police behaviour which prompts defendants to make charges of unfairness. Policing strategies are best understood in the context of police work-culture. Researchers[468] who have looked into police work norms have identified a number of strands in the sub-culture of the British police. Police officers have been said to possess a deep sense of 'mission' - a conviction that the world is constantly threatened by forces of chaos and lawlessness, against which they, the 'thin blue line', are fighting a noble but losing battle. Internal solidarity, and isolation from wider society, are other characteristics of police culture which

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[467] Some 34 individuals said that their arrest had been unfair (i.e that it was without reasonable cause (n = 18) or was accompanied by unnecessary violence or threats of violence (n = 16).

[468] Examples are Holdaway (1983) *op. cit.*, esp. at p.2 and pp.37-8; Reiner (1985) *op. cit.*, esp. at pp.87-88; Reiner (1978) *op. cit.*, esp. at pp.220-22; McConville and Shepherd (1992) *op. cit.*, esp. at p.149.

have been remarked upon.[469] The data collected by the present research suggest, however, that it is the strands of 'action' and 'authority' in police culture which have the most utility in explaining the nature of many police-citizen encounters.

i. Action

The officer's view that society is threatened by complete lawlessness fosters in his mind the belief that policing should be about 'crime-fighting'; that it should involve 'action' and 'excitement'.[470] This collective quest for action is held by an institution noted for its ethos of machismo[471] and is combined with the fact that the police possess, in the last resort, a monopoly on the legitimate use of force. The result is that for many officers the possibility of violence is a positive attraction of the job.[472]

It is this which explains the finding of McConville and Shepherd that the overwhelming majority of officers view community police work as 'boring' and the 'minority pursuit of misfits, or of officers approaching retirement'.[473] As one PC put it:

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[469] Reiner (1985) *opt cit.*, at p.92; McConville and Shepherd (1992) *opt cit.*, at p.160.

[470] Reiner (1985) *op. cit.*, at p.89.

[471] The authors of the PSI Report (1983 vol.iv, *op. cit.*) found a strong 'cult of masculinity' in the police force (at p.91).

[472] PSI Report *Ibid.*, at p.87: 'We find that the idea of violence is often central to the conceptions that police officers have of their work ... many officers see violence as a source of excitement and glamour.'

[473] (1992) *Op. cit.*, at p.186.

> '(I)ts going to be that the most punch-ups are going to be on a Friday night, say; that's when you are going to get the adrenalin flowing, which you are not going to get walking around on a Monday morning'.[474]

The authors concluded that this desire for 'excitement' led the majority of relief officers to 'want the core of policing to be aggressive, action-centred encounters with citizens'.[475] They found that 'categories of work which do not require resolution by coercion and which demand the service skills of negotiation, conciliation and diplomacy are dismissed as "grief" and "rubbish"'.[476]

The findings of the present study indicate that the quest for excitement leads some officers not simply to 'want' aggressive confrontation, but to *create* it. Almost one third of the sample (n = 28) stated that either they themselves or people whom they knew had at some point been subjected to unnecessary or excessive police violence on the streets, or had been in situations where the police had behaved in a manner designed to provoke a violent reaction. Twelve of these 28[477] were referring to past occasions:

Case 1/33/W/A/POO

> Defendant stated that he had been at a football match where one of his friends had been arrested. The police had used unnecessary violence and numbers to affect the arrest, and when he (the defendant) and his friends objected to the manner in which the arrest had been carried out, 'one of the coppers said, "If you feel hard enough, have a go ... ". They just wanted us to start so they could have a bit of fun, and then make us do time'.

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[474] *Ibid.*, at p.150.

[475] *Ibid.*, at p.149.

[476] *Ibid.*, at p.157.

[477] 3 blacks; 8 whites; 1 Asian

Case 1/35/W/A/Drugs

Defendant said that he was seated in the passenger seat of his friend's car whilst the car was parked outside his friend's house, who had gone in to fetch something. Being cold, he decided to switch-on the car fan-heater. He turned the ignition and the car, having been left in gear, jerked forward and hit the car in front. A passing police car stopped, and a PC and WPC alighted. The defendant described them as 'rude' and 'aggressive': 'She came up to the car, and the first thing she said was that I could get out of the car in one of two ways. I could get out as I was, or I could get out with a black-eye. I just thought to myself: "nice". I got out of the car and she just pushed me back, and I rocked back into a lamp-post...'

Case 1/49/B/A/OAP

Def: 'I was attacked by six of them in the street... they wanted to know where I was going. I had a walking stick.* I got approached by one of them, who asked me where I was going. I thought to myself I don't have to answer this, you know, I'm just going about my business. He then became very awkward. He blocked my path and started going on about how he was going to have to arrest me for having a dangerous stick or something like that. At this point two police cars arrived, five policemen. This is just harassment, I got six policemen around me and when I saw this I just took off. I ran for a bit and then I thought it a bad idea. They is gonna get me at some point so I might as well stop. I stopped and the first one of them come up, with his truncheon. He put his truncheon in my neck, and punched me in the stomach. In that short space of time, I found myself on the floor with them sitting on top of me. One of them started shouting, "Break his fingers! Break his fingers", so they try and break my fingers. One of them was stood up and kicking me. And this was in broad daylight!' (*I got the impression that the defendant viewed the walking stick as a fashion accessory).

Case 1/61/B/A/Dis.

Defendant said that he was returning from the DHSS when he was approached by two policeman who had alighted from a panda-car. He said that one of the policeman took hold of his arm and started asking him where he had been and where he was going. The defendant, being in a bad mood due to problems with his unemployment benefit, told the policemen that he didn't see why he should answer their questions: 'I couldn't see how it was any of their business... I just said "leave me alone, alright." They said "Right, you're going down the station *now*". I said I

didn't see any reason why I should be arrested, and he punched me in the balls. I pushed him off... Now, there I was humiliated for no reason, punched in the balls in front of ordinary people going about their business, and I had to resort to force to defend myself.' He said he was arrested, placed in the cells for some hours and then released without charge.' The guy assaulted me and got away with it'.

Case 1/62/B/A/Dis.

Def: 'They always wanna make it out that I'm some big criminal, just the way they'll throw me up against the car, put hand-cuffs on whether I'm struggling or not.'

Unfortunately, the sample was too small to make any conclusive finding on the issue of whether subjection to this type of behaviour increases the likelihood of defendants making negative evaluations of future encounters with the police. Two of the 12 who said that they had suffered from police excesses outside the station on previous occasions said that their present arrest had also been accompanied by such behaviour. Seven of the remaining 10 were to be found in that category of individuals who said that their treatment overall had been unfair. Subjection to unreasonable police behaviour could, however, decrease the likelihood of negative evaluations as individuals lower their expectations of fairness. One of those spoken to appeared to accept this type of police violence as inevitable, whilst another seemed to think the violence used against him was justifiable.

Case 2/09/W/A/Dis.

Defendant explained how on one occasion he had been violently assaulted by the arresting officer, despite the fact that he was in no way resisting arrest. He added, 'but every police station keeps a few animals, and they just let one loose on me that time.'

Case 1/60/W/A/Dis.

Defendant said that once he had fled when the police came to arrest him. In the course of the chase that ensued, he found himself dangling from the railings of a bridge. At this point the officers caught up with him, and one of them struck the

defendant on the hand with his truncheon, permanently damaging one of the nerves and causing him to fall into the river below. When the defendant finally swam out of the river, he was badly beaten by the officers. He concluded that, 'the police, yea, if you're fair with them, they're fair with you'.

16 persons[478] (4 blacks; 9 whites 3 Asians: 20% of the total sample) stated that their present arrest had been accompanied by unnecessary police violence or the police had attempted to provoke them into saying or doing something which the police could then use to justify the use of violence.

Case 2/05/B/A/Dis.

Def: 'I was still in bed ... they barged in...they were very rude, kept shouting "get up you little arsehole", kept calling me "a little shit" .... They didn't tell me what I had been arrested for ... told me I was up for drugs, smuggling, gun-running - asked me what I wanted to be charged with.'

Case 2/18/W/A/Drugs

Def: 'There were one or two of them, you could tell they were quite aggressive, they were just waiting for me to play up so that they could you know..., but I didn't retaliate or nothing so they couldn't do anything.'

Case 2/24/B/J/OAP

Def: 'I was talking to the one copper, and he was alright, just telling me he was arresting me and that ... I was cooperating, yea? But then a van load of them turned up, swearing and that, saying "get him in the fucking van!" So I said like there was no need for that, yea? And the driver of the van said "I'm gonna cuff yer if you don't shut up", and "You really think you're something" - started threatening me and that.'

Case 1/43/W/A/Dis.

Def: 'We saw the police arrive. There were loads of 'em, and we went and hid in this little back room... They came through the door and they were rough, rough

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[478] Including two individuals who also fell in that group of twelve who complained of unnecessary violence or provocation on previous occasions.

as I've ever had it. As you can see my arms, my wrists... And I wasn't even resisting arrest. He said to me, "Lie down on the floor!", and as soon as I lay down on the floor that was it - I was kicked in the head... they lent over and called me a little bastard... I was punched in the eye.'

Case 1/45/W/A/Dis. & Crim.Dam.

Def: 'They came on heavy ... got me on the floor, put a knee in my back, punching me and stuff... and then in the back of police van, he had his foot on my head, pressing it into the floor.'

Case 1/50/W/A/Dis.

(Defendant said he was walking down the street with his girlfriend and was approached by two officers. When he asked what it was all about they twisted his arms behind his back and slammed his face down on the car bonnet:) 'They had my head in an armlock and put the cuffs on real tight. I was almost in tears I was in such pain.'

Case 1/62/B/A/Dis.

Def: (Told he was arrested) 'So I said yea, alright lets go. And they watched me walk over to the other side of the room and put my jacket on, and they didn't say nothing. Then they said "Take it off!" Said that they couldn't search me properly with it on. I said I wasn't taking it off, so all three of them jumped me, putting their knees into my head and in my back.'

As stated above, those individuals who felt that their arrest had been unfair were very likely to state that their treatment as a whole had been unfair. Only 3 of the 16 who said that their arrest had been accompanied by unnecessary violence or provocation went on to state that their treatment as a whole had been fair. The first of these, arrested for possession of cannabis, fitted perfectly the stereotype of the 'laid-back hippy', stating that he saw no point in taking the bait which some 'aggressive' officers had presented him. The second said that he had been man-handled, but felt 'lucky' that he had not been subjected to the type of beating which he alleged his co-defendant had suffered. The third stated that the arresting officers had sworn at him and threatened him, but said that this

was an improvement on previous occasions when he had actually been beaten up.

The tendency of the police to 'build-up' situations in the hope of seeing some excitement was observed by Foster in her study of patrol policing in two London inner-city police districts. Officers were seen stopping, questioning and searching people 'in an uncivil and intimidating manner, with a clear presumption of guilt'.[479] One of the officers she spoke to explained the attitude of most officers in the following terms: 'Instead of having a straightforward stop and search they want to build it into something else, into something a bit more, not violent, but a potentially more sort of explosive situation. I mean it's the easiest thing for a policeman on the street to wind someone up...'.[480] Foster gives the example of officers stopping a car and questioning the occupants in the hope of finding the car to be stolen. She writes that '(e)ven when rightful ownership was confirmed, the officers maintained an aggressive and sarcastic manner, hoping that the youths would rise to the bait'.[481]

Conversing with police officers reveals that some officers certainly view the possibility of being involved in a violent confrontation with what can only be described as glee. The following extracts give an indication of some of the attitudes encountered in the course of the research:

Field-Note Extract (Grimeston).

> Speaking to a custody officer (CO) about policing and the stories of violence officers had recounted to the researcher, the following exchange took place:
>
> Researcher: All this confrontation can't be good though, can it? I mean it increases the risk that officers are placed at.

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[479] (1989) *op. cit.*, at p.133.

[480] *Ibid.*

[481] *Ibid.* Skogan's analysis of the British Crime Survey data revealed that 'one quarter of those stopped by the police while on foot ... rated the police as a 'bit' or 'very impolite' (see Skogan (1990) *op. cit.*, at p.35).

Custody Officer: Oh, they can try it! Yes, sir! They can't knock us down, we've got the biggest gang around here: there's more than three thousand in our gang'.

Field-Note Extract (Nasherford).

CO: 'These boys, they're our support group. They don't take no shit. I mean if I'm on the street and someone says something to me, I just ignore it. But these boys, they won't wear it. They'll go up and ask 'em what they said, and if they get any mouth, they'll drag 'em in.'

The custody officer in this above extract was referring to the Police Support Unit. This is a system of policing whereby eight or nine PCs are allocated a van and put under the command of a Sergeant or an Inspector. Some of those assigned to these vans will have received specialist public order training. The vans are used to patrol those sections of the city which the police perceive to be 'problem areas', as well as acting as back-up for normal patrols. This style of policing has been described by some as 'paramilitary'.[482]

In their survey of residents, McConville and Shepherd found that those living in inner-city areas regarded these vans with anathema and spoke of them in terms of fear.[483] Residents complained that not only were the vans intimidating by their very presence, but also that they had frequently seen the officers in them acting in a provocative fashion towards passers-by. Some reported that they had seen officers engaging in unjustifiable acts of violence, and spoke of their belief that there was no redress against such injustices.[484]

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[482] Jefferson, T. (1990) *The Case Against Paramilitary Policing*, at p.3. For a contrary viewpoint, see Waddington, P. (1993) 'The case against paramilitary policing considered', *Brit. J. Criminol.* Vol. 33, pp.33-73. Jefferson's reply appears in the same volume at pp.374-81.

[483] (1992) *op. cit.*, at p.40.

[484] *Ibid.*, at p.41.

The following two extracts from defendants give voice to similar sentiments.[485]

Case 2/12/W/A/POO

> Def: 'They (Special Support Unit patrols) always come up to the estate in their vans looking for people to nick and beat up. There's no other reason for them to be there - they're just looking for bodies.'

Case 2/13/W/A/POO

> The defendant admitted that, when asked to move on by a Special Support Unit, they had given the police 'a bit of mouth'. Officers grabbed one of the gang, a sixteen year old, 'and gave it him up against the van. I mean, if he was a threat to them then fair enough, but he wasn't a threat to them because he was too small to be a threat to them ... these guys in the vans, they're a lot bolshier, I mean they won't take any shit at all... I mean they beat him outside and then in the van, even though he was too drunk to do anything, they still had him on the floor with their feet on his back... I just wish there was someone to see what they've done to his face, because now the police are going to get away with it, which isn't right. What they've done is a criminal offence, If I'd done that to some guy in the street I'd get prosecuted, fined, even perhaps a short stretch. But 'cos they're the police, they've got the power to get away with it. I just can't have any respect for them, not after tonight'.

The officer's desire to see excitement, and be involved in what he views as authentic crime-fighting, is continually frustrated by the reality of a job which involves dealing mainly with the boring and the mundane.[486] In order to escape the boredom, some officers will engage in proactive policing.[487] This

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[485] See also Case 2/19/W/J/Dis., *Supra.*, at p.123.

[486] Cain, M. (1973) *op. cit.*

[487] McConville and Shepherd (1992) *op. cit.*, at p.156; Foster (1989) *op. cit.*, at p.134.

is something which is encouraged by institutional emphasis on 'figures' - the number of arrests which an officer affects.[488] McConville and Shepherd found that arrests took precedence over all other policing objectives, and good arrest figures were necessary to gain 'respect' from colleagues and were considered by most officers to be vital for career promotion. So great was this pressure that it was felt even by community beat officers.[489]

In the present study the researcher was often told by officers of the importance of bringing in not only 'quality' arrests, but to keep 'turning over the bread and butter stuff'. Officers were heard poking fun at those who had not arrested anyone for sometime, with remarks such as, 'CID will be head-hunting you soon if you're not careful mate!'. On a few occasions it was observed that when an arrest was carried out by two officers, the issue of who would take credit for it was the subject of negotiation ('you take this one if I get whatever comes next').

Unfortunately, a combination of wanting to relieve boredom and needing arrests can lead some officers to engage in policing which can be viewed by citizens not only as unnecessary, but also as arbitrary and oppressive. The following extracts provide examples of the anger and confusion that citizens feel when they become the victim of an officer's determination to bring in a 'body':

Case 2/25/W/A/POO

Defendant said that he and his friends were walking through a shopping precinct, and 'just dossing around with each other - like I mean I had this rolled up

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[488] Dixon *et al* (1989) *op. cit.*, at p.190.

[489] 'I find that if I have got an hour or a couple of hours to myself, where maybe I'd like to go and chat to someone in the street and then maybe go into the house, I'm unable to do it because you've got pressure ... you're thinking "I haven't booked anyone today", or "I haven't booked anybody for two or three days, I'd better go out and look for someone"'((1992) *op. cit.*, at p.202).

magazine and was just whacking the others over the back of the heads with it, yea?' In the course of this 'play-fighting', one of them jokingly told another to 'fuck-off'. Two officers, who were standing near-by, arrested them for using 'threatening and offensive' language in a public place. When the defendant complained of the unreasonableness of the arrest, one of the arresting officers replied, 'Well we've got nothing else better to do'. The defendant said of the arrest, 'they could have just given us a caution or something, you know, just like "lads, can you keep the language clean", or just "keep the noise down", or something like that.'

Case 1/33/W/A/POO

The defendant was at a football match where his team, Grimeston, were playing at home against Hull. At the half-time interval 'most' of the supporters decided to 'do a bit of chanting. Like they were shouting "Fuck-off you Grimeston wankers' and we were chanting "Fuck-off you Hull wankers'. He said he was beckoned by one of the policeman present and, when he went over to him, the policeman asked him what he had been singing. Somewhat surprised, the defendant told him. 'He said, "Right, you're nicked". I said, "You what?", and he said "You heard, you're nicked". So I said "What for?", and he said "For swearing"... I couldn't believe it! I felt like striking out just to make it worthwhile.' The defendant told me that he could not understand the charge of 'threatening and abusive language' because, in his view, the Hull supporters would have been disappointed if not sworn at: 'that's part of it, innit? Part of the atmosphere.'

Case 2/06/A/A/Dis.

Defendant complained of being arrested in circumstances where the police had no reason to believe that he had committed an offence. He was carrying a barbecue hot-plate from his flat to his parents' home. He was approached by two officers who asked him when and where he had bought the plate and where he was taking it. The defendant explained that he had brought it in Birmingham a few months earlier and was now taking it to his parents, who were having a barbecue. The officers told him that they believed he had stolen it, and the defendant was arrested. He said that at no point did they give any reason as to why they believed he had stolen it. The defendant was released pending further police inquiries.

Case 1/55/W/A/Dis.

The defendant was stopped when driving his car. He was then questioned, together with his friends who had been in the car with him. The police searched the car: 'They looked through the car about three times, and I said to one of them, "you're determined to find something aren't you?" And he said, "Yea, well I normally do". We were just driving down, perfectly innocent, breaking no rules or anything, and they came up to us and started accusing us of going to do burglaries in a stolen car.' The defendant and his friends were all arrested on suspicion of theft of a motor vehicle, but later released without charge. The police gave no reason as to why they thought the car had been stolen.

This attitude of arresting persons solely to escape boredom and, it is speculated, to increase arrest figures, was on one occasion the subject of direct observation.

Field-Note Extract (Nasherford).

A PC walked into the custody area and said to another PC, 'There's two old girls handing out leaflets outside the leather shop on St. Gallons, protesting about fur and leather and how people shouldn't buy it. I'm gonna nick 'em; what can I nick her for? I can think of breach of the peace - what else is there?' A brief discussion between the two officers established that since they were standing well out of the way it was not possible to arrest them for blocking the highway. Neither were they using abusive language, or in any other way causing a nuisance. The patrolling PC concluded the discussion with, 'Well I'm gonna bring one of them in anyway for breach of the peace.' He returned approximately thirty minutes later with a middle aged woman whom he told the custody officer he had arrested for breach of the peace. The CO told the PC that he could not accept the charge because there was no evidence.

ii. Authority

The interview data revealed that some officers apparently feel the need regularly to affirm their authority by demanding deference from members of the

public. This supports the findings of Bittner,[490] Lambert,[491] Lee,[492] the PSI study,[493] Foster[494] and McConville and Shepherd.[495]

Foster writes that despite the lack of any law which requires citizens to show respect to the police, she was explicitly told by officers that they expected respect to be forthcoming and would not condone any challenge to their authority. This was seen to result in some officers adopting a tone and stance demanding submissiveness. Not surprisingly, perhaps, this will on occasions foster resentment and encourage the very type of challenge which so annoys the police.[496]

A policeman described to McConville and Shepherd how such a scenario can arise, and what it can lead to. Some officers, he explained, 'tend to expect too much submissiveness from people when they are dealing with them. And there is no reason why people should be submissive, especially if they are treated in an aggressive way ... They antagonise people and then wind them up and end up arresting them for something they wouldn't have arrested them for if the

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[490] (1967) *op. cit.*, at p.708.

[491] 'The importance of respect,' he wrote, 'can be extended... to most situations involving police and members of the public. The police are sensitive - at times I thought ultra-sensitive - to the way people treat them' (Lambert (1970) *op. cit.*, at p.192).

[492] Lee, J (1981) 'Some structural aspects of police deviance in relations with minority groups', in C. Shearing (ed.) *Organisational Police Deviance: Its Structure and Control.*

[493] (1983) (Vol.iv), *op. cit.*: '... the central meaning of the job for most officers is the exercise of authority', (at p.87).

[494] (1989) *op. cit.*

[495] (1992) *Op. cit.*

[496] Foster writes that where the police complained of a lack of respect, the 'provocation often came from the officers themselves setting the tone of the encounter by their attitude and stance ((1989) *op. cit.*, at p.134).

attitude of the officer had been correct.'[497] That this occurs with some frequency receives support from Home Office statistics which show that 10 percent of arrests arising out of official stop and searches have nothing to do with the initial suspicion, but come about due to the reaction of the citizen to what is probably viewed as a negative police attitude.[498]

The present study also uncovered evidence which points to a tendency on the part of some officers to want to impose their authority, by either demanding that their requests for information be unquestioningly complied with, or by simply treating persons in an off-hand and cursory manner. This left some defendants with a sense of powerlessness and humiliation.

Case 2/19/W/J/Dis.

> Def. complained that he had been stopped and searched on numerous occasions. He said he could not understand why he was subjected to so much 'hassle' - he had frequently been shouted at and threatened, and said that he 'feared' the police. At first he had attempted to challenge the behaviour of the police by asking for a search certificate, but this had got him nowhere. On one occasion the police had replied, 'You wanna come down the station and get it, son?', and another time the police had threatened to frame false accusations against him.

Case 1/66/W/A/Drugs.

> Defendant said that he was out walking when he saw a WPC on a bicycle. Finding this rather a novelty, he said he waved at her and smiled. 'She came off the bike, came across to me and started giving me all this aggressive style, you know "I'm a copper, so you answer when I ask you questions."'

Case 1/69/W/A/Dis.

> (The defendant said that the police had unfairly and wrongly began to threaten his friend with arrest): 'Now I thought that the law was that I could ask for their name

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[497] (1992) *Op. cit.* at p.178.

[498] See *Home Office Statistical Bulletin*, published quarterly.

and number, so I did. They told me to get lost, not to interfere. I said that I had the right to know who they were, and they said that if I didn't keep out of it they would arrest me. So I told them they were full of shit, and they started to try and arrest me. I wasn't having that; I had the right to resist so I did. They pushed me into the car, brought me down the station and charged me with resisting arrest and assault on the police.'

The following incident has much in common with the events described by this defendant.

Field-Note Extract (Nasherford).

Three youths (two whites and one Asian) were arrested in connection with an incident at a bus-stop in the centre of town. I was told by a colleague of the arresting officer that whilst one of the youths was being arrested, a fourth West Indian youth, unconnected with the previous offence or offenders, had told the arresting officer to 'fuck-off and leave him alone.' He was arrested and brought to the station. I observed that there was much hostility and tension between the youth and the police. Asked for his name, the youth replied, 'Silcott'. When the CO wrote this down, the youth said, 'That was just a bad joke, man.' He was taken away and placed in the cell block. The colleague of the arresting officer explained the circumstances of the arrest to the CO in the sergeant's room. CO: 'So he got arrested for telling PC X to "fuck-off"?' PC: 'Well, that's about it'. CO: 'So what does he (PC X) want to do?' PC: 'I think he wants him Sarge, he was really annoyed.' The youth was eventually brought out and charged with 'using insulting and abusive language towards X, a Police Constable of the Midsouthern Vale police, causing the said officer to fear for his personal safety'. He was additionally charged with 'assaulting PC X in the execution of his duty'.

Case 1/71/W/A/Dis. and TWOC.

The defendant complained that the police stared at him in a threatening and intimidating manner whenever they saw him in the street. He said he always had to look down or look away - a friend of his had been arrested simply for staring back.

Case 1/48/B/A/POO

Def: 'I said "No man, don't put the handcuffs on. Don't do that, please. I don't want my son to see anything like that." And he said he had to, that it was the law.'

Case 1/54/B/A/POO

The defendant's watch was in the possession of the police, and he had been told to come and collect it from the station. He said he had come to the station almost every day for two weeks, and had been told to come back or leave a message for the person dealing with the matter who would then contact him. Nothing happened about the messages he left. On this occasion he was once again told to return later and see WPC X, who would retrieve his watch from the property room when she came on duty at 11 p.m. The defendant tried to explain that not only had he heard this before, but also that he could not see how his watch could be retrieved at 11 p.m considering that the property room closed at 10 p.m. The desk officer told him that he 'didn't have time to argue with him'. At this point the defendant lost his temper, expressed his frustration at the whole situation by using a number of expletives, and demanded to see the Superintendent. The desk officer told him 'he doesn't see your type, so just leave the station'. The defendant replied that he would not leave until the matter was finally resolved. Two officers came out from the behind the desk and started pushing him out of the station. 'So I said, "Just get your hands off me man, I'm going", and I push their hands off me, like so - see? (demonstrating a brush-off motion). They barge me up against the wall, push my arms up me back, and bring me down here ... Naw man! They didn't tell me no rights, they not tell me why I was arrested ... I was pelted down the stairs - kept pushing me as I walked'.

In a discussion about the above incident, one of the arresting officers justified the police response by stating that 'those people up there (the civilian desk staff) are not paid to sit there and listen to that kind of language and we won't let people come in here and get away with that sort of thing.'

The two following field-note extracts further exemplify the importance attached by the police to maintaining their authority.

Field-Note Extract (Grimeston).

> One of the sergeants claimed that more complaints were made against the Grimeston force than any other. He stated that in his view this was because the police at Grimeston, quite correctly, did not believe in a 'softly, softly' approach. Any individual or group who defied police 'authority', he declared, was rapidly 'taken out'.

Field-Note Extract (Grimeston).

> The researcher was discussing with an Inspector the use made by the police of public order legislation, and made the point that many defendants appeared to be arrested for seemingly trivial matters under S4 or S5 of the Public Order Act 1986. The officer agreed that it was best to walk away from 'abuse' most of the time. He then went on to say that if someone swore at an officer then they deserved to be arrested, 'because that's going a bit too far; I mean there comes a point where you think, you know, come on - lets have a bit of respect for the cloth. We shouldn't have to take that kind of shit, and we won't take it.'

Some of the cases discussed in connection with the police desire for action also provide examples of the officer's desire to impose his or her authority. The suspects in cases 1/49[499] and 1/61[500] where primarily arrested because they had challenged the police 'right' to demand information, and the suspect in case 1/33[501] incurred police wrath because he had sought to challenge the legality of police behaviour in arresting others. As Bittner observed in his study of policing in the United States, any action which challenges what the officer views as his 'entitlement to inquire into a man's background, business, and intentions ... significantly enhances a person's chances of being arrested on some minor charge.'[502] Charges of assault, obstructing an officer in the execution of his duty, or charges under the Public Order Act, are resources which the

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499 *Supra.*, at p.136.

500 *Supra.*, at p.137.

501 *Supra.*, at p.143.

502 (1967) *op. cit., at p.708.*

police can use in order to achieve the police defined objective of creating and maintaining what Bittner called 'operational control'.[503]

III. ATTITUDES OF THE POLICED TOWARDS LAW AND POLICING

Although the interview extracts cited above give some idea of how those on the receiving end of policing view the police, some further detail is necessary.[504]

When officers were informed that one of the purposes of the research was to discover what suspects thought of the law and the police, many replied that it was obvious that suspects, being criminals, would be opposed to the law and would rather that the police did not exist. This was not found to be the case. Most of those spoken to viewed the police as simply doing a job, and no-one indicated that they were fundamentally opposed to what that job entailed. It would, therefore, be fallacious to dismiss the criticisms that suspects make of the police on the ground that this group of the population is opposed to the fundamental principles of legality and policing.[505]

At the end of each interview, suspects were asked a series of open-ended questions about their attitudes towards the police, such as 'What do you think of the police in general?', 'Have you ever tried to use the law to your advantage?'

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503 *Ibid.*

504 The relationship between attitudes to the police and defendants' evaluations of their treatment will be discussed in the next chapter. The following discussion presents the attitudes of both who said they were fairly treated and those who said they were unfairly treated.

505 Casper, who spoke to a group of defendants in the United States, similarly found that policemen were viewed by defendants as simply workers doing a job (Casper, J. (1972) *American Criminal Justice: The Defendants Perspective*, at pp.20-1). McConville and Shepherd found that even those residents who were most critical of the police did not want to see the police abolished, but fundamentally changed ((1992) *Op. cit.*, at p.16).

and 'Would you ever call the police for help?'. Seventy-seven of those questioned offered some opinion, and the responses were graded under the headings of 'strong respect for law and policing', 'some officers operate in highly unfair way', and 'strong distrust and dislike of the police in general'.

A third of the respondents (n = 26) were judged by the researcher to exhibit strong support for the law and policing. Comments such as 'the police only take the necessary procedures to get you to justice' were common amongst this group. The remaining 51 defendants were critical of the police in varying degrees. Some 18 defendants (almost a quarter of the total number of individuals who replied) stated that although not all policemen were bad, they had come across some who acted in an unfair manner.

Case 2/13/W/A/POO

> Def: 'I don't see them as a threat or anything; I mean the local policeman that comes round the Farm, he's alright ... he doesn't give us a hard time ... I was quite surprised by today - I've never seen them beat anyone up like that before. Usually they've only been doing their job.'

Case 2/20/W/A/Dis.

> Def: 'Most of them are alright, but some of them take advantage of anyone who is drunk and treat them rough.'

The remaining 43 percent (n = 33) of defendants were judged by the researcher to be extremely hostile to the police as a whole. Those falling in this group viewed the police as violent, racist, authoritarian or rude. This came across in the accounts suspects gave of their various encounters with police, and is reflected in many of the interview extracts which will be cited in the following discussion. Twelve of these 33 'hostile' defendants (16 percent)[506] described the police as racist, and 19 (almost 60 percent) stated that they would never or only very reluctantly call upon the police for help. Two individuals explicitly

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[506] 1 white; 6 Asians; 5 Blacks.

stated that the law offered them, and others in their position, no protection at all:

Case 2/15/W/A/OAP

> Following a dispute with a pub landlord, the defendant was arrested for assault. He denied having assaulted the landlord, but said that he was resigned to the fact that he would be convicted. This was because the landlord had money and would be believed by the police and the court: 'once they know that you got no job, and no money, you don't stand a chance'.

Case 1/48/B/A/POO

> Def: 'Once you're a criminal yea, you don't count for nothing. Once I got stabbed, real bad. I lost my finger, I got my lung slashed, I was in hospital for ages. I went to London court and they goes "You can't claim 'cos you're a criminal". And I thought, fucking hell - I've been to court, I've been to prison, I've served my time, and I can't claim fuck all! And you know why? 'Cos the fucking law, that's why! Criminals don't claim nothing!'

A number of these individuals described the police as beyond control, and felt helpless against what they alleged was unnecessary police violence and persecution.

Case 2/13/W/A/POO

> Defendant, referring to the violence his friend had suffered: 'I just wish there was someone there to see what they've done to his face, because now the police are going to get away with it, which isn't right. What they've done is a criminal offence, if I'd done that to some guy in the street I'd get prosecuted, fined, even perhaps a short stretch. But 'cos they're the police, they've got the power to get away with it.'

Case 1/61/B/A/Dis.

> Def: 'If they're in a bad mood or something, they can make you suffer - and they can get away with it, because in my experience I've found that they will close

ranks to protect each other.' The defendant felt that complaints were a waste of time. The only way to protect oneself was to avoid them: 'My general attitude is, "keep away from me, I don't want anything to do with you." If I see them I will cross the road to avoid them. I will be cooperative if I have to be, otherwise I'd like not to have anything to do with them at all.'

Case 1/47/A/A/OAP

Def: '...you make some complaint today, and tomorrow they get you for something - you can't win.'

Case 1/50/W/A/Dis.

Def: 'I've been beaten up by the police, punched in the face and all sorts, but I don't complain because it just makes things worse next time round.'

Case 1/70/W/A/Dis.

Def: 'Like my brother, they started roughing him up so he hit them back. Anyway, he decided to sue them, but they're saying that if he drops charges against them they'll drop charges against him. You can't win, you see?'

Attitudes towards the police appeared to be influenced by the way in which suspects had been treated on past occasions. Almost 70 percent of those who fell in the 'strong respect for law and policing' category had either never been the subjects of police suspicion, or considered themselves to have been fairly treated when suspected. Two thirds (n = 12) of those who fell in the 'some officers operate in an extremely unfair way' category said that they had been suspected by the police in the past, and on some of these occasions the police had treated them very badly. Finally, of those who had wholly negative things to say about the police, nine out of every ten stated that they had been treated badly by the police each time they had become the subjects of suspicion.

A greater percentage of whites (almost 39 percent) fell in the 'strong respect for law and policing' category than either Asians (27 percent) or blacks (8 percent). This would appear consistent with the finding that a greater percentage of whites (42 percent) than Asians (27 percent) or blacks (25 percent) claimed to

have experienced fair treatment from the police in the past. Due to the small number of non-whites in the sample, however, it is not possible to draw any firm conclusions from these figures.

IV. CONCLUSION

The findings of the present study, especially if they are viewed in conjunction with a number of other studies which have investigated current policing strategies, point persuasively to the conclusion that the police target their activities primarily against those on the margins of society. It is this which explains the frequency with which certain individuals are arrested, or find themselves stopped and searched on the street. Consequently, encounters between the police and the policed cannot be viewed as isolated incidents. In order adequately to understand any one encounter it is necessary to realise that it is part of an on-going interaction. Whilst those in the mainstream of society may have the odd brush with the police, those who I have labelled as 'the policed' find themselves in a long-term relationship.

This relationship is imposed by the police: it is structured by police work-norms and attitudes, based fundamentally on a demand for deference, and is maintained by the threat, and at times the actuality, of physical violence. Opportunities for the use of violence are *created* by some police officers because the infliction of violence is the ultimate method through which individuals are taught that police authority cannot be denied. In addition, physical confrontation provides the officer with the excitement and glamour which he views as the defining characteristics of his job.

It is the continual degradation of being in such a relationship which explains the anger and resentment of many of those who, although officially portrayed as the perpetrators of crime, quite often harbour the feelings of humiliation and injustice associated with the victims of crime.

The police attitudes which I have described in this chapter, together with the policing strategies to which they give rise, call into question the assertion that the police can be trusted to abide by rules designed to screen out the legally innocent. The next chapter will develop this theme further, but with regard to procedures employed by the police inside the station.

CHAPTER SIX

THE NATURE OF POLICE CONTROL INSIDE THE STATION

This chapter will describe the nature of the interactions between defendants and the police within the confines of the police station. It will be shown that once inside the station, suspects undergo processes which convert them from individuals into 'bodies', and which force them to re-adjust their notion of 'self'. These processes are characterised by police efforts to gain absolute control and dominance over the suspect's actions and speech, and at times are directed towards achieving objectives unconnected with law enforcement.

It is important to understand both the extent and nature of police control, and the strategies adopted by defendants to cope with their various humiliations, because the impact of suspects' rights (which will be the subject of the next chapter) cannot be assessed without an appreciation of the context in which these rights have to be exercised.

I will examine also the way in which defendants evaluate the fairness of particular procedures, such as confinement and interrogation, and seek to identify which factors most influence overall evaluations of treatment.

I. THE 'USUAL PROCEDURE' AND THE SETTING

Suspects at both Nasherford and Grimeston are brought into what the police refer to as the 'custody suite' (the charge room). The charge rooms at both stations are very similar, except that at Nasherford the room is located on the first floor and suspects are brought in by means of a lift situated in the 'van dock'. This lift is divided into two, with a 'cage' at the rear for defendants. Both charge rooms are devoid of all furnishings apart from 'the desk', which is the counter from behind which the custody officer (CO) operates. There are no

windows, the walls are painted white, and the rooms are lit by strip-lighting. Corridors lead from the charge room to the cells, finger-print room, doctor's room, search room, the kitchen and the consultation rooms. There is in both stations a board showing the name of each 'prisoner', the reason for arrest, the name of the arresting officer, the cell number and the time at which the next detention review is due. Doors leading into the charge room at both stations are kept locked at all times. Entry into and exit out of the room is controlled by the CO by way of an automatic locking mechanism operated from behind the desk.

The custody blocks at both stations are busy places, with five or six officers present at most times. The CO is accompanied by one or two PC 'jailers', one of whom may be a Woman Constable, and the team is collectively known as the 'custody staff'. There will usually be officers presenting suspects to the CO, others waiting to do the same, and some officers coming in and out of the charge room simply to have a chat, take some refreshment or to use the telephone. In addition to police officers, 'outsiders' are sometimes also present. These include doctors, solicitors, social workers and interpreters.

The normal procedure at both stations is for defendants to be 'booked-in' as soon as they arrive. The arresting officer puts the defendant before the CO and informs him briefly of the reason for arrest (e.g 'breach of the peace'). The CO then asks the defendant, 'Do you know why you're here?', and then asks him to provide his 'details' (name, address, occupation, age and height). The CO informs the defendant of his rights, and tells him that he will be placed in a cell until the investigating officers are ready to 'interview' (interrogate) him. The booking-in procedure is sometimes carried out by the jailer.

The defendant is then searched, his property taken from him (including watch, belt, and shoes) and, if an adult, locked in a cell. Juveniles are locked in detention rooms. Cells are fitted with a toilet, and have metal doors with grills. Detention rooms have a wooden door with no grill, and are not fitted with a toilet. Cells and detention rooms are fitted with buzzers in order for suspects to

be able to summon assistance if they require it. If a suspect presses the buzzer, it illuminates a light on a panel located in the charge room, indicating the cell in which assistance is required. The buzzers did not 'buzz' at either of the two stations because they had been switched off by the custody staff.

Defendants at Nasherford were usually interrogated by the arresting officer, who would inform the CO of his readiness to begin the interrogation and ask the CO or his jailer to fetch the defendant from the cell. The system is somewhat different at Grimeston, where defendants were usually, but not always, interrogated by 'trained interviewers' known as the 'prisoner reception unit' (a group of CID officers). Defendants were for the most part fetched from the cells by the CO or the jailer.

A decision is made on disposition once the police have completed questioning, and the defendant can either be charged and released on police bail, charged and remanded in police custody to appear at court the next morning, bailed to reappear at the station pending further enquiries, cautioned, informally warned, or 'refused charge'. This decision is sometimes made a considerable length of time after the interrogation has been completed, and is conveyed to the defendant by the CO or the jailer. The defendant is asked whether he understands and, if charged, whether he has anything to say.

II. POLICE CONTROL OVER 'BODIES'

If a researcher were to spend only a brief period observing the above procedures, it would be quite possible for him or her to form the view that interaction at the station is no different from that which takes place between citizens and state officials in other types of state building, such as the local council offices or the out-patient department of a hospital. There is no apparent antagonism between suspects and the police: the police are polite even if somewhat formal and stern, and suspects do not appear to resist the routine. There are persons in authority (the police), who are relaxed and confident, and

there others (suspects) who, whilst somewhat anxious, are put at ease by having matters 'explained' to them. The concern is with efficiency and smooth running. Talk of being 'booked-in', of waiting in 'suites' and being met by 'reception units', to be 'interviewed', all contribute towards the creation of a welfare agency image.

This image, however, is completely misleading, and the reality lying behind it reveals itself only after a lengthy period of observation.[507]

The station is police territory, where defendants are brought against their will and forced to accept absolute police control over their bodies. The police are confident and relaxed in their actions because they know that their dominance over the proceedings cannot be challenged. The police secure a moral victory over the defendant solely by bringing him to the station: the police have shown that they have the power to remove him from his home, his family and his friends and isolate him on their own territory.

Case 1/32/W/A/Dis.

The defendant's mother was present when he was arrested in the front foyer of the station. He asked whether his mother could go down to the charge room with him: 'He just said "No".'

Res: 'Did you or your mother ask him why not?'

Def: 'Yea, he just said the serg wouldn't like it.'

The police are well aware of the mental debilitation caused by detention at the station, and this is one of the reasons why they use arrest as opposed to summons

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[507] I spent a total over 80 days at the two stations, spending between twelve to eighteen hours in the charge room each day. At a conservative estimate, I observed approximately 144 eight-hour shifts.

as a standard strategy, regardless of the seriousness of the crime.[508] The defendant must accept the loss of autonomy; this is the first of many 'climb-downs' which he has to perform whilst at the station.

As the defendant attempts to cope with the loss of all supporting structures, his adversary, the arresting officer, is entering an environment where he can expect unquestioning support from his fellow officers. The power imbalance is so clear that, in the vast majority of cases, nothing need be said. The expectation is that the suspect will 'comply with the directions that officers feel appropriate', that there will be 'deference, quietness, compliance with searching, questioning, obedience in the charge room and composure'.[509] The police refer to suspects as 'prisoners' or 'bodies', thus signifying their belief that once on police territory individuals become their 'property'. Police control and dominance is for the most part implicit, with few finding the courage to defy police expectations. Most defendants will simply accept the humiliation of being rendered powerless.

Case 1/54/B/A/POO

> Def: 'I've been treated fine in the past, I've been treated good 'cos I've never been any hassle to them ... because when I come down here I know there's no point, yea? I just stand there and say "Yes sir, Yes sir, Yes sir". And they put me in the cell and let me go when they want to let me go.'

Case 1/78/B/A/Dis.

> Def: 'When I get arrested, I just keep my head down, cause no aggro and get out of there as quickly as possible. Just let them get on with whatever they want.'

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[508] Research by McConville *et al* shows that police use of arrest has increased considerably since the introduction of PACE: 98.2 percent of all adults and 90.8 percent of all juveniles in their sample were arrested. In some of the subdivisions studied by the researchers, *all* defendants, adults and juveniles alike, were arrested (McConville, M., Sanders, A., and Leng, R. (1991) *The Case for the Prosecution*, p.39).

[509] Holdaway, S. (1983) *Inside the British Police*, at p.27.

Case 1/44/B/A/OAP

Def: I've been beaten up, I've seen other people beat up. I mean, I didn't get beat up that severe. I mean I've been quite lucky ... but I've seen it happen to my brothers ... there's no point 'cos you can't win, you hit them and you'll get charged for it *and* beaten up.'

Case 2/02/W/A/Dis.

Def: 'When I told them that I didn't want my fingerprints taken, he said they could do it by force, they didn't need my consent. So I thought no point arguing about it, might as well do as they say and get out into the fresh air.'

The defeatism of these defendants is perhaps not unjustified. One defendant told me that he was going to complain because he had been wrongly arrested and unnecessarily man-handled. The next day I asked one of the arresting officers whether the man had in fact made a complaint. The officer replied, 'I don't know and I can't say that I really care. He can do what he wants; we always have his type making complaints - it means nothing.'

At both stations, those who accorded the police the deference demanded of them were labelled 'good as gold', and those who did not were called 'obnoxious'. Some had an on-going relationship with the police which was openly hostile, and were therefore given the 'obnoxious' tag as soon as they walked through the door. For the most part, however, defendants had been through the process before and were aware of the advantages of winning the 'good as gold' badge.

The following sections will explain the factors which combine to sap the courage of defendants to resist police control. Many of the specific incidents which I relate are atypical, in that they deal with situations where suspects challenged police control. The vehemence of the police response to the most minor of challenges serves to demonstrate the true degree of submissiveness which is routinely in operation.

i. Abuse, Intimidation and Humiliation

Those who openly defied police authority were shouted at, threatened and made the subject of abuse in what I interpreted as attempts on the part of the police to intimidate and humiliate such 'obnoxious' individuals.

Field-Note Extract 12 (Grimeston).

A juvenile was brought in for attempted theft of a motor vehicle. His attitude could be described as 'complacent'; he did not take his hands out of his pockets, he took his time to stand up when the CO told him to come up to the desk and did not give his details immediately. The CO shouted at him sternly: 'Stand up straight!'; 'Look at me when I speak to you!'; 'Answer properly!'. He was given a written notice of his rights but pushed it back, muttering, 'Can't read'. The arresting officer told him he was 'thick'. After D had been taken away, the CO informed me that D was 'a real little Al Capone psycho, thinks he owns the show. He'll be a real little thug one day for sure..'.

Field-Note Extract 13 (Grimeston).

The defendant was extremely upset when brought into the custody room. I later learned from speaking to him that, in his view, the arresting officers had used unnecessary and excessive violence against him in front of his girlfriend and child. He refused to answer the CO when asked for his details, and refused to make eye-contact with the CO or the arresting officers. He was shouted at by both the CO and the arresting officers, e.g 'Come on Mickey, don't be a dick' etc. When this failed to break his resistance, the CO shouted, 'Alright! We can play it the hard way. Put him in the cell and he can he stay there until he decides to be a good boy!'

Case 1/73/W/A/POO

Whilst the defendant was being searched, the police informed me that he hated the police and was an 'obnoxious' individual who ought to be locked up for good. When I interviewed him, the defendant said that the police had on one occasion attempted to kill him by running him over. He accused them on this occasion of taunting and mocking him: 'They were baiting me left, right and centre, they were offering me the chance to have a roll, they wanted me to start...'

The police will sometimes mock and threaten those who have not sought to challenge their authority. It is suggested that the motivation behind this is to *emphasise* their own invincibility whilst correspondingly emphasising the powerlessness of the defendant.

Case 1/54/B/A/POO

The defendant complained that the officers had torn his jacket in the process of unnecessarily man-handling him: 'I said to the officer when he was taking my property off me, "What you going to do about my jacket? Look at it. It's ruined." And you know what he said? He says, "Go and see my cobbler." Can you believe that?'

Case 1/52/A/A/OAP

The defendant explained that the cell he was placed in was littered with rubbish. 'So the woman (WPC jailer) comes round, right, and tells me, 'Pick it up!', like that. So I said that I didn't make it, it was already there. She said, 'So you're saying you are not going to pick it up?', and started going on about how the sergeant could make things difficult for me. I just thought, you know, what's the point, I might as well just pick it up.'

Field-Note Extract 14 (Grimeston).

An officer brought in an individual whom he had arrested. When the CO was ready to book him in, he asked the defendant to step forward. CO to arresting officer: 'And what do you call your man, PC Jones?' Officer: 'What do I call him, sir? I call him a thief!' There was much laughter from all present, including two solicitors who were in the charge room at the time. The only person who did not laugh was the defendant.

A similar objective is achieved by accusing individuals of crimes when there is no evidence whatsoever to support the accusations. This is a form of abuse, but it is unlikely that officers view it as such: they are so convinced of the

worthlessness of those whom they bring to the station that they no doubt believe it impossible to insult them.[510]

Case 1/44/B/A/OAP

> The defendant said that whilst being searched he was asked whether he was in work. He replied that he was not, and added that he was hoping something would come his way nearer Christmas. 'This bloke turns round and says, "So what you doing now? You just steal bikes and clothes and that and sell 'em on, yea?" I just thought, you know, what is the point? They were just trying to push me, and I didn't say anything after that.'

Case 1/60/W/A/Dis.

> The defendant had been arrested on suspicion of shoplifting. 'I had a centre punch on me when we went to Texas, 'cos were just doing up me car. Well, when the officer was taking my property off me, he seen it and started telling me what I'd been doing with it. Started saying I'd been putting windows through with it, or putting it into locks - crap like that.'

The custody staff at Grimeston used a very simple but effective 'put-down' tactic. There is at that station a white line on the floor approximately one foot away from the custody desk. Not all defendants were made to stand on this line when giving their details - it was in most cases sufficient to stand close to it, and the 'good as gold' were even allowed to lean on the counter. Anyone who appeared complacent, however, or who in anyway appeared by their look or tone of voice to be challenging the 'right' of the police to ask for details, was ordered to stand on the line. This was usually done by a flat, 'Stand on the line will you', and sometimes accompanied by a patronising 'That's right' when the defendant had obeyed. It is difficult to convey the tone of voice and look which the police frequently used to belittle defendants. It was observed, for example, that

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[510] Note in this regard the conclusions of Bittner, E. (1967) 'The police on skid-row: A study of peace-keeping', American Sociological Review 32:5 (pp.699-715) and Foster, J. (1989) 'Two stations: an ethnographic study of policing in the inner-city', in D. Downes (ed.) *Crime and the City*, discussed above at pp.140 and 122 respectively.

officers always referred to defendants by their first names, even where the officer was in his early twenties and the defendant in his late fifties or older. What became clear was that whilst most defendants may have appeared compliant without, they harboured resentment within.

Case 1/66/W/A/Drugs

> Def: 'I don't think they mean to come across so aggressive, but they come across *so bloody aggressive.* It's like they feel you've no right to question anything they say or do...' (original emphasis).

Case 1/55/W/A/Dis.

> Def: 'I find that they talk to you like you're a criminal, like you've already been found guilty ... the slightest thing in here and they'll jump down you're throat. They'd find their job lot easier if they was bit more relaxed and talked to people like they were individuals rather than treating them like criminals.'

ii. Violence

Most defendants are undoubtedly aware that at any moment whilst in custody they could be subjected to the pain and, far more importantly, the humiliation of violence. This knowledge may either be derived from past personal experience, or from having seen or heard of others who have been assaulted in the charge room or in the cells. Interaction at the station takes place against the backdrop of this knowledge.

a. Observed violence.

Field-Note Extract 15 (Nasherford).

The defendant, a sixteen year old juvenile, was brought into the charge room by two officers, each holding an arm, with the wrist pushed up and the elbow pushed down, forcing D to double forward. D had two black eyes, a bleeding nose, and a thick lip. He was drunk, and shouting repeatedly 'It's my fault, yea, its my fault alright!' He then told the officers that they were hurting him, and pleaded with them to let him go. He was ignored by the officers. He then pleaded with the CO,

who also ignored him. The CO then began to ask D for his details, and D appeared to be in too much pain to concentrate. He continued to scream and plead with the CO to tell the officers to let go his arms, shouting that he would cooperate. The two officers exerted more pressure on D's wrists and shoulders, telling him to cooperate and answer the questions, and to stand straight. D, evidently in much pain, screamed out that he could not stand upright unless his wrists were released. The officers eventually released him, but only because they needed to complete the search procedure. D was wearing a thin gold neck-chain, and did not want the officers to take this from him. He put his hands around his neck, pleading, 'No, not my chain. Please, please let me keep my chain! It's real special to me, this chain...'. The officers placed him in the same wrist and shoulder lock as before, whilst a third officer took off the chain. D began to shout that they could have the chain, and pleaded to be released. He was ignored and taken out of my view, still in an arm-lock.

Field-Note Extract 16 (Nasherford).

The defendant (approximately 17-18 years of age) had been drinking, and was clearly upset. He came forward when asked to do so by the WPC jailer, and gave his details as requested. Whilst giving his details he complained to the WPC about the way in which he had been treated by the arresting officers out on the street, and this was interspersed with much slurred swearing. The WPC said something to the effect that she was not interested in his complaints, to which D replied, 'If you were a bloke, I'd tell you to go fuck yourself'. He was immediately jumped on by two policemen, who pushed his arms behind him in a painful arm-lock and dragged him out of my view. From the noises which emanated from the cell block it sounded as though D was being beaten, and his screams were heard for some time. The defendant had originally been arrested for Breach of the Peace, but one of the officers who had dragged D out of view walked determinedly into the Custody office, rubbed 'BOP' off the board and put in 'Assault'. D was released from custody some four or five hours later, but not before he had been charged with assault.

Field-Note Extract 17 (Nasherford) Case 2/14/W/A/POO

The defendant was seated on the floor of the lift when the doors opened. He was dragged along the floor by either the lower part of his arms or his handcuffs, whilst shouting 'Just let me stand up will you'. He was brought to the desk, lifted up, his cuffs taken of, and held in an armlock by two officers. D did not appear

to be at all violent, and neither did he seem particularly drunk. He asked them to let him go, and when ignored, asked the CO to tell the officers to let him go. The CO ignored him. He once again pleaded with the arresting officers, who eventually let him go. He then began to tell the CO that the officers had been 'well out of order in the lift. I told them that I wanted to stand up and they wouldn't let me. He (pointing to one of the officers) told me that it was tough shit.' The CO told D to shut up, that he could have his say later. D replied 'OK, fair enough'. He gave his details, and then began to tell the CO that the arrest was unlawful and unfair. D was totally coherent throughout. The CO and the officers told D to shut up, and when D said that he was just explaining, he was once again put in an armlock by the two officers, and a third starting going through his pockets. D began to struggle, shouting that they could only search him once his solicitor arrived, and demanded to see his solicitor. He was forcibly searched; put through unnecessary pain, and dragged from view whilst still in an armlock.

Field-Note Extract 18 (Nasherford).

The defendant was quite violent when brought in, and had to be restrained. He calmed down, however, and began to give his details. The person he was arrested with was put in a nearby room, and the door closed. D shouted to his friend, asking him what he had been arrested for. The officers told him to be quiet. D: 'I'm just talking to my mate. I can do that if I want.' Officer: 'No you cannot do that. Just shut up!'. D decided to ignore this and asked his friend once again what he had been arrested for. One of the officers began to push D back by hitting him in the chest, angrily shouting, 'Don't you dare, in here! IN HERE!' D pushed the officer's arm away, and as he did so he was thrown to the floor by three officers, sat on, picked up and put in an armlock and dragged out of sight. I heard him yelling for some time afterwards.

Field-Note Extract 19 (Grimeston).

Notice was received that an individual had been arrested on suspicion of attempted burglary, and had assaulted one of the arresting officers. The desk was cleared of empty tea cups, the CO and the jailer took up a more formal stance and four PCs were called down into the charge room.

The defendant came into the charge room accompanied by two officers, one of whom, a young PC, had a slightly bloodied nose.

D was shouted at a soon as he entered the charge room, and ordered to stand on the white line and give his details. He refused, not saying anything. The CO replied, in a loud and stern voice. 'If you want to play it like that, it's fair enough by us. We'll just put you in a cell until we find out who you are. The longer it takes the longer you'll be here!' D turned around, walked to the other end of the room and sat down. The PC jailer shouted: 'Stand up! The sergeant hasn't finished with you yet. You'll sit down when you are told to sit down!' D got up and walked back to the desk, but pointedly refused to stand on the line, leaning on the sergeant's counter instead. D ignored the sergeant as the sergeant attempted once again, without success, to get D to give his details.

D had lit up a cigarette and had been smoking it during this exchange and whilst being searched. He was then ordered to be taken down the cell blocks. As he was being taken away the CO barked 'Put out your cigarette.' D threw the stub on the floor and put his foot on it to put it out.

CO: 'Not on the floor! Pick it up!'

D: no reply, simply stared at the CO.

CO: 'I said, "*Pick - it - up*".'

D: no reply.

(Two PCs closed in on D).

PC 1: (in a low threatening voice) 'You heard the Serg, pick it up.'

D: 'kiss my arse.'

PC 2: 'Pick it up, NOW!'

D: 'Kiss my arse.'

CO: 'Alright, take him away!'

At this point three PCs pounced upon D, two of them twisting his arms behind his back until he screamed in pain, a third grabbing his hair and pushing him down the corridor towards the cell. D was taken out of sight, but I could hear him screaming and yelling. The officers emerged from the blocks 3-5 minutes later. One of them went up to the officer who had been assaulted out on the street and said 'You'll be pleased to know that he's hurt a bit now.' The young PC left the room, and the CO explained to two officers who had come into the room half-way through the incident the details of the case. The PC who had been assaulted was the object of derision and scorn, with the CO and the two officers agreeing that he should have evened the score outside.

The violence on each of these occasions was inflicted by the police on the defendant. None of these defendants had posed a physical threat to anyone present. What each of them had done was to challenge the 'usual procedure': challenge the right of the police to treat them as inanimate objects. One had wanted to explain his side of the story to the CO; one had disagreed that it was necessary for the police to take all his personal items; one had used strong language in voicing displeasure at his treatment; one had wanted to converse with his friend; and one had decided that he would not succumb to the conscious effort made by the police to belittle him. The police simply could not allow any of these challenges to succeed; to allow the defendant 'victory' would not only defeat the primary purpose of bringing him to the station, but would threaten the dominance of the police over the policed generally.

b. Violence which defendants' alleged they suffered on the present occasion.

Six of those interviewed alleged that they had been assaulted by the police whilst at the station.

Case 1/62/B/A/Dis.

The defendant had refused to give his details (see field-note extract 13 above, at p.178). He said it was cold in the cell, and he rang the buzzer so that he could ask for his coat. The WPC jailer eventually came to see what he wanted, but when he explained that he was cold and wanted his coat she said he could not have it,

locked the door and left. D said he became angry and started kicking the cell door. Two officers came into his cell: 'One of grabbed me by my hair and pushed my face into the wall, and said that if I didn't stop playing up and relax and start cooperating they would kick me in.'

Case 2/14/W/A/POO

(See field-note extract 17 above at pp.167-8). When I spoke to him, the defendant was extremely upset, angry and somewhat confused. He said that the officers had not allowed him to stand up in the lift, and that one of them had stamped on his chest. Of the events in the custody room, he said 'They just didn't want to know what I had to say ... they just wanted a fight or something ... All I wanted was a solicitor. They got nasty when I didn't want to be searched - what for? I hadn't done anything.'

Case 1/54/B/A/POO

Def: 'I was pelted down the stairs - kept pushing me as I walked, I had to do a lot just to keep on my feet ...' The defendant was threatened with further violence if he did not keep his 'mouth shut'.

The defendant in case 2/15 said that he asked an officer who was passing his cell door for a cigarette: 'And he says "yea" like, you know "no problem". So when I put my hand through the grill he hits me, raps my fingers with a stick - hard like. There's no need for that ...'. The defendant in case 1/45 alleged that he had been kicked by officers once inside the charge room, and that they had intentionally banged his head against walls and door frames as they literally carried him through to the cell.

c. Violence suffered by defendants on past occasions.

A quarter of those interviewed (n = 20) said that they had been assaulted by the police whilst at the station on past occasions, or said that they had seen others assaulted.

Case 1/51/W/A/Dis.

Def: '... the police do hit yer, you know, in the interview room. They slap you about, with the tape on and everything ... I've had it done to me - I've had me hand broken.'

Case 2/20/W/A/Dis.

Def: Said he had been arrested for ABH. He was placed in a police van, which was followed to the station by a police car. The defendant said that he was looking out of the back window at the CID car, and one of the CID officers made a rude gesture. The defendant said that he made one back: 'When we got to the police station, when the van was reversing up to where the lift is - the van hadn't even fully reversed - and one of the CID men was round the back of the van, opened the door, and the first thing he did was to smack me - punch me right in the face ... he hit me quite a few times.'

Case 1/30/W/A/Dis.

Def: 'Once, two of them came round my cell and started whacking me round the head.'

Case 2/24/B/J/OAP

Def. said that on a previous occasion he had run away when the police attempted to arrest him. The police ran after him and he was caught. He said he did not put up a struggle once the officers had got hold of him, but it was clear that they were very angry. At the station he was processed as normal and placed in a cell. An hour later three officers came into his cell and assaulted him, shouting that he had to be taught to stop when told to do so.

Case 1/52/A/A/OAP

Defendant said he had seen people being mistreated in the custody room, especially juveniles: 'Alright, they might be stealing cars and that, and that's bad, but there's no reason to fist them up and treat them like they do.'

Case 1/76/A/J/Dis.

Def: Said that on a previous occasion he had been arrested together with his friend. He was placed in a cell, and when his friend was led past the cell the

> defendant shouted out his friend's name. 'One of the guys that arrested me, he comes into the cell and says, "You know that once you're in here you don't fucking talk to your friends". I said I didn't know, and he grabs me by my throat and starts slapping me in the face.'

iii. The Closed Nature of Station Proceedings

Holdaway, writing about police behaviour in the early 1980s, argued that intimidation of defendants was facilitated by the closed nature of the police station. The police were keen to ensure that events inside the station were observed by none but the police, and consequently refused access to prisoners or dramatically changed their behaviour when a solicitor or doctor arrived.[511]

Each time I went into the station I was allowed past the front counter only after the charge room had been notified of my arrival. It was clear to me during the course of my research that my presence in the charge room occasioned much surprise on the part of officers, not to mention some unease. Whilst most officers were quite friendly, one CO made his displeasure at my presence quite clear. After ignoring all my attempts at conversation and omitting me from the 'coffee round', he said to me, 'Listen. As far as I'm concerned you're just another problem in my custody area. You're pretty privileged to be in here, looking at what's going on. I mean it's not many people who can just walk into a police station and look.'

It has recently been argued by Dixon that, in view of the 'access' provisions of PACE, this notion of the station as closed territory needs to be re-thought.[512] The police can no longer refuse access to a solicitor,[513] are

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[511] Holdaway (1983) *op. cit.*, at pp.28-9.

[512] Dixon, D. (1992) 'Legal Regulation and Policing Practice' *Social and Legal Studies* (Vol.1;pp.515-541) at p.529.

[513] S58. The section does allow the police to delay access if certain conditions are satisfied.

under a duty to call out an 'appropriate adult' if they wish to interrogate a juvenile or a person suffering from mental deficiency,[514] and must contact an interpreter if they wish to interrogate a person who has a poor grasp of English.[515] '(I)ncreasing access by people who are not police officers to cells, charge rooms, and interrogation rooms', writes Dixon, has meant that 'control of these symbolically crucial spaces has been challenged.'[516]

Although it is true that solicitors, social workers, 'appropriate adults' and interpreters enter police territory with greater frequency than they did before PACE, it does not follow from this that they can 'challenge' police control and dominance of that territory. It is not only suspects who are commanded by the police: officers tell solicitors when to wait, where to wait, where to stand and when to sit down. The same goes for social workers, parents, friends and relatives who come to play the part of 'appropriate adults'. Solicitors are called when the police are ready to interrogate; if the police change their plans, the solicitor is told to come back later. McConville and Hodgson, in their study of custodial legal advice, discovered that many solicitors felt that they were as much captives at the station as the defendants they represented: 'You are in their control. They decide to let you in, lock you up, when you do, what do you do. It's their place - they are in control'; 'You are under quite a lot of pressure at the police station. It's human nature really; everyone wants to be liked, even defence solicitors'.[517]

'Challenge' is punished, regardless as to whether it emanates from defendants or solicitors.

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[514] Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C) para. 11.14.

[515] Code C Para. 13.2

[516] Dixon (1992) *op. cit.*, at p.529.

[517] McConville, M. and Hodgson, J. (1993) *Custodial Legal Advice and the Right to Silence* (RCCJ Study No. 16) at p.35.

Field-Note Extract 20 (Nasherford).

> CO to his PC jailer: 'One of the solicitors from Gutts and Co. asked me why some CID officers were walking towards the cell blocks. Cheeky bastard! I'm damned if I'm going to have solicitors walk in here and quiz me about things like that. I told him it was none of his business. He's getting no cooperation from me from now on - not until I get an apology.'

In fact, on one occasion it was observed that even the possibility that someone may have a critical perspective on what takes place inside the station was felt to be a cause for concern.

Field-Note Extract 21 (Grimeston).

> Shortly after a young social worker from Juvenile Justice had departed, a sergeant came up to the CO and said, 'That guy from Juvenile Justice whose just gone out? He's a trendy, left-wing fucking communist! He's the one I saw selling *Socialist Worker* up at Purity Street. He's a fucking commie!' The CO smiled, looked towards me, looked back at the sergeant and said, 'Well, I er.. I really don't feel that I'm in a position to pass comment on his political views at the moment.' The sergeant replied, 'All I'm saying is that we can't have scum like him looking after the welfare of our juveniles; I'm telling you that we've got to be wary of that guy.'

The role of outsiders at the station is defined by the police, and that role is to obey police directions and to fulfil their legal responsibilities in as unobtrusive a manner as possible. The police are so confident in the legitimacy of their absolute control over defendants that they believe that others present will share police notions of what constitutes normality in the charge room, and in that sense outsiders are an audience in front of whom the police demonstrate their ability to impose control when 'normality' is challenged by an 'unreasonable' defendant. Only this can explain why the police treated individuals in the way described above, despite it being common knowledge that I was investigating fairness of treatment. In fact, on some occasions the CO or other officers would turn to me after the defendant had been dragged off to the cell and make such remarks as, 'What can you do with these people, hey?', and, 'Now you know what we have to put up with!'

The extent to which legal advisers and social workers do adopt police ideas of normality and reasonableness as regards interaction in the cell block is difficult to assess. I spoke to only a handful of legal advisers, but one told me that the station was the best place to process defendants because the police were 'very good at sticking to PACE'. A juvenile worker to whom I spoke appeared never to have considered alternative ways in which juveniles could be processed.

Field-Note Extract 22 (Grimeston).

> Speaking to a juvenile worker, I asked whether in her view juveniles were treated fairly at the police station. She replied that, on the whole, the police were very fair and that the system worked well. As far as she could tell the police always called out parents or social workers, and a solicitor was always contacted if one had been requested. I asked whether she thought it fair or necessary that youngsters should be arrested, brought to the police station and locked up for long hours for such minor offences as shoplifting, small scale acts of criminal damage, and attempted deceptions. I suggested that perhaps those interested in the welfare of youngsters should encourage the police not to bring juveniles to the police station at all and proceed by way of summons. She replied, 'Yes, I suppose this is not a nice place to be really ... And they do keep them down here for an awful long time sometimes ... yes, I've never really thought about it like that before. But I mean, they've got a procedure and they stick to it. I suppose I can't say I've really thought about it.'

The final point to be made in relation to the closed nature of the station, and the pressure which this places on defendants, is that regardless of the stipulations of the law regarding access, ultimately the police can simply ignore the defendant's request for a solicitor. Examples of this will be given in the next chapter. Although the police very rarely resort to this illegal behaviour, what matters is that the defendant can be made to *believe* that he is cut off from the outside world.

Case 1/54/B/A/POO

Def: 'The bottom line is that they've got the power, yea? Like one of them said to me out there, "you keep your mouth shut in here, because we can do whatever we want to you in here". And that's all it boils down to.'

Case 1/68/W/A/Dis.

Def: 'It all depends on the copper ... but one thing I've learnt is that they can get away with whatever they want.'

iv. Search and Confinement

In its *Report*, the Royal Commission on Criminal Procedure had argued that the process of searching could be 'humiliating and disturbing', and it should therefore not be carried out on a routine basis.[518] The Commissioners also recommended that, except in exceptional circumstances, the suspect should not be deprived of his watch.[519] PACE confers on the CO a power to make a full record of the suspect's property,[520] and allows him to have the suspect searched for this purpose.[521]

I observed that all defendants, before being locked up, were routinely forced to hand over all items of property, including jewellery, watches, shoes and belts. The police argued that it was possible for an individual to harm himself with almost anything, and it was therefore vital that all suspects be searched and every item of their property be confiscated *as a matter of routine.* From the defendant's viewpoint the procedure operates simply to emphasise the extent of police authority. I observed some defendants requesting to be allowed to keep their watch, whilst others objected that the cell floors were filthy and they

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[518] 1981 Cmnd. 8092, Para. 3.117.

[519] *Ibid.*

[520] Section 54(1).

[521] Section 54(6).

should therefore be allowed to keep their shoes. The police routinely failed to explain to defendants the reasons for searching,[522] and in fact made it clear by their tone and mannerisms that the process was not open to negotiation. Not surprisingly, defendants found the procedure humiliating and resented it.

Case 1/59/W/A/Dis.

> Def: 'They said they had to take all my stuff, said that I had to take my wedding ring off. I wasn't having that - I told them there was no way they were having it, and they said they'd take off by force ... I mean it doesn't come off, so they couldn't take it, but if they'd tried I'd 'ave kicked off...'.

In fact, I was present when this defendant was searched, and the police did try to pull off the defendant's wedding ring. This was how it was discovered that it did not come off. The defendant, whilst he appeared most upset, certainly gave no indication that he was going to 'kick off'. His telling me that he would have put up a struggle represented an effort on his part to re-establish his sense of dignity and integrity now that he had left custody.

I asked defendants to describe how they felt when they were locked in the cell, and 72 of the 78 who were locked-up gave an answer. I graded the answers into three categories: 'intolerable', 'distressing' and 'indifferent'. One in 5 responses fell in the 'intolerable' category:

Case 2/27/W/A/Crim.Dam.

> The defendant said that he had in the past been confined in a mental institution, where he had spent long periods of time in solitary confinement. As a result of these experiences he found it very difficult to cope with being locked up in a confined space. 'Once I was in there and I was dying of thirst, I had to have some water and I rang the buzzer again and again but no one came. I had to drink the water out of the loo ....'.

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[522] PACE Section 54(5): 'Where anything is seized, the person from whom it is seized shall be told the reason for the seizure...'

Case 1/58/A/A/Dis.

Def: 'They just try and make you mad, they lock you up in a little cell for hours ... it's horrible!'

Case 1/69/W/A/OAP

Def: 'In that cell, it was desperate, I've never had a feeling like it in my life ... I've never been in one before, I've never in me life been in the trouble with the police before.'

Case 2/07/W/A/OAP

The defendant described confinement as a form of 'mental abuse', and said that the police never responded to the buzzer: 'I don't care which station, anywhere in the country, you're deprived of water. I'm an alcoholic, I start de-hydrating very quickly, but there's never any water...'

Some 57 percent of the defendants who replied found confinement in the cells to be 'distressing', and spoke of feeling 'trapped', 'powerless' and 'angry'. I observed that the police were very lax in responding to the buzzer (or, more precisely, the light on the cell-panel since the buzzer was in fact switched off in both stations), and suspects frequently complained that this was wrong. Many felt that the conditions in the cells were appalling.

Case 2/04/W/A/Dis.

Def: 'Mattress was filthy, I mean you wouldn't want to lie on it ... I thought I'd lean against the wall, but there was blood and er ... er, you know, like snot all over it.' The defendant said that he spent the eleven hours of his confinement either pacing the floor or sitting on it.

Case 2/24/B/J/OAP

Def: '... I mean look at their reception, look how clean that area is with all their 'phones and cameras and stuff. And look at the cells ... you're supposed to be innocent until proven guilty, but when you're put in the cell you're treated like you're guilty ... it's punishment, that's the way I see it ... just look at it, it's all scummy - someone's written all over the walls in their shit or something.'

Case 1/30/W/A/Dis.

> Def: 'I don't like it. Don't like it at all. You've got people screaming and banging the doors, 'cos people don't like being locked up, so they start banging and smashing the cell door. Then you hear the officers coming down the corridors to put the plastic cuffs on, and give people a smack and tell them to shut up. They won't mark your face - although some do, some just don't care...'

Case 1/61/B/A/Dis.

> Def: I do find it very distressing, a bit claustrophobic ... it's very filthy. I mean when I first came in there was a guy already in here lying on the bench, so I just had to take a blanket and make myself comfortable on the floor, and it's not nice, opening your eyes and starring at that (pointed to a corner of the cell which was extremely dirty and appeared to be stained with vomit). I can't see why, if you have to be confined while your down here, it has to be in these kind of conditions.'

A quarter of the defendants (24 percent) said they were not distressed by the experience. Some said this was because they were accustomed to it as a result of having served a prison sentence, whilst others explained that they had fallen asleep due to drink, drugs or fatigue.

v. A system of rewards and punishments

Violence and abuse are only the most obvious methods of securing control over defendants and emptying them of the courage to challenge and resist. In addition to this, defendants are locked into a system of rewards and punishments: rewards for the 'good as gold' and punishments for those who decide to be 'obnoxious' or whose 'obnoxious' status is permanent due to the fact that they have been less than deferential on previous occasions.

The police have power over such matters as whether or not to search the defendant's premises,[523] whether or not to strip search the defendant,[524]

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[523] PACE Section 18.

the speed with which to process the defendant, whether or not to charge, the choice of charge, whether or not to grant police bail[525] and whether or not to recommend a remand in custody when the defendant is presented before the magistrates. The police can, if they are so minded, refuse the defendant exercise, cigarettes, blankets, and food and drink.

Police discretion over some of these matters is by no means absolute, and varies according to the relevant legal provisions and the circumstances of each case. The argument is not that police discretion in these matters is too wide, but that to a large degree the limitations on police power are not appreciated by defendants. Many of those spoken to *believed* that the police would use their power over such matters as the duration of confinement, charge and bail in order to make matters worse for them unless they went along with police wishes.

a. Duration of confinement.

Brown, in his study for the Home Office, found the mean average period of detention without charge to be five hours and ten minutes.[526] Similarly, Bottomley *et al* found that the majority of suspects are released before the first six hour review.[527] Dixon has argued that it is important to emphasise these statistics, and has chastised the critics of PACE for suggesting that the maximum period of detention is the norm in practice.[528] These statistics and the arguments founded upon them miss the central point about confinement.

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[524] PACE Section 54.

[525] PACE Section 38.

[526] Brown, D. (1989) *Detention at the Police Station under PACE* (Home Office Research Study No.104), at p.61.

[527] Bottomley, K., Coleman, C., Dixon, D., Gill, M., and Wall, D. (1991) 'The detention of suspects in police custody', *British Journal Of Criminology* (Vol.31; pp.347-64).

[528] Dixon (1992) *op. cit.*, at p.529.

When brought to the station, the suspect does not know that the average time for which suspects are detained stands at five hours and ten minutes. Even if the suspect did know this, he has no way of knowing the actual time for which he will be held. The stress which suspects experience arises from *uncertainty* - they have no idea of the length of time for which they will be locked up.

Case 1/41/W/A/Dis.

> Def: 'The cell does your head in ... I think it's designed for that ... you sit there and every time you hear footsteps coming you think they're for you, that there's light at the end of the tunnel.'

What suspects are aware of, however, is that it is the police who decide how long they are detained for, and this is yet another factor which contributes to tightening the police grip.

Case 1/59/W/A/Dis.

> The defendant said that he did not want to be questioned. I asked him why, this being the case, he answered police questions: 'I mean the way I look at it, if you don't talk to 'em they aren't gonna let you go, they'll keep you here for the full 48 hours, or whatever it is now...'

The defendant in case 1/71 said that it was sometimes not worth denying the allegations of the police because one ended up spending a lot more time locked up in the cell. On a previous occasion he had denied the offence and had been told that he would be put back in the cell whilst further inquiries were carried out. He requested a second interview, promising that he would confess: 'I just wanted to get out. I got a thirty quid fine for it in the end.' The defendant in case 1/43 told of an occasion, some three or four years earlier, when the police had kept him in custody for three days because he had refused to admit to offences he had not committed.

The defendant in case 1/69 alleged that, on the present occasion, he was told he would continue to be held in detention until he admitted the offence.

b. Police bail.

The defendant in case 1/45 was arrested, along with three others, on suspicion of breaking into a laboratory and causing substantial damage to the equipment kept therein. The charge was framed as 'aggravated burglary'. The defendant said that the interrogating officers came to his cell and told him that he was being refused bail because, unlike his accomplices who had been granted bail, he had admitted only to the burglary. He was told that if he confessed to the criminal damage, the grant of bail would be considered. The defendant in case 1/62 alleged that he had been threatened with refusal of bail during the interrogation.

The defendant in case 1/49 was arrested for alleged assault on his girlfriend. He was refused bail on the ground that he had given the complainant's place of residence as his address. The defendant said that this reason was simply a front. Had the police told him that he could not go back to that address, he could have assured them that there were other addresses to which he could return. The true reason for the withholding of bail, he told me, was his refusal to answer police questions.[529]

In most cases the police do not say anything about bail at all. Defendants already 'know', from past personal experience or from what they have heard from others, that non-cooperation entails risking the refusal of bail. The defendant in case 2/02 said that he had in the past refused to answer questions and bail had been withheld, whilst the defendant in case 1/34 told me that it was important 'to go along with what they say 'cos otherwise they won't give you bail.' It is immaterial whether or not the police use bail as a tactical device to put pressure on suspects to cooperate with police wishes. This pressure is placed

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[529] Yorkshire T.V have in fact filmed the police threatening to refuse bail unless the defendant confesses (see McConville, M. (1992) 'Video-taping interrogations: police behaviour on and off camera', *Crim. LR* pp.532-48).

on defendants simply by their knowledge that the police have some degree of discretion over the issue.

c. Charges and remand.

Two of those spoken to said that they had, on previous occasions, been punished for non-cooperation by being remanded in custody to await trial. The first of these defendants said that the police had asked the magistrates for a remand solely because he had refused to answer questions. The second said that he had escaped from police custody, and when the police caught him they charged him with a string of burglaries which they acknowledged he had not committed. The police asked for a remand in custody, and when the case came to trial, three months later, the prosecution decided to offer no evidence.

The defendant in case 1/50 said that the police had, on the present occasion, told him that the court would remand him in custody unless he named his alleged accomplice.

The defendant in case 2/20 said that the only reason he had been charged was because he had refused to tell the police the name of his friend, whom the police knew was the real culprit. The defendant in case 1/65 said that he should have been charged with theft rather than burglary, and that the only reason he had been charged with the latter was because he had refused to have a list of offences taken into consideration. The defendant in case 2/05 said that he had refused to answer police questions, and the police had charged him with an offence which they knew he had not committed: 'They told me that they knew I hadn't done the first one, but said that someone's gotta get it and it may as well be you.'

d. Search of premises.

Five of the defendants to whom I spoke complained that the police had searched their premises without giving any reason for the search. Two of the five, arrested for shoplifting, had refused to admit the offence during interrogation and had been repeatedly accused of lying. They alleged that the search was carried out as a punishment for not confessing. The remaining three alleged that the police searched their premises as a matter of routine each time they were arrested. I was informed by the police in relation to each of these three defendants that they were 'obnoxious', and it became clear that they were regularly arrested. On this occasion, one was arrested for driving whilst disqualified; the second, an unemployed heroin addict, was arrested on suspicion of knowingly attempting to pass a counterfeit £50 note, and the third was arrested for shoplifting.

Case 1/30/W/A/Dis.

> Def: 'They went round and searched my house, which they do every time they arrest you ... and this stresses people out, you know, it stresses out the people who you're living with ... I mean the police have no respect, they have no respect for your stuff, no respect for the other people in the house, no respect for any children that may be in the house.'

Case 1/59/W/A/Dis.

> Def: 'One of the police officers said they're going out to search my house. I don't think that's right, I don't think that's right at all, 'cos I wasn't arrested from my house, I was arrested outside on the street outside a shop (defendant had been arrested for shoplifting). I don't see why they have to go back and search through my personal belongings ... The copper said to me that they were gonna search my house, and that if they found something I'd be nicked for that and all.'

e. Strip-searching and deprivation of material benefits.

The Codes of Practice empower the CO to order the defendant's clothes to be removed if he 'considers this to be necessary to remove an article which the detained person would not be allowed to keep.'[530] Forcing a recalcitrant defendant to remove all his clothes in front of a number of PC's is possibly the ultimate humiliation which the police can inflict. It is made worse by the fact that in all probability the forcible removal of clothes takes place in front of the arresting officer/s with whom the defendant has possibly had a confrontation at the point of arrest. Nothing could be more effective in driving home to the defendant the completeness of his defeat.

Case 1/62/B/A/Dis.

> Def: 'If I decide not to do what they tell me at the station, they way they do it is they strip-search me: they'll just take all my clothes off ... you just get slapped around.'[531]

This was the only defendant who mentioned strip-searching as a punishment he had been made to endure.[532] During my period of observation, I saw the police utilise the power on one occasion.

Field-Note Extract 23 (Grimeston).

> A WPC walked into the charge room and announced, 'You'll be getting one that's kicking off soon'. The desk was cleared, and the CO and jailer took a more formal stance. The defendant was brought in hand-cuffed, held by two PCs, who informed the CO that the defendant was arrested for causing a breach of the peace

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[530] Annex A (para. 6) of Code C.

[531] An example of the police using strip-searching as a punishment is also provided by McConville (1992) *op. cit.*, at p.544.

[532] There are no official statistics as to the incidence of strip searches. Brown found that such searches took place in less than 1 percent of the cases in his sample (59 out of 5,500) - see Brown (1989) *op. cit.*, at p.53.

in the probation office. The defendant was drunk; he was weeping and appeared resentful. He was pushed down onto a bench, and shouted, 'Get off, there's no need to push, I know how to sit down'. The jailer shouted sternly, 'Just shut up and do as you are told!'. One of the arresting officers was told to bring the defendant up to the desk. The defendant was ordered by the arresting officer to stand on the white line.

CO (shouted): 'You know why you are in here? You know why you have been arrested?'

Def: 'No, I don't actually, I don't know why I'm here.'

Jailer: 'You are in here for occasioning a breach of the peace!!'

Def: 'I didn't cause no breach of the peace.'

Jailer: 'That's not for you, but for us to decide, do you understand? And you will stay here until we decide that the breach is unlikely to occur again. And don't talk to me in such a familiar way!'

The defendant was asked for his address and refused. He was immediately turned on by both the CO and the jailer.

Jailer: 'When I ask a question, you give a straight answer!'

CO: 'If you don't start acting properly, you'll go in a cell while we find out the address!'

The CO then turned to the arresting officer and said, 'I believe Constable that you have a request to make', to which the arresting officer replied, 'Yes, I would like a strip search to be made of the suspect.'

Def: 'You can't do that...what you want to do that for.'

CO: 'We know that you have used drugs in the past, and we want to make sure there are none on you now.'

Def: 'What makes you sus.. believe I've got drugs on me now.'

Jailer: 'Listen Kevin, stop being a knob! If you don't stop making a fool of yourself, we'll do it forcefully, we have that power and we'll use it. So just do yourself a favour.'

The defendant was strip-searched. Nothing was found.

According to some suspects, the police will on occasions refuse material benefits to those whom they dislike. One person said that he had been refused food and drink on previous occasions, and five respondents said that they had been deprived of material benefits on the present occasion. The defendant in case 1/53 said that when he requested water, the arresting officers told him that they 'might think about it' if he started telling the truth.[533] The defendant in case 1/55 complained that the custody staff refused to allow him to go out into the yard to smoke a cigarette. This defendant was refused bail and I interviewed him in his cell. When I asked the jailer to take me to the cell, I was told, 'You don't want to speak to him, Sat, he's just an obnoxious shit.'

Two defendants said that they had been refused a blanket, one of them alleging that it was because he had refused to provide his details. The defendant in case 1/76 said that the interrogating officers had put pressure on him, both in and outside the interview room, to admit that he was in possession of a stolen passport. He said he refused to make such an admission, and that as a consequence the police refused him a blanket, and ignored his requests for tea and food.

Reading material was available at Grimeston, but its availability was dependent on whether the police viewed the defendant in question as 'obnoxious' or 'good as gold'. So the defendant in case 1/73, whom I was informed was

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[533] This incident took place in my presence, and was also witnessed by the CO.

'obnoxious', told me that when he asked for something to read so as to make confinement more bearable, the jailer told him, 'We haven't got time'.

III. POLICE CONTROL OVER THE DEFENDANT'S 'STORY'

The refusal of the legislature to lay precise guidelines on interrogative tactics[534] has meant that the police continue to utilise strategies which have the aim of placing immense pressure on defendants to confess. In this section I will draw upon a number of research studies, as well as what defendants told me during my field-work, to provide an account of the types of persuasive tactics and linguistic strategies which the police use to mould and structure the narrative of events which defendants are forced to provide.

In order to fully appreciate the impact of the persuasive tactics outlined below, it is important to view them in the context of:

a. The psychological advantages enjoyed by the police.

These were discussed at length in Chapter Four.[535] In his research for the Royal Commission On Criminal Procedure, Irving found that the police enhance situational pressures by following the advice found in classic interrogation manuals (e.g dress, layout of interrogation room, tone of voice etc.). He also found that nearly half the suspects in his sample were suffering from mental abnormalities related to drink, drugs or fear. These findings are supported by more recent studies.

McConville and Hodgson found that all interrogation rooms lacked aural or visual stimuli, the suspect's chair was often fixed to the floor, and he was confronted by the dominant interviewer whilst the secondary interviewer stood

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534 *Supra.*, discussion at p.88.

535 *Supra.*, at pp.78-81.

in a position where he could observe the suspect and have eye contact with his colleague. The interviewers could move around, and often moved in on the suspect.[536]

Gudjonsson *et al* found that despite greater reluctance on the part of the police to interrogate individuals who are under the influence of drink or drugs, 35 percent of the suspects in their sample were not in a normal mental state due to extreme distress, mental disorder or the influence of drugs.[537]

The majority (56 percent) of defendants to whom I spoke described the atmosphere in the interrogation room as 'tense'.

b. The treatment of defendants prior to interrogation.

The procedures which are utilised to take control over suspects when they are in the charge room operate to infuse them with a sense of inevitable defeat. The majority of defendants lack the mental fortitude to resist police endeavours to take control of their decision-making, and the few that do put up a challenge are quickly reminded of its futility. Interrogation should not be viewed as an event separate from what takes place in the charge room, because the defendant will carry his adjusted sense of self into the interview room. Interrogation should instead be viewed as an extension of the process of manipulation which begins as soon as the suspect enters the station.

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[536] (1993) *op. cit.*, at p.168.

[537] This assessment was made by trained psychologists after a brief clinical interview (see Gudjonsson, G., Clare, I., Rutter, S. and Pearce, J. (1993) *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (RCCJ Study No. 12), at p.15.

c. Police control of information.

It would be very rare for a suspect to know precisely which legal charge he will face, and in some cases he may even be ignorant of the reason for his arrest. If the suspect does know the precise legal offence which the police intend to charge him with, he may have no idea as to what evidence, if any, the police have against him.

In his study of police interviews with juveniles, Evans found that in over 38 percent of cases defendants were at 'no point ... told precisely why they were being interviewed or why they had been arrested.'[538] He states that a 'major purpose of some interviews appears to be not only to obtain a confession but also to decide what offence the juvenile should be charged with.'[539] In their study of custodial legal advice, McConville and Hodgson found that the police were very keen to keep the defendant and his adviser in the dark about what information they had, thereby seeking to become 'dominant persuaders'. The withholding of information, and its gradual release, is a strategy used by the police to unsettle uncooperative defendants and to emphasise their dominance over the proceedings.[540]

In the present study, 66 of the 80 respondents (83 percent) were interrogated by the police. Ten (15 percent) of these complained that they were given inadequate information about the offence for which they had been arrested, with some alleging that they were not even told of the general offence category until the questioning actually began.

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[538] Evans, R. (1993) *The Conduct of Police Interviews with Juveniles* (RCCJ Study No. 8), at p.28.

[539] *Ibid.*, at p.27.

[540] (1993) *op. cit.*, at p.57. See also Holdaway (1983) *opt cit.*, at pp.104-5.

Case 2/05/B/A/Dis.

Def: 'When you get arrested, most of the time you're never quite sure what you're nicked for. They just keep you down in the cells for hours and hours, and once you've been there for about eight hours someone comes down and tells you.'

Case 1/44/B/A/OAP

Def.(arrested for theft of a mountain bike): 'At first it was alright. I thought they were going to talk to me about the push-bike, because until then they'd kept on about the push-bike. When we got to the interview they just turned to this burglary thing. They said my name on the tape and then said "robbery". My solicitor said, "I thought this was about some bike"...'

Case 1/52/A/A/OAP

Def. was arrested for ABH. The defendant said that all the police told him was that someone had made a complaint against him. He said that the police began to ask him questions about the offence in the police car, and when he attempted to ask questions himself so as to get a fuller picture of the circumstances, the police told him, 'Shut up! You answer our questions, we are not here to answer yours.'

The father of one juvenile defendant said that he was amazed that the police would use a strategy of 'information starvation'. The father's occupation as an interviewer for the Inland Revenue alerted him to the full consequences of what the police were attempting to do, and helped him decide how to deal with the situation.

Case 2/19/W/J/Dis.

Father of defendant: 'We decided together with the solicitor that the best thing to do was to say nothing in the interview because the police were not giving us any information at all about what they knew and what they intended to do. So we thought that if we said nothing they would be forced to tell us something more. I mean they were asking silly questions, like, 'When was the cheque book stolen?' I mean if you don't know it was stolen, and they are not prepared to give you the time then you can't really answer that, can you? ... They had arrested him on one thing, possession of a stolen cheque book, but really they were trying to get him all caught up in another charge, breaking into and stealing the cheque book from

a car or attempted theft of a car. That's why they weren't giving any information away ... They wanted to suggest that they had more information than they really had ... Not a fair interview ... it's their interview and its all one sided ... Of-course, the problem (with not saying anything in the first interview) is that someone listening to the tape will think that you're making some story up, that's why you didn't say anything the first time round. When in fact the reason is that there's no point in saying anything unless you know what it is that's going on.'

i. Type and Frequency of Persuasive Tactics

In his research study for the Royal Commission on Criminal Procedure, Irving identified five main types of tactic used by the police to persuade suspects to confess.[541] The study was carried out in 1979, and he found that use of these tactics was widespread, reporting that one or more of these tactics was used in all but 16 of the interrogations he observed.

As part of an exercise designed to assess the extent to which the police were complying with the provisions of PACE, Irving and Mckenzie observed interrogations in 1986 and 1987 to measure the frequency with which the police used the above five persuasive tactics. They compared their findings with those of Irving's earlier study and, despite the fact that PACE had not sought in anyway to discourage most of the tactics described above, found that there had been 'dramatic and unexpected' changes in interrogative practices.[542] On the basis of their 1986 findings, the authors concluded that the introduction of contemporaneous note-taking had 'more or less eliminated the use of persuasive interrogation tactics',[543] and that the police no longer saw interrogation

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[541] Irving, B. (1981) *Police Interrogation: A Case Study of Current Practice* (RCCP Study No. 2). These tactics are discussed above at pp.81-5.

[542] Irving, B. and McKenzie, I. (1989) *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984*, at p.103.

[543] *Ibid.*, at p.118.

simply as method of securing confessions.[544] Although the use of persuasive tactics had risen slightly by 1987 from 1986 levels, the authors concluded that the Act had made a significant impact in reducing the pressures placed on defendants.[545]

These conclusions have since been disputed by Sanders *et al* and McConville and Hodgson. Sanders *et al* state that the primary objective of the police in most of the interrogations they observed was to persuade the suspect to confess. The authors argue that this is the reason why officers are hostile towards suspects who remain silent, and why the police make efforts to circumvent the presence of solicitors by discouraging requests for legal advice.[546]

McConville and Hodgson, in a research study carried out in 1991-92, measured the frequency with which the police resorted to the five types of persuasive tactic identified by Irving. They concluded that PACE has not prevented the police from using their discretion over such matters as bail and charge to manipulate the suspect's decision-making. Although the Codes of Practice ban this type of strategy,[547] the authors found that it was still being used in 11 percent of all cases, half the rate measured in 1979.[548] They write that in some cases the police were blatant in their violation of the codes, bargaining openly with solicitors over matters such bail and charge.[549] Some of the

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[544] *Ibid.*, at p.98 and p.194.

[545] Irving, B. and McKenzie, I. (1989) 'Interrogating in a legal framework', in R. Morgan and D. Smith (eds.) *Coming to Terms with Policing*.

[546] Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (Lord Chancellors Department), at p.134.

[547] Para. 11.3, Code C.

[548] Table 7.2, at p.130.

[549] *Ibid.*, at p.121.

officers spoken to argued that this type of rule-breaking is justifiable because it does not harm the interests of the defendant.

Field-Note Extract 24 (Nasherford).

> CID officer: 'Although most of the time things are done to the book, sometimes there are cases where it's possible to negotiate with the solicitor. I mean there's nothing wrong with that, it's just that one can sometimes reach a solution which is favourable to all. I mean the suspect has his solicitor and he's obviously doing all he can for his client.

Irving and McKenzie, in their 1987 survey, reported that the police attempted to influence suspects' assessments of the consequences of cooperation/non cooperation in 15 percent of cases. McConville and Hodgson observed such attempts in 27 percent of cases.[550] They also discovered a 7 percent overall increase from 1979 in the use of the 'no decision to make' strategy. The authors added two further categories to Irving's five: police use of accusations and abuse, and the strategy of telling the suspect that the interrogation provides the best opportunity for explanation. The first aims to frighten and intimidate the suspect into confessing, whilst the latter implies that unless the suspect is willing to talk immediately, he will lose some unspecified benefit.[551] The authors observed that over one third of suspects were subjected to abuse and accusation, and 16 percent were told that the interrogation provided the most appropriate opportunity to explain themselves.[552]

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[550] Table 7.2, at p.130.

[551] *Ibid.*, at pp.128-9.

[552] The authors make three important methodological points about these statistics. Firstly, the sample was composed solely of those interrogations in which a solicitor was present. Secondly, the figures include only overt use of these tactics, and take no account of allegations made by suspects about what was said to them outside the formal interrogation. Finally, the authors felt that there was a 'researcher effect', in that the police minimised their use of such tactics (at p.51).

The findings of McConville and Hodgson are supported by those of Evans, who has recently carried out a study into police interviews with juveniles. He found that although the vast majority of juveniles (76.8 per cent) confessed immediately, the police nonetheless used persuasive tactics in 67 per cent of cases in his sample.[553] Twenty-eight percent of defendants were told that there was no decision to be made, and in 7 percent of cases 'more coercive tactics were used including the threat of further detention',[554] or telling suspects that 'owning up is a way of avoiding the police coming around to arrest and interview them again'.[555] Evans suggests that use of such techniques against juveniles, who commit relatively minor offences, probably means that they are routinely used against adults.[556]

ii. The Coerced-Passive Confessor

The underlying assumption behind police questioning and confessions is that the police 'discover' facts through the use of skilful interrogative tactics, and defendants 'make' or 'offer' confessions. McConville *et al* argue that once the true interactive nature of questioning is understood, it becomes clear that 'these "admissions" are not volunteered by the suspect and nor are they the work of the suspect; they are very directly created by the form and style of police questioning'.[557] These authors have put forward the argument that, in addition to the persuasive tactics outlined above, the police routinely utilise question formats designed to 'increase the likelihood of a confession consistent with the police desired account and irrespective of true detail.'[558]

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[553] Evans (1993) *op. cit.*, at p.32.

[554] *Ibid.*, at p.33.

[555] *Ibid.*, at p.34.

[556] *Ibid.*, at p.7.

[557] (1991) *op. cit.*, p.67.

[558] *Ibid.*, at p.68.

They identify four types of question format which they argue can lead to suspects adopting the 'confession form' without understanding the nature of what has been accepted. Suspects in this situation may either 'internalize' the confession by simply taking on trust the police assertion that they have committed an offence, or 'simply adopt words which amount to a confession without even appreciating that they have made an admission.'[559]

a. Leading questions - these seek to persuade the suspect to give a particular answer by foreclosing other possible answers (e.g 'Is it not true to say that you knew the book did not belong to you?')

b. Statement question - this is a statement which is disguised as a question. The usual format is for the police to state what happened and defy the suspect to disagree with it (e.g 'You took the knife to scare him but when he tried to hit you, you panicked, lunged forward and the knife went into him, didn't it?')

c. Legal-Closure questions - whilst they appear merely to invite the suspect to provide information, in reality they seek to force the defendant to adopt a word which will take his actions into a legally significant category. In the vast majority of criminal cases, a conviction can only be secured if the prosecution can prove that the defendant possessed a particular state of mind at the time he committed the wrongful act. Unknown to many defendants, words such as 'recklessly', 'intentionally' and 'knowingly' are extremely significant in this regard.

d. Imperfect syllogistic questions - the suspect is persuaded to accept the truth of an unarguable proposition. Once he has accepted it, he is persuaded to accept the truth of a disputable or erroneous proposition by being told that it follows logically from the acceptance of the first (unarguable) proposition. An example

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559 *Ibid.*

of this type of question is provided by Evans in his study of police interviews with juveniles:

> WPC: 'So, if they were property to (sic) the school, why did you take them? Why did you take them, then?'
>
> Sus: 'To play with them.'
>
> WPC: 'Do you know the difference between right and wrong?'
>
> Sus: 'yes.'
>
> WPC: 'And is it right or wrong to take property that belongs to somebody else?'
>
> Sus: 'Wrong.'
>
> WPC: 'So, you took property belonging to somebody else which amounts to stealing, that's right, isn't it?'
>
> Sus: 'Yes'.[560]

McConville *et al* go on to argue that these types of questions are 'almost never followed by "neutral" questioning designed to elicit the suspect's own story and, indeed, are used in a context in which there are explicit efforts to suppress any attempt by the suspect to introduce exculpatory material into the interview.'[561] McConville and Hodgson argue that these question forms are associated with unreliable confessions, and yet the police have systematic recourse to them.[562] Thus they conclude:

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[560] Evans (1993) *op. cit.*, at p.37.

[561] (1991) *op. cit.*, at p.70.

[562] (1993) *op. cit.*, at p.140.

> 'Our examination of police strategies and question forms suggests, in comparison with the findings of Irving (1980) and Irving and McKenzie (1989), a shift towards a more confrontational interviewing style; and a greater emphasis upon obtaining confessions (as opposed to information or evidence) through getting suspects to adopt police formulations or agree police accounts.'[563]

Evans has claimed that his findings challenge the contention of McConville *et al* and McConville and Hodgson that the police systematically resort to problematic question formats. He reports that leading questions were used in 19.5 percent of cases, and legal closure questions in 12.2 percent.[564] These figures, if accurate, demonstrate that questions of this type are used in a significant number of cases. The important point, however, is that these percentage figures are in fact misleading. This is because Evans found that in over 76 percent of cases the suspect confessed immediately, thus leaving the police with no reason to resort to problematic question formats. Therefore, on Evans' own figures, the question types causing concern were used in almost *all* the remaining cases.

The final point to be made in relation to Evans' research is that he himself recognises that in those interviews where the suspect confessed immediately, 'there must have been some discussion between the suspect and the interviewing or arresting officer prior to the formal interview'.[565] This leaves open the possibility that many of the question forms about which McConville and Hodgson have voiced concern were used before the formal interviews monitored by Evans, an inference which is made more compelling by the point made by Evans that an observer would not know by the nature of police questions just what offence the suspect was expected to confess to committing.

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563 *Ibid.*

564 (1993) *op. cit.*, at p.36.

565 *Ibid.*, at p.28.

Disturbing cases of false confessions continue to come to light, and give support to the argument that PACE has not encouraged the police to adopt more ethical interviewing techniques. In 1988 the newspapers gave much coverage to the case of Colin Pitchfork as the first rapist and murderer to be trapped and convicted as a result of genetic finger-printing.[566] Little mention was made of the fact that the police had earlier arrested and interrogated Richard Buckland, who had confessed to the murder and rape of one of the victims. Proceedings against him were dropped only when forensic evidence showed that he could not have been the culprit. Asked on Central Television's *Central Weekend* why he had confessed, he replied that the police kept going on and on at him and in the end he just gave in.

iii. Fairness of Interrogation: Findings of the Present Study

The present study can make only a small contribution to the debate about the nature of police interrogation. I did not observe any interrogations, and neither did I have access to the tape-recordings. I did, however, speak with some police officers about the importance and methods of interviewing, and also asked all those who were interrogated what the police said to them in the interview.

a. Police views.

There can be no doubt that in most cases the police view interrogation as of central importance. Police officers made it clear to me that the primary reason for bringing suspects to the station was so that they could be interviewed. I was told that the interview is 'where all paths lead', the 'gritty bit' and, 'it's the evidence that matters, and the interview is where we get the evidence'. As already pointed out, more than 80 percent (n = 66) of the individuals in my sample were interrogated.

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[566] *The Times* 23 January 1988, p.3.

Some officers told me that the interview was an opportunity for the suspect to explain himself, and one even expressed it as a 'right' of the suspect.

Field-Note Extract 25 (Grimeston).

> Res: Tell me, why is that you interview even when, on your own admission, there is enough evidence to get a conviction. I mean sometimes the case is clear cut, like a shop-lifting case where you've more or less got the man doing it on video, and you still interview. Why is that?
>
> Officer: Well it's in PACE isn't it. The Act says that the suspect has a right to be interviewed. I mean its only fair to let them give their explanation as soon as possible, that way they can't deny that they were given an opportunity to tell their side of the story.

However, most of the officers spoken to did not describe the interrogation as simply an opportunity for suspects to put forward their account. Suspects were interviewed so that the police could secure the evidence needed for a prosecution.

Field-Note Extract 26 (Grimeston).

> Sergeant: 'It's not an interview, lets face it. I mean most people don't want to be in there, it's not pleasant for them. We know what we want out of it. It's an interrogation, that's what it is, we just don't use the word because it doesn't sound nice.'

The most illuminating account of police attitudes towards interrogation was provided by a group of CID officers who formed part of the 'prisoner reception unit' at Grimeston. In order to ensure that uniformed officers spent the majority of their time on patrol, the station worked a system whereby most suspects were interrogated by officers other than the arresting officer/s.

Field-Note Extract 27 (Grimeston).

> DC 1: 'We're what you might call experts. We've been sent on courses that the others haven't been to learn the skills of interviewing .... we are taught to look out

for signs of lying, like sweating, fidgeting, pulsating nerve... These are all very important, you can tell when someone's lying.'[567]

Res: 'So how do you go about planning the interview? I mean do you talk to the arresting officers, do they give you a file or what?'

DC 2: 'Well, I mean we will have a chat with the officer or officers in the case, ask them what they saw, what info or evidence they've got, then we will have a chat amongst ourselves and then we go in.'

Res: 'And what do you look for in the interview? How do you go about structuring the interview?'

DC 1: 'Well, we know that 99.9% of the people brought in here are guilty. Most policemen, because of their own personal experience, will tell you this. In any case, we certainly question on the basis that the person sitting in front of us is guilty - that's what we're paid to do, I mean we can't assume they're innocent, we'd never get the job done. And then of course it's just a matter of getting all the ingredients of the offence: I mean, with theft you know you've got to get appropriating property, secondly, its got to belong to another, and thirdly that the suspect intended dishonestly to permanently deprive that other of it.'

With regard to the purpose of conducting interrogations, it is interesting to note that of the 14 individuals who were not interrogated, 11 had been arrested for public order offences. When I spoke to these 11 persons, they complained that they had not been given an opportunity to put forward their account of the events.

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[567] The importance which the police attach to these 'signs of lying' is clear from the manuals used in police training courses (see Dyer, C. 'Detectives taught to read suspect's body language', *The Guardian* 19 June 1990, at p.4). The evidence suggests that it is in fact extremely dangerous to rely on this type of 'popular psychology' (see Kaye, T. (1991) *Unsafe and Unsatisfactory*, and Moston, S. and Moston, T. (1991) 'Challenging the obvious?: Suspect behaviour during police questioning', Paper presented at British psychological Society Annual Conference, cited in McConville (1992) *op. cit.*).

Case 2/10/W/A/POO

Def: 'I never got a chance to say anything ... I would have preferred it, and maybe all this time, expense, aggravation and bureaucracy could have been avoided.'

Case 2/13/W/A/POO

Def: 'I didn't ask for a solicitor first, but when I found I was going to be charged without an interview I asked for my solicitor so that I could tell my side of the story ....'

Public order offences very rarely raise complex issues of intent or recklessness, simply requiring the prosecution to show, for example, that the defendant was behaving in a threatening manner, or used foul and offensive language in a public place. Interrogation in these cases would serve no purpose, other than to allow the defendant to object that his behaviour had not been unreasonable, or in fact had been provoked by the arresting officers. Non-interrogation in these cases lends support to the argument that the police do not question in order to bring out the full circumstances of an arrest, but to persuade defendants into accepting the police version of 'what happened'.

b. Suspects' views.

I asked all those who were interrogated whether they felt that the officers who questioned them had given them an adequate opportunity to explain matters, and to tell their side of the story. The responses were almost evenly divided: 33 of the 64 who replied said they had been given such an opportunity, but 31 stated that the interview did not provide a forum in which they could adequately put forward their version of events.

Some of those who fell in the latter category explained that although they were given an opportunity to talk, they felt that the officers were not listening to them, or were not believing them.

Case 1/50/W/A/Dis.

Def: 'I was trying to tell my story and they were just kind of letting me know that they didn't believe me ... got me really frustrated.'

Case 1/66/W/A/Drugs

Def: 'There was an opportunity to explain, but they weren't listening, they weren't interested. When I spoke they would just switch off.'

Case 1/77/W/A/Dis.

Def: 'They're not interested in what I've got to say, only what they want to hear.'

Others complained that the police made it very difficult to explain.

Case 2/52/A/A/OAP

Def; 'They kept saying, "we're not interested in this", or, "We don't care about this, what we want to know is this"....'

Case 1/61/B/A/Dis.

Def: 'You are trying to explain to them what your problems were, what was going through your mind at time, and they will turn around and say, "Oh, come on! Do you really expect us to believe that? I mean you knew X and Y, how could you really be thinking Z?" It all gets a bit much after a while ... they gave you a fair opportunity to say what you wanted to say, but then they would want to summarise what you had said - you know what I mean?'

Some of the 31 stated that the police made it so difficult to give an explanation, that there was no point in even trying.

Case 2/05/B/A/Dis.

Def: 'It's all too one sided. You're not given any information, you're not listened to, they've already decided, and if they're going to give it to you you're gonna get it no matter what.'

Case 1/62/B/A/Dis.

Def: 'There's no point in saying nothing 'cos they'll just twist it all round.'

Finally, some complained that they were simply given no opportunity at all to put forward their account.

Case 1/39/W/A/Crim. Dam.

Def: 'I couldn't get a word in edgeways.'

Case 1/63/A/A/Crim. Dam.

Def: 'They wouldn't let me explain; I wanted to speak and he wouldn't let me speak.'

I also attempted to catalogue the types of pressures to which suspects were exposed during questioning. This exercise was done solely on the basis of what defendants told me when I asked them what the police had said to them during questioning. In total, 35 (53 percent) of those questioned complained about one or more of the tactics outlined below.

Use of police discretion (n = 3).

As discussed above, one individual alleged that the police threatened him with refusal of bail during the interrogation, whilst another said that the police told him he would not get any water until he started telling the truth. A third complained that the police told him that he would stay locked up until he confessed.

Case 1/69/W/A/OAP

Def: Said he admitted everything 'because I was told that the more I argued, the more I tried to put my point across, the longer I'd be here ...'

Expert knowledge (n = 1).

One person said he was informed during the interrogation that unless he named his alleged accomplice the magistrates would remand him in custody.

Case 1/50/W/A/Dis.

Def: 'I'm not happy about the way they tried to force me to grass someone else up ... they were trying to tell me that because I refuse to grass someone up that I wasn't gonna get bail, that I was gonna go on remand.'

No decision to make (n = 7; 11 percent).

Seven of those interrogated stated that they were told that their guilt was obvious, and that the police possessed evidence which would be sufficient to prove that guilt in court.

Case 2/07/W/J/Crim. Dam.

Def: 'They just kept saying that they knew it was us, that they had all the evidence and that I may as well make life easy for myself and tell them.'

Case 1/39/W/A/Dis.

The defendant was told that he had been seen running away from a garage which had been burgled and damaged: 'They told me that that was enough evidence to get me done on...'

Case 1/70/W/A/Dis.

Def: 'They told me that if I denied it that they would just get these people in who had seen me and they would say, "yea, that's him" ... they were just trying to scare me into saying summat.'

Abuse and accusation (n = 11; 16.6 percent).

Defendants falling in this category said that the police shouted at them, or called them 'liars' or repeatedly accused them of being the culprit.

Case 1/71/W/A/Dis.

Def: 'They just kept telling me I was a liar, that I was lying ... it was out of order, 'cos they didn't know whether I was lying or not, but they said I was anyway.'

Case 1/32/W/A/TWOC

Def: 'They kept telling me that I was lying, that I was a liar ... he kept saying, "If it wasn't you, who was it?".'

Case 2/24/B/J/OAP

Def: 'They just kept saying, "Go on, we know you did it, why don't you tell us!" They were saying I was looking guilty 'cos I wasn't talking, but I mean its my right not to say nothing.'

Case 1/63/A/A/Crim. Dam.

Def: 'They were aggressive, not physically, but just the way they spoke ... they were directly saying "Come on, you done it, tell us"...'

Attempted to intimidate by tone of voice/ mannerism (n = 5).

Case 2/08/W/A/OAP

Def: 'Just kept staring at me - they were going for the sweet and sour routine, just the way they spoke to me, looked at me ...'

Case 2/06/A/A/Dis.

Def: 'They were trying to get me to change my story, just the way they were looking at me, you know?

Case 1/62/B/A/Dis.

Def: 'It was the way they were looking at me, their expressions yea? They were just saying that they could be the same as me, that I wouldn't win.'

Oppressive questioning (n = 13; 19.6 percent).

These were individuals who explicitly stated that the questioning placed them under extreme mental pressure. Some were repeatedly told to give the names of friends, whilst others were pressurised to TIC offences. Most simply complained that the questioning was extremely difficult to cope with, not least of all because the police attempted to put 'trick' questions.

Case 2/07/W/A/OAP

Def: 'I was bombarded with questions from two officers, it's the same old police trick, one asks you questions and the other asks you a different question - I mean which question you supposed to answer? ... I felt they were trying to push me into a situation, which happens to a lot of people when you're frightened and you're bombarded with questions from two people, in that situation where you're scared you just think, well just say "yes", just to please the guy, anything to stop the pressure...'

Case 1/39/W/A/Crim. Dam.

Def: 'They were doing my head in, they really were doing my head in, asking me silly questions, asking me things which had nothing to do with anything.' The defendant said that the police attempted to twist everything he said. So, for example, he tried to explain that he was on a conditional discharge and therefore the last thing he would do was to go and smash up someone's premises: 'So I said that this kind of thing, I'd probably have done it two years ago, but not now, no way. The geeza then turns round and says, "Oh, so you would do it?" ... They were trying to make me come out with things, trying to sort of make me slip up or something.'

Case 1/79/W/A/Dis.

Def: 'They were trying to put things in my mouth ... saying I should say that I helped him nick the bike ... they told me that they just wanted the truth, so I told

them the truth but they weren't having it, they started telling me what I should say .. It all starts to get confusing with you trying to tell them what happened and them trying to tell you what happened. They keep saying , "It'll all be sorted out a lot quicker", "It'll work out best for you in the end", and you just feel like turning round and saying, "Yea, it was that, that was how it happened".'

Case 1/70/W/A/Dis.

The defendant said the police asked him 'trick' questions: 'Like I was sat there not saying nothing, and they said, "Right, so what did you do when you came back from there?", and I had to say, "Hang around, I never said I was there"!

Case 1/59/W/A/Dis.

Def: 'He said to me, "We've spoken to your friend and he's admitted to it. Now tell us your part". I said, "What part? I aint had no part!"' D said that these types of questions were 'trick' questions, and he found them unfair.

In addition, four of those spoken to said that the police asked questions, or put statements to them, which they found intrusive, irrelevant or insulting.

Case 2/16/W/A/Dis.

Def: 'The officer tried to squeeze all sorts of information out of me about my private life - I had a disability book on me and she wanted to know why I got disability allowance, wanted to know about my previous jobs, what job applications I was making now. They got no business asking me any of that. I would have been quite within my rights to refuse that information.'

Case 1/47/A/A/OAP

Defendant, a taxi-driver, was arrested for GBH after he made a complaint to the police that he had been badly assaulted by three white passengers when he had requested them to pay their fare. Defendant said that in the interrogation, the police asked him a number of questions about his immigration status which he found to be both irrelevant and racist: 'They asked me whether I had British nationality - "You know your passport number?", "Where were you born?" ... He asked me what education I had and I told him my CSEs. He said, "So you were

educated here?" I said, "Yea, I was educated here." And he turns round and says, "Can you tell me the name of the school you went to?"!'

Case 1/62/B/A/Dis.

Def: 'I don't think it's right that they starting going on about private things, like they was saying where did I get my new clothes from, where I got my trainers from, started asking about my girlfriend ...'

IV. UNDERSTANDING THE DEFENDANT'S OVERALL PERSPECTIVE

Towards the end of the interview, defendants were asked whether they would describe their overall treatment by the police as fair or unfair. The result was a more or less even split, with 41 replying that they had been fairly treated, and 39 stating that their treatment had been unfair. This raises the question, 'what differentiates the "fairs" from the "unfairs"?'

i. Treatment was Unfair.

A total of 39 persons made an overall evaluation of unfair treatment. A variety of factors influenced them in making this evaluation.

As shown in the previous chapter, defendants attach great significance to what takes place at the point of arrest when making overall evaluations of treatment. In view of this, it is not surprising that of the 34 suspects who said that their arrest was either without reasonable cause or carried out in an unfair manner, 27 (almost 80 percent) went onto say that their overall treatment had been unfair. Whilst four of these 27 individuals gave the unfairness of the arrest as the sole reason for describing their treatment as unfair, the remaining 23 went onto give other reasons also.

A total of six individuals alleged that they suffered violence once inside the station, and all six of them made an overall evaluation of unfairness. All six had

also claimed that their arrest had been unfair. Eleven individuals voiced a belief that they had been punished in some other way whilst at the station, and eight of these went onto say they had been unfairly treated overall. Two of these also fell in the 'unfair arrest' category, and six in the 'violence suffered' category.

Defendants were asked whether they thought that the interviewing officers were fair or unfair, and 27 (almost 41 percent of those interrogated) answered that they had found the officers unfair. The reason given by the vast majority (24 of the 27) was that they resented the abuse and accusation that had been directed against them or that they found the questioning oppressive. Twenty-three of those who found the interviewing officers unfair went onto state that their overall treatment was unfair. Eight of these 23 gave the unfairness of the interrogation as the sole reason for their overall verdict of 'unfair'.

Furthermore, of the 31 individuals who thought the interrogation provided an inadequate opportunity to explain their side of the story, 22 (71 percent) said their overall treatment was unfair. Although all of them gave reasons in addition to this for describing their treatment as unfair, it does nonetheless demonstrate that defendants attach great importance to whether or not police officers are prepared to listen to them. This supports the findings of Casper *et al*, who questioned a sample of felony defendants about their courtroom experience and concluded that a 'process in which litigants feel that they have the opportunity to express their points of view fully and in which the decision-maker is perceived as having listened to and considered their side's arguments will promote a sense of fair treatment'.[568]

Ten of those falling in the 'unfair' category complained of the length of time for which they were kept in custody, and 2 of these 10 gave this as the sole reason for stating that their overall treatment had been unfair. It is interesting

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[568] Casper, J., Tyler, T. and Fisher, B. (1988) 'Procedural justice among felony defendants', *Law and Society Review* (Vol.22; pp.483-507), at p.486.

to note that 10 of the 14 individuals who found confinement 'intolerable' regarded their overall treatment as unfair. Three felt that it was unnecessary to bring them to the station at all.

Case 1/63/A/A/Crim. Dam.

> Def: 'I don't see why I have to spend 14 hours and 10 minutes in custody ... they could have interviewed me in my house, they didn't have to drag me here. So I think it is very, very unfair. Perhaps I could understand them bringing me here if I was a dangerous criminal.'

Finally, three of those who said their treatment was unfair pointed to the unfairness of the outcome, with two of the three giving this as the sole reason for their verdict. In one of these cases it was difficult to separate outcome from treatment. The defendant said that the police had charged him with an offence which they knew he had not committed, but told him, 'Someone's gotta get it, it may as well be you'. He felt he had been unfairly treated because he had been 'framed'. Another said the whole affair was unfair because he had been charged with theft for being hungry:

Case 2/09/W/A/Dis.

> Def: 'I was hungry, so I went into Boots to steal my breakfast, a couple of packets of crisps and a drink ... the way I look at it, if a man's hungry, he's got every right to eat, whether he's got money or not.'

ii. Treatment was Fair

A total of 41 individuals said that they felt their overall treatment by the police had been fair. Most of those who made this evaluation (82 percent; n = 39) also said that the interrogating officers were fair.

a. Negative expectations.

These evaluations of fair treatment must be understood in the context of *low expectations of police fairness.* This is not to say that those who said that they were unfairly treated had entertained particularly high expectations of police fairness; as the interview extracts cited throughout the above discussion illustrate, defendants as a group do not expect to be treated well. Nonetheless, of the 41 individuals who said they were fairly treated, 25 (60 percent) had *particularly low* expectations of police fairness.[569] They appeared to accept the legitimacy of unfavourable treatment prior to conviction and viewed police attitudes and station conditions as 'normal', with some emphasising that matters could have been worse.

Case 1/42/W/A/Dis.

> Def: 'I don't expect to be treated well ... I mean you're a prisoner, you can't expect to be treated well, can ya? It's hardly a five star hotel!'

Case 1/44/B/A/OAP

> Defendant, on the subject of confinement: 'It's not nice, but what can you do? You can kick up a fuss but it's not gonna do anything for you, is it?'.

Case 1/60/W/A/Dis.

> Defendant described the cells as 'dirty' and 'disgusting', but added, 'I suppose they've got to put you somewhere - they've gotta do their job, haven't they?'

Case 1/59/W/A/Dis.

> Def: 'I think the cells are disgusting and unhygienic ... but I suppose they've got to put you somewhere, they can't just let you roam around the station.'

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[569] Persons who held low expectations of police fairness did not always fall in that category of individuals who were judged to have 'strong dislike and distrust of the police.' Many of those in the former category considered it normal for the police to mistreat individuals, and they appeared therefore to lack that sense of 'shock' which would lead them to develop a strong dislike for the police.

Case 2/30/W/A/Dis.

Def: 'I've had it far worse, lets put it that way. I've been here when I've been locked up for hours, deprived of food, drink ... you get rights, but you know it depends on what you mean by rights ... like there's human rights, like food and water.'

Case 2/10/W/A/POO

Def: 'I've been treated worse ... one of them was a bit heavy-handed verbally, but there's gotta be a bad one in every apple-cart.'

Some of those who fell in this category considered themselves lucky not to have been physically assaulted.

Case 1/75/W/J/Dis.

Def: 'I mean I thought I was in for it. As soon as I crashed (the stolen car) into a police car I thought I was in for a good thrashing .... that's what happened to a mate of mine once.'

Case 2/18/W/A/Drugs

Def: 'When I didn't make a statement, they were alright about it, I was quite surprised they didn't force me to make a statement ... in the past if you didn't make any comment you would have been punched in the head or something ... I've not been beaten up myself but I've got a couple of friends who have, so I was quite surprised I didn't get a kicking this time - quite strange really.'

One defendant complained that his arrest, confinement and charge had all come about due to the provocative behaviour of a group of Special Support Unit officers. He was particularly upset at the severe beating he alleged that the police had inflicted on his friend. Asked to decide whether he had been fairly or unfairly treated, he replied, 'I suppose I'd say "fairly", 'cos I mean they could have done to me what they did to me mate. So I should consider myself lucky, really.'

Those who said they had suffered violence on previous occasions were especially likely to have low expectations of police fairness. Twenty individuals claimed to have been assaulted by the police on previous occasions, and 13 (65 percent) of these said they had been fairly treated on the present occasion. Seven of these 13 explicitly mentioned their past treatment when asked to pass a verdict of fair or unfair on their overall treatment.

Case 1/34/A/A/TWOC

Def: 'They didn't shout at me ... I've been beaten up in the past, but now I just play along with them. I mean, I don't want no trouble so I don't give 'em no cause to give me aggro..'

Case 1/46/W/A/Drugs

Defendant, who was arrested for possession of cannabis, was kept in custody for 17 hours and 35 minutes. He was given no reason as to why he had been kept in custody for so long. Asked if he had been fairly treated, he replied that he had. 'I mean the last time I was down here (on suspicion of shoplifting) they treated me real rough, for absolutely nothing. I reached into my pocket to get a fag while giving my details to the serg, and one of them grabbed my hand. So I just pushed his hand off mine. And that was it. They just flipped. Six or seven coppers got me to the floor, laid in a few and then four got my legs, two got my arms and another one grabbed the scruff of me hair. They carried me to the cell and just chucked me in. I was just gonna get a cigarette. They said afterwards that I'd drawn me hand back like I was gonna throw a punch, but no way. That's not what happened.'

Case 1/51/W/A/Dis.

'It was cold down there (in the cell), it was freezing, and they wouldn't give me a blanket, said I had to wait 'til later (he was never given one).... They brought me up here, all the way from Eastbourne (one hundred miles away from Grimeston), in a car. Now (past midnight) I've just been kicked out. How am I suppose to get back? I got no money or anything. They bring you up here they should take you back.' When asked whether he felt he had been fairly treated, he replied that he had. He felt his treatment had been fair, he said, because he had not been shouted at or hit as on previous occasions.

Case 1/33/W/A/POO

Def: 'Last time, I was beaten up and hit over the head with a torch ... so it 'ain't been that bad.'

Case 1/59/W/A/Dis.

The defendant, arrested for shoplifting, complained of a number of unfair things which had been done to him whilst in custody. The arresting officers had accused him of committing crimes which they had no reason to suspect he had been involved in; the police refused to tell him clearly why he had been arrested; the interrogators attempted to trick him into making incriminating remarks and, when he failed to admit involvement, told him that his flat would be searched. At the end of the interview I asked him whether he felt he had been treated fairly:

'I've been treated pretty fair this time. I've been down here before and I've been beaten up and all sorts by coppers. I've really had a tough time here sometimes. Other times their fine ... Its all up to the policeman, if he don't like you that's it - it all depends of their mood.' The defendant related one incident where he had been arrested for driving whilst disqualified. He said that the police insisted on hand-cuffing him: 'The handcuffs were on real tight. They started cutting into me wrists and me wrists start bleeding. I said "Please take these handcuffs off me, *please*". He grabbed them and made them even tighter, so I twisted round and head butted him in the stomach ... The handcuffs were taken off and I was taken down the cell, and this bloke who arrested me, he weren't the jailer nor nothing, yea, he was behind me, pushing me all the way. I turned around and someone tripped me up. As soon as I hit the floor I felt this boot come in my face, my head went back and I was dragged into the cell and locked up. I went off me head, started screaming and hitting the cell door. In the end the serg came down, saw the state of me face and said, "What you done? Rammed your face into the wall?"! He took me down the hospital ...'.

Low expectations of fairness also affected the way in which individuals evaluated the fairness of the interrogation process. When asked whether they would describe the interviewing officers as fair or unfair, 39 of the 66 individuals who were interrogated replied that the officers were fair. However, when asked to state why they thought the officers were fair, 30 of the 39 defendants could

only mention the fact that the questioning had not been as unfair as they had experienced on previous occasions.

Case 1/32/W/A/TWOC

> The defendant said that the officers would not give him the precise details of the offence, and repeatedly called him a liar. He thought the officers were fair: 'The last time I was down here I was kept locked up for eight hours ... they just kept saying over and over again, "Come on, David, we know you done it, why don't you just tell us?", and I almost did.'

Case 2/02/W/A/Dis.

> Def: 'They never take "no comment" as no comment, but last time there was two of them asking questions and you can't think and hear both of them and speak... this time there was only the one officer so it wasn't too bad.'

Case 1/60/W/A/Dis.

> Asked what he found fair about the questioning, the defendant replied that it was the fact the officers had not tried to get him to TIC offences he had not committed: 'Last time I was here, I was in for nicking car stereos. Well, if I done it I tell 'em the truth, save pissing 'em round. So I said yes, right I done it. But then they thought, "Well, one more stereo is not gonna make any difference", so they stick this stereo on me which I hadn't done. I went to court and started to deny it, saying I wasn't having that one. They was trying to like pressure me, yea, like pressurise me to TIC it. But I wouldn't and it got thrown out.'

b. Good treatment.

It must be emphasised that of the 41 defendants who said they had been fairly treated, over a third (n = 16; 20 per cent of the total sample) indicated that they had absolutely no complaints against the police, with some saying that they were genuinely surprised at how 'understanding' and 'fair' the police had been. Some of these also mentioned that the police had 'looked after them' - given them cigarettes, cups of tea or water and allowed them out in the exercise yard.

Case 2/01/W/A/Dis.

> Def: '... I was offered cups of tea, and got two glasses of water within five minutes.'

In common with others who fell in this category, the defendant said that the interrogating officers had been very fair.

Case 2/01/W/A/Dis.

> Def: 'They told us what had happened, that someone had been burgled and given a description fitting us. They told us exactly what this women had told 'em, and just asked where we was going, what we'd been doing that day, you know, stuff like that.'

In some of these cases the defendant had been caught in the act, had decided to make a confession, and was possibly even genuinely contrite. This is the attitude the police like to see, and, if the defendant is suitably deferential, the relationship between police and suspect can be friendly. In this regard it is important to note that in a minority of cases police questioning is not confrontational. This can either be because a confession is readily made, or because the police are pursuing some other objective, such as constructing an interview record which will justify them in not taking any further action.[570] As demonstrated by the figures cited above, if the defendant feels that the interrogating officers are fair he is more likely to say that his overall treatment was fair.

Examples of cases where a confession was readily made include case 1/40 where the defendant said he went into a store and, 'because it looked so easy', he decided to steal some underwear for his girlfriend. He was caught by the store detective, and the police were called. The defendant said that the arresting officer, who also carried out the interview, was 'very friendly', and they both had a 'great laugh' over the items he had stolen. Case 1/41 was a similar shoplifting

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[570] McConville and Hodgson (1993) *op. cit.*, at pp.111-5.

case, where the defendant said he had been an 'idiot', and that the arresting and interviewing officer was 'probably the most decent chap I've come across.' In another case the defendant was apologetic for causing so much trouble for the police, against whom he had 'no grief'. He had fallen into an argument with his father, and 'ended up beating him up'. He said the police had been forced to 'sort it out', and had been very understanding.

Examples of cases where the police were pursuing an objective other than that of obtaining a confession included those cases which the police viewed as 'rubbish'. This can include cases of domestic violence, or any other type of case where the police believe that a 'result' is unlikely. They will go through the motions of criminal investigation, but their real aim is to convince the complainant that it is not a police matter but something which the complainant ought to pursue as a civil case.[571]

The defendant in case 1/80 was very astute in recognising this as the reason why the police had treated him 'very well'. He had been arrested for a minor alleged assault arising out of a dispute he had with another motorist. He told me, 'They weren't interested, they just had to do something because this guy reported it; they know there's nothing in it'. He compared his treatment to a previous occasion when he had been arrested and charged with robbery. He said that what had happened on that occasion was that he had rented a house to a student and, following a dispute, the student accused him of stealing some of her property. The defendant said the police had been threatening and aggressive, and explained that this was because at the time they were under pressure from the University, students' groups and the local media to 'do something about' unscrupulous landlords.

Another type of case in which the police will engage in a friendly interview is where they have made an arrest which later turns out to be problematic. Once

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[571] *Ibid.*, at p.112.

again, the objective is to construct an interview record which will justify the case being dropped, but the police may also feel it necessary to appease the defendant, if only to avert the possibility of an official complaint.[572]

Case 1/37/W/A/POO

Whilst walking back from the pub with his friends, V became the victim of an unprovoked attack. He fought to defend himself, and the police arrived whilst the scuffle was continuing. Some officers began to restrain V, and in the meantime the attacker got into a car and fled. V's friends, feeling that he was being wrongly arrested, intervened forcibly and were arrested along with V.

I was in the custody area when the defendants were brought in one by one, and each accompanying officer gave a reason for the arrest which was at variance with the reason given by the previous officer. One was charged with affray, another with assault, the third with S4 of the Public Order Act and the fourth with breach of the peace. Once the suspects had been locked in the cells, the CO spoke to three of the arresting officers: 'Listen, guys, I hope you know what you're doing here. I mean, this is all over the place - you've got one breach of the peace, one assault, one S4 - all from essentially the same incident. I've spoken to them and they're not even drunk!' The arresting officers said that they had been thinking it over and were leaning towards the view that the account of events given by the defendants whilst being driven to the station was probably true. The CO replied, 'Well, I suggest that you play it like that because the way things are looking at the moment I'm going to have to give you a "refused charge".'

V and his friends were all 'refused charge'. I interviewed V and one of his friends, and both were very satisfied with the way the police had treated them. They told me that the police had made a mistake in arresting them, but it was understandable considering that they had arrived midway through the incident: 'they have a job to do, and all the police officers saw was a scuffle, people fighting in the street. They don't know what's going on, they've only acted on what they've seen ... its just unfortunate that the guy who started it all got away.' The police had told them in the interview that they just needed a 'statement'; the defendants said that they

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[572] *Ibid.*, at p.114.

were allowed to put forward their account without interruption, and one of them described the police as 'nice' and 'totally reasonable'.

Possession of drugs cases involved a combination of the above two categories of case: confessions were readily made, and the police had objectives other than prosecution of the immediate offender. Five of the six defendants arrested for possession of cannabis stated that their treatment had been fair, and that the officers had in fact appeared almost apologetic when telling them why they had been arrested.

Field-Note Extract 28 (Grimeston)

Sergeant (possession of cannabis cases): 'I mean these guys can be turned round (processed) within five or ten minutes. Bring them in, caution them and kick them out. The only reason for picking them up is to get to the dealers: if enough of them can be persuaded to tell us where they got it from we've got something to put before the court when we go to get a search warrant.'

iii. Influence of factors extraneous to treatment

a. Outcome.

The present study supports Tyler's conclusion that an individual can feel that the outcome was unfair and yet still describe his or her overall treatment as fair, and vice versa.[573] So, for example, 28 of the 39 defendants who were charged said that the outcome was unfair, but only 18 of them said their treatment was unfair. Conversely, 10 of the 14 individuals who were unconditionally released said the outcome was fair, but 9 of them nonetheless described their treatment as unfair. Although 5 of the 7 individuals who were cautioned described their treatment as fair, their evaluation was not based wholly on the favourableness of the outcome. Cautions were given mostly for possession of cannabis, and those

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[573] Tyler, T. (1990) *Why People Obey the Law.*

arrested for this offence spent very little time in custody and were rarely placed in a cell.

b. Bail.

There was found to be no link between the refusal or grant of police bail and overall evaluations of treatment. The issue of bail arose in 39 cases, it was granted in 21 and refused in 18. Ten of those who were refused bail said they had been fairly treated, and 10 of those who had been granted bail said they had been unfairly treated.

c. Officer in the case.

Overall evaluations of treatment did not appear to have been affected by the type of officers (CID or uniformed) who dealt with the case.

d. Ethnicity.

Tyler discovered that whilst notions of fairness may vary according to the type of dispute settlement, they were unaffected by variables such as the respondent's race or gender.[574] It was very difficult to establish the influence of ethnicity in the present study because of the small number of non-whites in the sample (n = 23). I present the results here for the sake completeness. They show that non-whites are more likely to say they have been unfairly treated than whites: of the 57 whites in the sample, 24 (42 percent) said they had been unfairly treated, as compared to 15 out of 23 non-whites (65 percent). A recent study by NACRO made a similar finding, reporting that two thirds of non-whites thought they were unfairly treated at the station, whereas less than one third of whites said that

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[574] Tyler, T. (1988) 'What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures', *Law and Society Review* (22; pp.103-35), at p.125.

their treatment was anything but 'normal'.[575] The study also found that one third of the white sample said that they thought non-whites were treated worse by the police than whites.[576]

A proportionately greater number of blacks were charged (67 percent) than whites (49 percent) or Asians (27 percent). None of the blacks or Asians were cautioned, but this was most likely due to the fact that most cautions were given for drug related offences and no blacks or Asians had been arrested for this offence.[577] Blacks were also more likely to be remanded in custody than whites when charged: slightly under 43 percent of whites were remanded in custody after charge, whereas over 62 percent of blacks were remanded. These findings do not explain why blacks and Asians were more likely to say that they had been unfairly treated: outcome and bail were found not to affect evaluations of treatment in the sample as a whole.

It would appear that non-whites were more likely to say that they had been unfairly treated because more of them fell in the 'unfair arrest', 'violence suffered at the station', 'punished at the station' and 'interrogators unfair' categories than did whites. In other words, on the basis of what defendants told me, it would seem that non-whites are more likely to give a verdict of unfair treatment because they are in fact treated worse than whites. It must be emphasised, however, that the figures are extremely small and that the differences between whites and non-whites were for the most part marginal. Sixty percent of non-whites (n = 14) complained that they had been arrested

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[575] Smellie, E. and Crow, I. (1991) *Black People's Experiences of Criminal Justice*. The study was based on a sample of 30 non-whites and an equal number of whites.

[576] *Ibid.*, at p.20.

[577] Studies in the past have shown that blacks are less likely to cautioned and more likely to be charged than whites: Landau, S. and Nathan, G. (1983) 'Selecting juveniles for cautioning in the London Metropolitan area', *Brit. J. of Crim.* (Vol. 23; pp.128-49) at p.136.

without reasonable cause, or that their arrest was accompanied by unnecessary violence, but only 35 percent (n = 20) of whites made this complaint. Sixteen percent (n = 9) of whites complained of having suffered violence or having been punished in some other way whilst at the station, whereas 22 percent (n = 5) of non-whites made this complaint.[578] Finally, whereas only 24 percent (n = 14) of whites said that the interrogating officers were unfair, 56 percent (n = 13) of non-whites made this complaint.

e. Offence category.

A factor which clearly had some bearing on evaluations of treatment was the type of offence for which people had been arrested. Over two thirds of those arrested for public order offences stated that they had been unfairly treated, as did 58 percent of those arrested for offences against the person. Of those arrested for other offences, less than half said they had been unfairly treated.

f. The defendant's pre-held views on the police.

As explained in the previous chapter, defendants were asked at the end of the interview about their attitudes towards the police in general. It transpired that those who held a positive image of the police were more likely to state that they had been fairly treated. Almost three quarters (20 out of 28) of those whose responses were graded under the 'strong respect for law and policing' category described their overall treatment as fair. By comparison, less than a quarter (8 out of 33) of those whose views were graded as exhibiting a 'strong distrust and dislike of the police in general' described their treatment as fair. This latter group were more likely to complain that their arrest was unfair (63 percent as

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[578] The NACRO (1991 *op. cit.*) study found that four times as many non-whites as whites complained of being 'verbally or physically abused' whilst at the station. Whilst none of the Asians or blacks in the present study claimed to have suffered racist insults whilst at the station, one black and one Asian defendant complained that some of the police questions were based on racist assumptions (i.e questions about immigration status)

compared to 23 percent of those with a positive image), and that the interrogating officers were unfair (57 percent as compared to 4 percent).

Two alternative interpretations can be placed on this finding. The first is that those who were hostile to the police harboured this hostility because they had been treated worse than others. The second is that those who disliked the police viewed police behaviour as unfair *because* they disliked the police. It was not possible, using the methodology adopted in this project, to decide which of these two interpretations is the correct one. This issue can only be investigated by a researcher who can directly observe all stages of arrest and confinement.

g. Understanding the defendant's perspective.

The defendant's overall perspective on what happened at the station is very much shaped by what happened last time and what the police could have done this time. Police abuse and accusation, hostility and mockery, being treated as an inanimate object - these were factors which most defendants, regardless as to whether they viewed their overall treatment as fair or unfair, accepted as 'normal'. Although all but 15 of the defendants complained, sometimes bitterly, about particular procedures or particular actions of the police (e.g being forced to hand over property, being locked-up, being released at 3 a.m miles from home), less than half of all defendants (39 out of 80) went on to say that their overall treatment had been unfair. 'Unfair' verdicts came, in the main, from those who felt their arrest was groundless or accompanied by unnecessary violence or provocation (n = 27); from those who suffered violence at the station or who were punished in some other way whilst at the station (e.g refusal of material benefits) (n = 15), and those who suffered an interrogation more hostile than that experienced on a previous occasion (n = 23).

IV. CONCLUSION

The majority of defendants, when brought to the police station, surrender control over their actions to the police. They are told where to sit, when to sit, when to stand and precisely where to stand, when to talk and when to remain silent. Defendants are, as a matter of routine, forced to hand over all possessions to the police and are confined in conditions which the majority (55 out of 72) described as 'intolerable' or 'extremely distressing'. It is common knowledge amongst the policed that to resist police control entails the risk of being physically assaulted, threatened, insulted, refused bail, charged with a more serious offence or refused water, exercise, or cigarettes. Not surprisingly, very few defendants seek to challenge the way in which the police treat them.

The station environment is manipulative, in that suspects are forced to participate in a system of rewards and punishments. The relationship between the police and suspects has been described as 'negotiable', in that police discretion over such matters as bail, implicit and explicit recommendations to the court and severity of charge allows the parties to engage in bargaining.[579] It is important to emphasise that terms such as 'negotiability' and 'bargaining' do not imply that there exists some degree of equality between the two parties. The defendant will rarely get a 'bargain' because he is forced to make judgements about the value of his 'chips' in a coercive environment, with the knowledge that if he refuses to 'play' the police can make that environment, and his future situation, even more unpleasant.

The station serves two main purposes for the police. Firstly, it provides the ideal environment in which defendants can be pressurised into accepting police accounts of 'what happened', thus creating the evidence needed to avoid any re-opening of the case in public. Secondly, the power to arrest individuals and put them through the processes described above provides the police with the weapon

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[579] McConville *et al* (1991) *op. cit.*, at p.61.

they require to exercise authority over the policed. Those who challenge the 'right' of the police to stop, search, question, threaten or be abusive can be carted off to 'the punishment block' (i.e the police station) and subjected to summary imprisonment. Regardless of what happens in court, the police will have shown the defendant what happens to those who do not accord them the deference which they expect. Indeed, in some cases,[580] the police have no intention of charging whatsoever; in these cases detention at the station is the end of the sanctioning process.

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[580] It is probably impossible to calculate the precise number of cases.

CHAPTER SEVEN

CHALLENGING POLICE CONTROL: THE IMPACT OF RIGHTS AND PROTECTIONS FOR THE SUSPECT

The proponents of PACE had argued that the Act represented a dramatic improvement on the Judges' Rules because it introduced a comprehensive scheme of rights and protections for the suspect. This scheme was subjected to critical examination in Chapter Four, and shown to be minimalist in conception. It has nonetheless been suggested by some that PACE has changed the whole nature of police station proceedings: that the right to legal advice, the protection provided by the creation of the custody officer, and the introduction of tape-recording have exposed the police to the glare of legal scrutiny, and thus succeeded in bringing their practices in line with the dictates of the law.[581]

This chapter will assess whether the rights and protections contained in PACE have, in fact, been effective in challenging police control over detention and interrogation, and in protecting suspects from unfair treatment. It will draw upon the findings of post-PACE empirical studies and my own field-notes and interview data, the latter of which throws some light on how suspects themselves view the notion of 'rights'.

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[581] David Pannick Q.C, commenting on the release of the Birmingham Six, claimed that '(p)olice misconduct on such a scale would be difficult to repeat in the new world of the Police and Criminal Evidence Act 1984' (*The Observer* 17 March 1991, p.23). Some researchers support this claim: Irving, B. and McKenzie, I. (1989) *Police Interrogation: The Effects of the Police and Criminal Evidence Act* 1984; Maguire, M. (1989) 'Effects of the "PACE" provisions on detention and questioning', *Brit. J. Crim.* (Vol.28; pp.19-43); McKenzie, I. (1990) 'Police Hand-cuffed in No Man's Land', *The Independent*, 31 May, at p.23. For a more qualified version of the claim, see Dixon, D. (1992) 'Legal regulation and policing practice', *Social and Legal Studies* (Vol.1; pp.515-541); Maguire, M. and Norris, C. (1992) *The Conduct and Supervision of Criminal Investigations* (RCCJ Study No.5).

I. NOTIFICATION OF RIGHTS

The Royal Commission on Criminal Procedure had stated that fairness demands that suspects be informed of their rights.[582] Accordingly, PACE stipulates that all suspects should be informed of their rights to inform someone of their arrest and to contact a solicitor free of charge at any time whilst in custody. Notification can be delayed only if the suspect is drunk or violent.[583] The Codes of Practice state that interviewing officers must caution the suspect prior to questioning, informing him that he need not say anything unless he wishes to do so.[584]

Irving and McKenzie, in their research into the impact of PACE, wrote that '(i)n all cases observed prisoners were informed of their rights exactly as stipulated in the Code of Practice'.[585] The generalisability of this finding has since been disputed by Sanders *et al*, who have recently carried out a large scale research project to examine the operation of the 24 hour duty solicitor scheme.[586]

They found that the police had a specific policy of not informing some suspects of the right to legal advice. Although custody records indicated that 92.4 percent

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[582] Cmnd. 8092; Para. 2.19

[583] Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C) para. 3.1

[584] Code C, para. 10

[585] 1989 at p.42

[586] Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24-Hour Duty Solicitor Scheme* (Lord Chancellor's Department). The researchers examined custody records, carried out observational studies and interviewed police officers, solicitors, and suspects concerning a sample of 5756 cases taken from ten police stations situated in seven different regions. 2060 cases were actually observed by the researchers, and the remainder were taken from custody records.

of all suspects were given notice, when the researchers actually observed a sample of cases they saw notice being given in only 87 percent of cases.[587] Officers were seen providing written notice only, reading rights in a manner designed to render them incomprehensible,[588] and providing incomplete notification.[589] One custody officer told the researchers, 'Now under PACE, you read them their rights as quickly as you can - hit them with it so quickly they can't take it in - say "sign here, here, and here" and there you are: nothing's changed, we all know that, though you wouldn't get any policeman to admit it to you'.[590] The authors observed that in over half the cases in which notice was not provided (52 of the 94 cases), the police recorded that notice had been given.[591]

The researchers also found that in one third of the cases in which notice was not provided, the police misled suspects into signing the custody record to state that they had been informed.[592] One example was given where the suspect was handed leaflets setting out her rights, but was not told of her right to consult with a solicitor. The custody officer, pointing to the 'I do not want a solicitor' section, said to her 'sign here to say that I've given you these forms.'[593] The custody officer told the researchers that this fulfilled his duty, and he knew of no custody officer who acted differently.

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[587] Notice was not given in 94 of the 725 cases which they observed (*Ibid.*, Table 4 at p.49).

[588] *Ibid.*, at p.48.

[589] *Ibid.*, at p.56.

[590] *Ibid.*, at p.58.

[591] *Ibid.*, at pp. 48-50.

[592] *Ibid.* In other words, out of a sample of 725 cases, it was observed that notice was not provided in 94 (13 percent) cases. In 25 of these cases (i.e 38.5 percent of the non-notice sample) the police persuaded the suspect to sign to indicate that he had received notice.

[593] Example ENO24, at p.50.

Finally, in 7.6 percent of cases the custody record indicated that no notice had been given, but in half of these cases there was no reason given for this failure. Furthermore, the researchers observed ten cases in which the police recorded 'refusal to sign' as the reason why the custody record had not been signed, but in five of these the suspect had not even been informed of his rights.[594] In one case, despite the suspect's protests at being treated unfairly, he was taken to a cell, interviewed, and charged without any notification of his rights.[595] Drunk and/or violent was the most frequent reason given on the custody record for failing to inform suspects of their rights. As the researchers correctly point out, this assumes that police evaluations of a suspect's behaviour are correct and unbiased when one of the main reasons for allowing access to legal advice is so that police evaluations can be challenged.

The authors found that the lack of notification had substantial impact on the take-up rate. Whilst nearly 40 percent of those receiving notification requested advice, this figure fell below 16 percent in those cases where no notice of rights was given.[596]

All 80 defendants in my sample were asked whether the police had informed them of their rights, and all but one made a reply. One in seven (n = 13) claimed not to have been informed of their rights as prescribed by PACE. Four (5 percent) said that they had not been informed at all, and the remaining nine indicated that there had been partial notification only. Of those only partially informed, five said that they had not been told of their right to remain silent, two stated that they had not been told that the solicitor was free, one said he had not been told that he could inform someone that he had been arrested, and one said he had not been told that he could consult the Codes of Practice.

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[594] *Ibid.*, at p.51.

[595] *Ibid.*, Example MC119.

[596] *Ibid*, at p.48.

II. SUSPECTS' UNDERSTANDING OF THEIR RIGHTS

Three (4.5 percent) of the 67 individuals in my sample who said that they had been fully notified of their rights admitted that they had not understood them.

Case 2/02/W/A/Dis.

Res: 'Did you understand your rights?'

Def: 'I have a problem with reading, so I couldn't read the piece of paper they gave me.'

Res: 'But you said that they told you your rights, for example you say that they told you that you had the right to remain silent?'

Def: 'Yes.'

Res: 'What did you understand them to mean by that?'

Def: 'I dunno. They just arrested me and took me upstairs.'

Out of the remaining 64 individuals who said that they had been fully notified of their rights and had understood them, five (7.8 percent) could not outline their rights when asked to do so.

Case 1/57/A/J/Dis.

Res: 'So you understood what the sergeant said to you, about your rights?'

Def: 'Yeah.'

Res: 'Could you tell me what he said? What rights did he tell you that you had?'

Def: (silence)

Res: 'You say you understood your rights, yeah? Can you just tell me what your rights are while you're here at the station?'

Def: 'Aaaah, I don't know man, I don't know! The whole thing is just fucked up...'

In addition to these individuals who clearly did not understand their rights, a significant minority (no figures were collected on this) of the 59 who could outline their rights did so in a mechanical fashion. Defendants reeled off, almost word for word, the statement read out to them by the custody officer, stating at the end such things as, 'that's it, isn't it?, or 'I think that's what he says'. At the very least, this shows that information about rights had not been effectively communicated.

Clare and Gudjonsson, in an exercise designed to establish the proportion of suspects who, even when properly notified, fail to understand their legal rights, informed one hundred adult subjects of their rights, and discovered that only 52 percent of them understood the right to silence, and only 70 percent understood the right to free legal advice.[597] The experiment took no account of the stress which most individuals experience when taken to the station, and the authors therefore accept that these figures probably over-estimate the proportion of persons who understand these rights.[598]

III. SUSPECTS' ATTITUDES TOWARDS RIGHTS

Most defendants expressed extreme scepticism about the utility of their rights. I was told that rights were irrelevant because their exercise neither changed one's immediate situation nor challenged police control over the proceedings. Police power was seen as absolute, and the notion that rights were something which 'prisoners' could unilaterally exercise was one which was frequently rejected. I was told by many of those to whom I spoke that it was up to the police whether a person would be allowed to make a phone call, the police

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[597] Clare, I. and Gudjonsson, G. (1992) *Devising and Piloting an Experimental Version of the 'Notice to Detained Persons'* (RCCJ study No. 7), at p.15.

[598] *Ibid.*, at p.24.

decided whether to call a solicitor, and it was the police who determined if and when a friend or relative would be informed.

Case 2/07/W/A/OAP

Res: 'Did they give you your rights?'

Def: 'They gave me a piece of paper, but that don't mean nothing, its virtually useless ... it doesn't matter what it says on there because at the end of the day it's the police officer's word against mine and the police officer is going to be believed before I am.'

Case 1/47/A/A/OAP

Def: (Mock laugh) 'Yea, they tell you this and that but it's all crap!'

Case 1/48/B/A/POA

Def: (Bitterly) 'What rights? You wanna see your rights? You're rights is all on one piece of paper (getting out the charge sheet), *that's* your rights, right here!' ... What good's a solicitor? What's he gonna do for me? I'm gonna be here until the morning anyway, so there's no point is there.'

Case 1/52/A/A/OAP

Def: '...they tell you your rights but that don't mean nothing, I've seen people in here beat up for asking their rights. They beat me up once just 'cos I asked to make a phone call ... or if you wanna a cigarette they ignore you, and if you keep banging the door they come and beat you up ... even if you wanna drink of water they'll make you wait for it.'

For some the idea of having a right not to answer questions or a right to speak to a solicitor was incongruous and unimportant in a place where one had no choice as to when to eat, drink or smoke, and in conditions which were variously described as 'appalling', 'diabolical' and 'filthy'.

Case 1/65/W/A/Dis.

> Def: 'Yea, I understood me rights, but do you get rights in here? The loo don't flush, it stinks. You get breakfast in a cardboard box and it's freezing cold ... its not the law, its just the fucking conditions ... no fags, nowhere to wash, you've no idea what time it is...'.

IV. THE RIGHT NOT TO BE HELD INCOMMUNICADO

PACE stipulates that if a suspect asks for someone to be informed of his arrest and whereabouts, the police must inform the nominated person 'as soon as is practicable'.[599] Notification can only be delayed if the person is under arrest for a serious arrestable offence, and authorization for such delay must be given by an officer of at least the rank of superintendent.[600]

Bottomley *et al* studied the custody records of a northern police force and found that delay was authorised in only 13 out of over 1000 cases.[601] Police records, however, did not tell the whole story: after talking to police officers and observing procedures for themselves, they discovered that 'unofficial' delays took place.[602]

In some cases delay was 'intentional', as for example where investigating officers decided to search premises before delivering the 'intimation'. This 'rule-bending' is facilitated, argue the authors, by the 'flexibility' of such phrases in the Act as 'soon as practicable'. 'Unintentional' delay took place in cases where the person was released from custody before the nominated person could be contacted. This type of situation arose because officers viewed the task as one

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[599] S56(1)

[600] S56(2)

[601] Bottomley, K., Coleman, C., Dixon, D., Gill, M., and Wall, D. (1991) 'The detention of suspects in police custody: the impact of the Police and Criminal Evidence Act 1984', *British Journal of Criminology* (Vol.31; pp.347-64), at p.356.

[602] *Ibid.*, at pp.356-7.

of low priority, and failed to 'go out of their way to expedite matters in the interests of the prisoner'.[603] In another study it was found that one quarter of intimations were not delivered within the hour, and a large proportion of these took over two hours.[604]

Some of those to whom I spoke stated that the police were very lax in contacting friends and relatives on behalf of suspects, whilst others were sceptical whether the police made any effort at all.

Case 1/31/B/A/Dis.

Def: 'I asked to contact my father, and they took the number off me and said that they would do it.'

Res: 'Did they?'

Def: 'No, I don't think they did. I mean if they did, why isn't he here? If they had telephoned him, he would be here.'

One defendant alleged that a request to have someone informed was punished by lengthier detention.

Case 1/78/B/A/Dis.

Def: 'If you don't ask for someone to be informed, you buzz through. If you do, you're here for ages.'

In addition to the right to have someone informed of the arrest, the Codes of Practice state that the suspect also has the right to speak to one person on the telephone for a reasonable period of time.[605] There is no obligation on the

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[603] *Ibid.*, at p.356.

[604] Brown, D. (1989) *Detention at the Police Station under the Police and Criminal Evidence Act 1989* (Home Office Research Study 104).

[605] Code C, para. 5.6

custody officer to inform the suspect of this entitlement and I observed, as did Bottomley *et al*[606], that custody officers never mentioned it. Some defendants were nonetheless aware of the right, whilst others learnt of it from reading the written notice of rights supplied to them by the custody officer. Those who attempted to exercise the right, however, found that it was not easy to do so.

Case 1/39/W/A/Dis. and Crim.Dam.

Def: 'I read the piece of paper they gave me when I was in the cell and like it said I could 'phone someone. So I rang the buzzer and said to the copper that I wanted to ring my dad. He said, "We'll see what we can do".' The defendant said he waited for approximately half an hour and than rang the buzzer again. He was told he would have to wait. The defendant complained that he was made to wait what seemed to be very long time before he was allowed to make the call.

Case 1/66/W/A/Drugs

Def: They do make it difficult if you want to make a 'phone call. I've asked and I'm still waiting .... I don't know why; I think it's because they're very particular about making you wait.'

Case 2/06/A/A/Dis.

The defendant said that he was not told of his right to inform someone of his arrest, but that he nonetheless asked if he could telephone his parents. The defendant alleged that the CO told him that this was not allowed. He asked for a copy of the Codes of Practice, read them in his cell and rang the buzzer for the jailer. He told the jailer that, according to the codes, he was allowed to make a telephone call. The jailer said that he should have made the request when he was first brought in, and the defendant replied that he had. The defendant said that he was not given the opportunity of making the call.

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[606] (1991) *op. cit.*, p.357.

V. THE RIGHT TO SILENCE

As shown in the previous chapter, PACE has not succeeded in curbing the use of oppressive interrogation tactics. It is therefore not surprising to learn that very few individuals remain silent in the face of police questioning. McConville and Hodgson found that only 2.5 percent of individuals in their sample refused to answer all police questions, and a further 27 percent chose to answer selectively, thereby making the whole dialogue presumptively admissible in evidence.[607]

I found that a legal position which recognises both a police right to question and a defendant's right to refuse to answer made little sense to some defendants. They were unsure of how to exercise the right and unclear as to how a court would interpret silence.

Case 2/01/W/A/Dis.

> Res: 'So they told you that you could remain silent?'
>
> Def: 'They ask you questions, and you can't answer questions and remain silent. You'd have to be quite artistic to do that.'

Case 2/07/W/A/OAP

> Def: 'It's a catch twenty-two situation, and its getting more so with these taped interviews. If you stay silent you're assumed guilty.'

The fact that the vast majority of defendants do not exercise the right has also to be understood in the general context of interaction at the station. As argued in the previous chapter, the way in which suspects are treated is geared towards destroying their courage to challenge police behaviour. So although a

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[607] McConville, M. and Hodgson, J. (1993) *Custodial Legal Advice and the Right to Silence* (RCCJ Study No.16), Table 10.1 at p.176. This figure was calculated on the basis that all police questions are proper and legitimate, and thereby worthy of an answer.

suspect may have no wish to answer police questions, he is well aware that the police right to question means that he can be taken from his cell, incarcerated in a interview room, and interrogated until the police decide that no further purpose is to be served by questioning. As shown by McConville and Hodgson, it is not enough for the suspect to tell the police that he has nothing to say:

Case BO207

> Suspect: 'No - I've explained where I was; I don't wish to say anything else.'
>
> Officer (firmly): 'You know your rights - *I'll* decide when the interview finishes.'[608]

It is misleading to describe the right to silence as a 'right' because its exercise is visited with immediate punishment. Most suspects are aware that a refusal to answer will only prolong detention, and in all probability result in a more unpleasant interrogation.

All the defendants in my sample were asked whether they had wanted to be interviewed. Twenty-eight of the 75 who replied (over 37 percent) gave an unequivocal 'no' to this question. They answered police questions, they said, because they had no choice.

Case 1/59/W/A/Dis.

> Def: 'I mean the way I look at it, if you don't talk to 'em they aren't gonna let you go, they'll keep you here for the full 48 hours or whatever it is now...'

Case 1/39/W/A/Crim. Dam.

> Def: 'Had to go, didn't I? Had to do something, otherwise I'd still be in the cell now, wouldn't I?'

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[608] (1993) *op. cit.*, at p.125-6.

Case 1/44/B/A/OAP

Def: 'I was nervous, yea? But I mean what can you do? You gotta do something, you can't just sit there like a little kid, like you're scared, can you? .... You have no choice ...'

Case 1/47/A/A/OAP

Def: 'I don't think they would accept that, I mean that's why I had to come to the station ... I said to them when they 'phoned, "Come down to my house and I will make a statement", and they didn't, they wanted to arrest me you see.'

Case 1/52/A/A/OAP

Def: 'No not really, but that's the way they are. You can't make you're own rules, you have to go by their rules.'

Case 1/61/B/A/Dis.

Def: 'Do you have a choice? There's no two ways about it, you have to be interviewed ... I felt that I had to be interviewed so I wanted to be interviewed just to get it over with.'

A further 10 defendants, whilst answering 'yes' to the question, made it clear that the reason they wanted to be questioned was because they wanted to get out of the cell, or because they saw it as a step towards release.

Case 1/68/W/A/Dis.

Def: ' ... once you're interviewed they decide whether you're going to get bail or whether you're staying.'

Case 1/41/W/A/Dis.

Def: 'I knew that once the interview was over, I could go. I'd be charged or cautioned and then it'd all be over.'

Case 1/55/W/A/Dis.

Def: 'Yea, I suppose so. The sooner they question you the sooner they let you go.'

Case 1/71/W/A/Dis.

Def: 'Yea, well just to get out of the cell for a while.'

A further three individuals said that the police did not tell them why they had been arrested, and they therefore had to participate in the interview simply to find out what was going on.

Case 1/30/W/A/Dis.

Def: 'I wanted to find out all the details about why I was down there.'

Case 1/59/W/A/Dis.

Def: 'I wanted to find out what was going on, yea? Just hear what they had to say. At the time, you see, I didn't really know what was going on.'

The right to silence is, therefore, of little practical relevance to the vast majority of suspects. This is because it can be exercised only by those who are prepared to spend a longer period of time in custody, have the courage to challenge police demands, and possess sufficient psychological fortitude to withstand sophisticated interrogation tactics.

VI. THE RIGHT TO LEGAL ADVICE

Section 58 of PACE allows all suspects to consult privately with a solicitor at any time whilst they are in custody. The general rule is that a solicitor must be contacted as 'soon as is practicable', but the police can, in exceptional cases, delay access for up to 36 hours.

Those who had argued for this right had set great expectations by it as a method of protecting suspects from mistreatment and wrongful conviction. Solicitors, it was argued, can provide suspects with accurate details about the offence for which they have been arrested and the evidence against them; ensure that persons are told of their rights in a meaningful way; provide psychological

support for those who wish to exercise their right to remain silent; provide protection from coercive interrogation and thereby minimise the risk of unreliable confessions and, finally, monitor police treatment of suspects and thereby protect their material welfare. These expectations have not been fully realized.

i. Not all suspects request legal advice.

Slightly over half the defendants in my sample (n = 41) made a request for legal advice. This is much higher than the request rate measured by researchers who have taken samples far larger than that utilised in the present study. Sanders *et al*, for example, measured a request rate of only 25 percent.[609] Even if the request rate measured in the current study is taken as typical, it still means that almost half of all suspect decline a free offer of legal advice designed to assist them.

There can be no doubt that the primary explanation for the low request rate is to be found in the attitudes of suspects. Sanders *et al* discovered that the pressure of confinement is such that the vast majority of suspects find it difficult to contemplate waiting even the 15 to 30 minutes[610] it usually takes for a solicitor to arrive.[611]

A quarter (n = 10) of the defendants in my study who did not request legal advice said they did not do so because it would have taken too long.

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[609] Brown (1989 op. cit., at p.26) and Irving and McKenzie (1989 'Interrogating in a legal framework', in R. Morgan and D. Smith (eds.) *Coming to Terms with Policing*, at p.162) also measured a request rate of 25 percent.

[610] Brown (1989) *op. cit.*, at p.24; Sanders *et al (1989) op. cit.*, at p.87.

[611] *Ibid.*, at pp.72-3.

Case 1/50/W/A/Dis.

> Def: 'I'm happy I'm out, yea? That's the only thing I care about, I don't care what happens to me in court.'

A further 7 individuals thought the matter was not serious enough to warrant the need for legal advice. Six individuals said that they were innocent and therefore saw no reason why they should need a solicitor, whilst another 10 said they did not need a solicitor because they were guilty. Those who do not request legal assistance because they think they are guilty are as much at risk as those who refuse the offer of legal help because they say they are innocent.

Case 1/65/W/A/Dis.

> The defendant said he had stolen a pair of garden gloves from an open shed. 'I didn't think I'd need a solicitor. I thought it was just a straightforward stick me hands up to 'theft' and get bail. I was told I'd get bail - but I didn't.' The defendant was in fact charged with burglary.

Finally, there was a category of individuals (n = 4) who did not ask for legal assistance because they had either found it unhelpful in the past, or because they did not believe that solicitors were independent of the police and the courts.

Case 1/79/A/W/Dis.

> Def: 'I had a solicitor once - he wasn't much help. He wasn't listening to me and he wasn't interested in what I thought we should say to the police. He like just wanted to tell me what to do ... So when I come down here now I don't bother.'

Case 1/48/B/A/POO

> Def: 'Duty solicitors are crap anyway, they work for the fucking police and the courts.'

Although the attitudes of suspects go a long way towards explaining why so many decline the offer of free legal advice, police behaviour can also play a part. As shown above, some suspects are not properly informed of the right and

this affects the request rate. In addition to inadequate notification, Sanders *et al* discovered that various ploys are utilised by the police to dissuade suspects from requesting legal advice. They observed suspects being told, 'Its not a very serious charge'; 'You'll have to wait in the cells until a solicitor gets here'; 'We won't be able to get a solicitor at this time'; and 'You don't need one for this type of offence'.[612] The researchers were also told by some suspects that they had been schooled in the police car not to request a solicitor, or told that a non-request would lead to a caution whereas a request would lead to a charge.[613] It was discovered that one or more ploys were used in over forty percent of all cases, and that suspects against whom two or more ploys were used had a significantly lower than normal request rate. Stations where ploys were systematically used had the lowest overall take-up rate.[614]

I asked all those in my sample, regardless of whether they had requested legal advice, whether the police had said or done anything to discourage them from requesting a solicitor. Three defendants said that the police had attempted to discourage them.

Case 1/30/W/A/Dis.

> Def: ' ... they don't like it when you want your solicitor present ... I mean it's not that they say anything to you directly, but just their actions and everything, yea? You know that they'd rather he didn't come.'

Case 1/55/W/A/Dis.

> Def: 'They were really funny about it when I asked for a solicitor - "What you want one of them for?"'

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[612] *Ibid.*, at p.59.

[613] *Ibid.*, at p.64.

[614] *Ibid.*, at p.61.

Case 1/75/W/J/Dis.

The defendant believed that the police had attempted to pressurise him into going up to interview without a solicitor. He had requested a solicitor on arrival, but was told that he would have to wait until morning. The next day, the jailer came to his cell and told him that it was time for him to be interviewed. The defendant replied that he had not yet spoken to a solicitor, and would answer no questions until he had done so. The defendant said that the officers were clearly annoyed at his insistence.

Although the remaining 77 defendants said that the police had not discouraged them from requesting legal advice, it was clear from the accounts given that in 12 of these cases the police had attempted to discourage.

Case 2/01/W/A/Dis.

When he asked for a solicitor, the defendant was told that it was late and that the solicitor would probably not come out. The defendant changed his mind.

Case 2/25/W/A/POO

Asked if he had been told his rights, the defendant replied, 'Oh, yea, but they said there was no need for any of that because we'll just charge you and let you go.' When the defendant asked for someone to be informed, the police said, 'It isn't worth it. You'll only be here for ten minutes.' (He was kept in custody for over two hours).

Case 1/46/W/A/Drugs

Def: 'No, they didn't discourage me from having one, they just said it would be quicker if I didn't have one. I mean I changed me mind, got it sorted out with a solicitor.'

Four of these 12 were told that their arrest was just a 'formality'; all that was need was a 'statement' and they would be allowed to go. Two such individuals were subjected to lengthy interrogation and charged with serious offences.

ii. Not all suspects who request legal advice make contact with a legal adviser.

Sanders et al discovered that although the police invoked their power to delay access to legal advice in less than one percent of cases,[615] nearly a quarter of those requesting legal advice failed to secure such advice.[616] None of the defendants to whom I spoke were told by the police that access would be delayed, but 6 of those who made a request (15 percent) did not make contact with a legal adviser.

Failure of contact can sometimes be explained by a change of mind on the part of the suspect. For example, two of the six individuals in my sample who made a request but did not make contact said that they had changed their mind because they did not want to wait.

Case 1/52/A/A/OAP.

> Def: 'He said it was engaged so I said not to bother ... I just wanted to get out of there - it stinks in those cells.'

Sanders *et al* state that the change of mind is not always unprompted. They argue that a significant proportion of the large number of suspects in their study who changed their mind did so after pressure was applied by investigating officers, whom they observed taking suspects to one side to persuade them that it would be better or easier if the request was cancelled.[617]

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[615] *Ibid.*, at p.27.

[616] *Ibid.*, at p.24. Brown (1989 *op. cit.*, at p.24) had calculated that slightly over 16 percent of those requesting advice failed to secure it.

[617] *Ibid.*, at p.64 It was found that where ploys were used against suspects making a request, the cancellation rate went up from 12.5 percent to 19.6 percent (one ploy) and 38.5 percent (two or more ploys).

More disturbing is the fact that requests for legal advice are sometimes simply ignored. Sanders *et al* found that in 5.9 percent of cases a clear request by the suspect was not even recorded on the custody record. The researchers calculated that in a '(i)n a remarkable 10.4 percent of all cases in which a request was made and not cancelled, there was no call made to the solicitor or to Air Call'.[618] Sanders *et al* state that this comes about because the police operate a policy of denying legal advice to particular individuals even when it has been clearly requested. This argument is supported by the fact that the non-contact rate was almost twice as high in those cases in which the police had unsuccessfully attempted to persuade the suspect not to request advice. It would appear, therefore, that the police can simply block a request for legal advice if they are determined to deny legal assistance to a particular suspect.[619]

Four of the six individuals in the present study who requested advice but failed to make contact said that the police gave no reason as to why they had not been allowed to speak with an adviser. In the course of my observations I witnessed three incidents where a request for legal advice was either not recorded or access was unofficially delayed.

Field-Note Extract 29 (Grimeston).

> The defendant could not understand English and was informed of his rights through an interpreter. The defendant requested to telephone his cousin. The CO said that this call would be made by the police, and asked whether the defendant would in the meantime like to speak to a solicitor. The defendant, visibly confused, said that he wanted to speak to his cousin, who would decide whether a solicitor was needed. The CO tried the telephone number given by the defendant, and said that it was engaged. The investigating officer told the defendant that the CO would continue to try the number, but that in the meantime they should all proceed with the interview. The CO said he would write 'no' on the

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[618] The researchers do not discount a 'researcher effect': 'The extent to which the police deny access to legal advice, in breach of S58, could be greater than we were able to ascertain' (*ibid.*, at p.68).

[619] *Ibid.*, at pp.67-8.

custody record with regard to the request for a solicitor 'for the time being'. The defendant was then taken away to be interviewed.

Field-Note Extract 30 (Nasherford). Case 2/14/W/A/POO

The defendant was, as far as I could ascertain without reasonable cause, man-handled and subjected to much arm and wrist twisting by the two arresting officers. This took place in full view of the CO, and the defendant repeatedly demanded to see a solicitor.[620] After the defendant was dragged off to the cells, the CO rang up the duty solicitor and said 'I have a man who wants to see his solicitor. At the moment he is extremely drunk, doesn't know what he's saying, and is very violent and obnoxious... So you don't want to see him yet? I think that's best.' The defendant was eventually released before a legal representative arrived.

Field-Note Extract 31 (Grimeston).

The defendant was arrested at 7.40 p.m for causing criminal damage to the glass door of the police station. He was extremely angry and indignant at his arrest, and demanded to see a solicitor in loud and abusive language. He was locked in the cells, and his many calls for assistance were only occasionally answered by the custody staff. On each occasion, the defendant's demands to see a solicitor could be heard by all. The custody staff made no attempt to contact a solicitor. It was not until 10.30 p.m that they began to make efforts to locate the arresting officer so that an interview could take place. By this time the arresting officer had gone off duty, and his report of the incident could not be located until 3 a.m. I asked why there had been no review of detention at 1.40 a.m and was told that it was because the inspector was 'a bit tied up.'

The solicitor was contacted at 3 a.m and arrived at 3.30 a.m. After a brief consultation he emerged to inform the CO that his client refused to be interviewed. All the officers present exhibited much surprise at this. The CO told one of the officers to charge the defendant, saying, 'there's no problem, there is enough evidence.' The solicitor asked the CO why it was that he was not contacted until 3 a.m in view of the fact that the arrest had taken place at 7.40 p.m. The CO replied, 'Well, he didn't tell us he wanted a solicitor. Everytime we went to his cell

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[620] For full details of this incident, see *supra.*, at p.167-8.

to ask him, he was just abusive and incoherent, so we just ignored him thinking that we'd let him sober up.'

iii. Contact ensures neither legal advice nor legal advice in person.

There is no guarantee that a suspect who makes contact with a firm of solicitors will receive legal advice. Brown found that no direct consultation took place between a legal adviser and the suspect in 7 percent of the cases where contact was made.[621] Sanders *et al* put the figure higher at over 23 percent.[622] Furthermore, both Brown and Sanders *et al* found that in approximately 20 percent of cases advice was provided over the telephone only.[623] On the basis of their observational data, Sanders *et al* calculated that only about half of those making a request received legal advice in person. Although Brown is right to point out that the rate of attendance is higher for serious cases (arrestable offences),[624] slightly less than one fifth of suspects in such cases were advised over the telephone only.[625]

Sanders *et al* report that in some cases the legal adviser was heard asking the suspect whether he (the suspect) thought he needed a solicitor. As the researchers rightly point out, not only is this a professional decision which the solicitor is being paid to make, but the question is totally inappropriate because suspects are so obsessed with leaving custody that they cannot make a dispassionate evaluation. Furthermore, the offer to attend the station was never phrased in neutral terms: legal advisers did their best to convince suspects that the problem could be dealt with over the telephone. In view of this, it is not

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[621] Brown (1989) *op. cit.*, at p.26.

[622] 116 cases out of an observed sample of 499 cases (1989 *op. cit.*, at p.101).

[623] Sanders et al at p.101, and Brown (1989) op. cit., Table 3.3, at p.27.

[624] *Ibid.*, at p.31.

[625] Brown (1989) *op. cit.*, table 3.3, at p.27.

surprising that Sanders *et al* came to the conclusion that '(d)efence solicitors and police officers seem to have rather more in common - to the possible detriment of suspects -than the naive observer might expect'.[626]

The solicitors whom Sanders *et al* interviewed said that they were well aware of the importance of attending an interrogation, and the majority stated that they would always attend if the suspect was to going to be interrogated. The research showed, however, that despite having been contacted, legal advisers attended only 64 percent of cases in which an interrogation took place.[627] In one observed case the solicitor persuaded the suspect over the telephone that he should confess,[628] and in another, the police had to convince the solicitor that he ought really to attend.[629]

Fourteen of the 41 defendants in my sample who requested legal advice were advised over the telephone only. Two of these individuals said that they told the legal adviser not to come to the station.

Case 1/30/W/A/Dis.

> Def: 'I told him there's no point - it'd just taken longer. All I wanted was for him to find out why I'd been arrested, and to make sure I got bail.'

One person said that he had been told that it was his decision as to whether he wanted the legal adviser to come out to the police station.

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[626] Sanders et al (1989) *op. cit.*, at p.117.

[627] *Ibid.*, at p.113.

[628] Example EN065, at p.120

[629] Example MC015, at p.118.

Case 1/70/W/A/Dis.

Def: 'He said to me, "I'll come out if you really want me to", so I said "Naa, it'll be alright". He told me that if I changed me mind, if it got really serious, I should give him a ring, so I thought, "yea, fine".'

Seven of those who made contact were told by their legal adviser that he was not going to come out to the station because it was unnecessary for him to do so.

Case 1/49/B/A/OAP

The defendant did not contact a solicitor until after he had been interrogated. The solicitor told him that there was no point in him coming out, and that he would meet the defendant at court the next morning. The defendant agreed to this, but told me that he had misgivings about it. He would have liked to have told the solicitor the circumstances of his arrest so that the solicitor 'could sleep on it' and be better prepared for the court hearing the next morning.

Case 2/05/B/A/Dis.

Def: 'He knew I wouldn't make a statement - I never do ... so the solicitor just said, "Do the usual, if you need me, call me again".'

Case 2/09/W/A/Dis.

The defendant said that the solicitor told him that there was no point in her coming out because he would get bail and be out by the afternoon. D was in fact refused bail, and he blamed the refusal on the non-attendance of the solicitor.

In four cases the legal adviser gave no reason for not coming out to the station. It appeared from talking to these four individuals that the issue was not even raised.

In addition to these 'telephone advice only' cases, two individuals made contact with a legal adviser but received no advice. In one case the legal adviser said he would attend the next day, but by that point the defendant had changed his mind. In the other case the adviser refused to represent.

Case 2/03/W/A/POO

> Def: (A heroin addict) 'I was really upset about being arrested and I wasn't quite well and I ended up shouting at him. He said that if that was going to be my attitude he wouldn't represent me and hung up. So I screwed that one up. I wish I'd spoken to him a bit later on, when I knew what I was doing.'

iv. Attendance at the station does not ensure attendance during the interrogation.

Sanders et al discovered that in one fifth of those cases in which a legal adviser attended the station, he or she failed to attend the interrogation.[630] I found in my study that in two cases the legal adviser was at the station but did not stay for the interrogation. In one of these two cases this situation arose because the suspect felt that he could not wait.

Case 1/71/W/A/Dis.

> The defendant requested that his solicitor be present for the interrogation. His solicitor had to leave for court, and told him that she would be back shortly. After she had left, the defendant was told that the interrogating officers were ready to question and would he be prepared to answer questions without his solicitor being present. The defendant agreed: "cos I just wanted to get out, so I thought I'd see if I could convince 'em it wasn't me.'

Sanders *et al* state that the police will sometimes use ploys to persuade suspects to be interrogated without having a solicitor present.[631] In some cases, however, the absence is due to unprofessional conduct on the part of legal advisers. They cite one case in which the solicitor answered 'no' when asked by the custody officer whether he was going to wait for the interrogation. He added, 'I think I may not need to...He's coughing'.[632] I was informed by one of the

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630 *Ibid.*, at p.121.

631 *Ibid.*, at p.123.

632 Example NR058 at p.124.

two defendants whose legal adviser did not wait to attend the interrogation that he was told to stop the interrogation and give the adviser a telephone call if 'it started getting a bit hectic.'

v. Contact does not ensure advice from a legally qualified solicitor or even a legally trained adviser.

Sanders *et al* found that 30 percent of suspects in their sample were advised by individuals who were not qualified solicitors ('representatives').[633] Firms of solicitors who were not part of the Duty Solicitor Scheme, and therefore not subject to restrictions on the use of representatives, resorted to unqualified personnel in over 42 percent of cases.[634] McConville and Hodgson put the figure even higher: they found that representatives were used in over 75 percent of all cases.[635] They discovered that an 'unqualified representative' could be anyone from an articled clerk to an ex-police officer.[636]

McConville and Hodgson's study also revealed that although the vast majority of firms have recourse to unqualified personnel, very few provide any legal training for them. The authors write:

> 'Once new personnel had attended a police station on their own, they were considered 'trained' if they survived the process without noticeable adverse consequences for the firm. In this way, high volume criminal practices standardly

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[633] In a further 18% of cases the status of the adviser could not be determined.

[634] Firms operating under the Scheme used representatives in slightly over 10% of cases.

[635] (1993) *op. cit.*, Table 2.1 at p.17.

[636] 47 percent of firms used ex-police officers as advisers, and in addition firms had recourse to outside agencies who employed former police officers (*Ibid.*, at p.28). See also Sanders *et al (1989)*, at p.98.

drafted secretaries and office juniors into the business of delivering advice at police stations.'[637]

Concern must also be expressed at the fact that firms appear not to grade offences in order to decide when advice should be given by a solicitor rather than a clerk. Both McConville and Hodgson, and Sanders *et al* report that firms regularly send out clerks to advise even in serious cases.[638]

The dangers of using unqualified personnel to deliver legal advice in the stressful conditions of the police station are clear, and explained at length by McConville and Hodgson in their report to the Royal Commission on Criminal Justice. Although clerks may pick up knowledge about police station procedures, their knowledge of criminal law and of the rules of evidence and procedure is bound to be extremely limited. McConville and Hodgson report that in several cases clerks found themselves in trouble and asked the researchers for legal advice. Lack of legal knowledge can lead to a lack of confidence, and this was a weakness which the police were seen to exploit through 'belittling' clerks in front of defendants, for example by referring to them as 'secretaries'.[639]

A combination of no legal knowledge, a lack of confidence and hostility from the police led some representatives to advise suspects to make no reply, regardless of whether this was the best strategy. Others went to the opposite extreme and sought to shed themselves of their role as legal adviser, preferring instead to put themselves across as simply a friend of the suspect. These individuals attempted to befriend the police, and sought their advice and assistance.[640]

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[637] Only three out of seventeen firms were found to make any significant effort to train staff in the 'basic' skills of advisory work (*Ibid.*, at p.28).

[638] At p.20 and p.98 respectively.

[639] *Ibid.*, at pp.31-32.

[640] *Ibid.*, at p.44.

Finally, untrained staff are unlikely to understand the role of the lawyer in a system of adversarial justice. The authors state that most clerks were unsure of their role and this, combined with the fact that they spent a lot of time with police officers, meant that most clerks absorbed police values and adopted police perspectives. Comments such as the following were common: 'They should all answer. It is not as if they all tell the truth; also an honest person would want to explain and be able to explain', and 'I see my duty to the public in general: I don't think it's right that people should get away with it.' Several clerks enjoyed close social contacts with the police, and this was especially true of those who were former police officers. Some of the latter were seen chatting to police officers before seeing the client, telling the police what story they thought the client would put forward.[641]

vi. The quality of legal advice is often poor.

A total of 35 individuals in my sample succeeded in making contact with a representative, and 33 of them succeeded in securing advice. I asked this group what advice the solicitor had given them.

Nine said that they had been told to tell the truth (3 were advised over the telephone, and 6 were advised in person).

Case 1/63/B/A/Dis.

> Def: 'She said there was no point in her coming out, and anyway I wouldn't have any problems if I just told them the truth. She said that I could refuse to answer if I wanted, but that if I stayed silent they'd see that as being awkward and uncooperative and they may make things more difficult for me.'

Ten individuals, five of them over the telephone, were told to reply 'no comment' to police questions, and another six (2 over the telephone and four in person) were told that they could either tell the truth or say 'no comment'.

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641 *Ibid.*, at p.33.

Case 2/07/W/A/OAP

> Def: 'She more or less left it open to me to say something or not to say something ... she didn't give me any specific advice.'

Seven (21 percent) of those who spoke with a legal adviser said that they had not been given any legal advice at all. One said that the legal adviser had asked him a few questions about what led to the arrest but did not tell him what to do. Another said, 'He didn't say nothing - he knows I know the ropes. I know he's there if I need him.' In four of these cases it was clear from what the defendant told me that, although no specific advice may have been given, the adviser had assumed that the defendant would answer police questions. For example, the defendant in Case 2/22 was given no advice, but was told that if he 'explained' matters to the police they would probably reconsider the position relating to bail. In Case 2/27 the adviser did nothing but listen to the defendant and inform him that he should go up to the interview and that she would intervene if the police asked questions which she considered to be unfair. Case 2/43 provides another example of this type of 'advice':

> Def: 'Solicitor said I might get bail or I might not. Said he thought they would be pretty severe in the interrogation. He asked me whether I wanted him to represent me in court.' The solicitor did not attend the interrogation. 'He said if it started getting a bit hectic in the interview, just say you wanna stop, and then ask for me.'

In only one case did the legal adviser discuss with the defendant possible strategies which could be employed during police questioning. In this case the initiative came, not from the legal adviser, but from the defendant's father.

It is difficult to assess the quality of the legal advice received by suspects without detailed knowledge about the facts and the evidence against a suspect in any given case. The evaluations of defendants in this regard are problematic because their legal knowledge will usually be extremely limited. So although 56 percent of defendants said that they had found the adviser helpful, approximately

half of this group had been advised over the telephone only, and the other half said they had received no advice at all.

Despite the difficulties of evaluation, it can nonetheless be safely asserted that it is unacceptable for legal advisers to advise silence over the telephone but not attend the interrogation to provide the support necessary for the defendant to maintain silence. Similarly, and at the risk of stating the obvious, it is not good legal practice to offer no advice at all, to simply listen to the police version of events and advise the suspect to tell the 'truth', to assume that the suspect will answer police questions, and to not discuss any strategies with the suspect prior to the interrogation. The data gathered in the present study suggest, therefore, that the quality of legal advice offered at the police station is often poor.[642]

McConville and Hodgson have conducted thorough research into the quality of legal advice, tracing 180 cases from the point at which a firm of solicitors was first contacted by the police, through to the adviser/client consultation and the interrogation. They found, firstly, that advisers failed to persuade the police to part with information. In 45 percent of cases they did not even make the effort to ask investigating officers for details, and when such efforts were made, they were successful in securing extensive information in only 14.7 percent of cases.[643]

Secondly, it was discovered that advisers routinely failed to secure necessary information from the suspect, or to strike up a relationship of trust and confidence with him. This can only be done by spending some considerable time with the client in private consultation prior to the interrogation, and yet it was found that almost half of all consultations took less than ten minutes, with nearly

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[642] Sanders *et al*, on the basis of interviews with relatively small numbers of suspects and solicitors, came to the same conclusion (at p.137).

[643] *Ibid.*, at pp.40-2.

a quarter taking less than five minutes,[644] and in a small percentage of cases (2.3 percent) no consultation took place at all. In only 5.3 percent of cases did advisers spend more than thirty minutes with the client. The authors report that only a minority of advisers do not appear rushed, distracted and anxious to get the consultation over and done with.[645]

The consequence of short consultations is that advisers routinely fail to unearth important factual material and to understand or explain the legal position to the client. McConville and Hodgson state that concepts which may have been relevant to a defence were left unexplored, and if suspects explained the strategy they were thinking of employing (e.g to confess, to deny etc), advisers made no effort to tell them the implications of it or how the police would be likely to respond. The authors write that '(s)o far as (advisers) were concerned, the strategy chosen exempted them from inquiry.' The failure to secure information from the police or from suspects meant that in less than one third of cases did advisers have thorough knowledge of the case before going into the interrogation.[646] In view of this, it comes as no surprise that in 78 percent of cases advisers either explicitly or implicitly advised the suspect to co-operate with the police.[647]

Finally, advisers were only very rarely seen to ask after the suspect's welfare, and complaints by suspects of police threats and intimidation were either totally ignored, or vague assurances were given that something would be done

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[644] It must be borne in mind that some of this time is spent in extracting biographical details and in establishing the clients eligibility for legal aid.

[645] *Ibid.*, at p.52.

[646] *Ibid.*, at p.65.

[647] *Ibid.*, Table 5.1 at p.69.

'later'.[648] Rule-breaking by the police was rarely challenged. For example, section 37 of PACE states that if there exists sufficient evidence to charge, the police must make a decision as to whether they wish to charge or not, and that no interrogation can take place once a decision to charge has been made. Despite this provision, the researchers observed that, in many cases, interrogation took place after the police had decided to charge, and that advisers, although they knew that the police had no power to do this, routinely allowed the police to question.[649]

vii. Presence of a legal adviser does not ensure protection from unfair interrogation tactics.

Research by Irving and McKenzie[650], Bottomley *et al*[651], Baldwin[652] and McConville and Hodgson[653] has established that legal advisers are, in the main, passive spectators during police questioning of suspects.

A legal adviser was present during the interrogation in 17 of the 66 cases in my sample in which police questioning took place. These 17 defendants were asked what their adviser did during the interrogation, and 10 replied that he did nothing. In the remaining seven cases it appeared that the intervention of the adviser was limited: he or she either answered a question asked by the suspect or the police, asked for a question to be repeated, or explained a question to the suspect. In only two cases was I told that the solicitor asked for the interrogation

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[648] The authors state that advisers very rarely took action, and usually failed even to make a note of the complaint (*ibid.*, at pp.59-60).

[649] *Ibid.*, at pp.60-3.

[650] (1989) *op. cit.*, at p.164.

[651] (1991) *op. cit.*, at p.362.

[652] (1992) *The Role of Legal Representatives at the Police Station* (RCCJ Study No.3).

[653] (1993) *op. cit.*

to be halted so that further consultation could take place, and in both cases this was done at the request of the suspect.

Baldwin, after observing video recordings of 182 interrogations conducted in the presence of a legal adviser, found that in 66.5 percent of cases advisers said nothing. They pushed the clients interests in only 7.7 percent of cases, whilst in 8.8 percent of cases they played the role of a third interrogator.[654] Baldwin provides numerous examples of cases where advisers failed to challenge coercive questioning, or even assisted interrogators with their task.

> *Case 54 (Belgrave Road)* The tone of the interview changes abruptly as the officer becomes increasingly assertive, repeatedly accusing the suspect of lying, saying that she is behaving in a 'despicable' and 'terrible' manner. The other officer adopts a more sneering tone, though he too is aggressive towards the woman. Both officers refer to her within the space of a few minutes as 'an out and out liar'. When this approach fails to produce an admission, the suspect is told that she may need 'help' and the tone of the interview is shrill and harrying, almost gratuitously offensive. The legal representative says almost nothing in a series of interviews that last almost two hours.[655]

> *Case 9 (Redditch)* The suspect is given an opportunity to put his version of events and he offers a detailed account of what took place. The officers challenge this version with reference to statements that have been made, and the challenge becomes stern and tough. They disbelieve his claim that he cannot remember crucial parts of the altercation. One officer raises his voice when the suspect corrects him on whether he slapped or punched the other youth. The following brief exchange then takes place:
>
> Interviewer: 'Don't try and be smart.'
>
> Suspect: 'I'm not trying to be smart, sir.'

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[654] *Ibid.*, at p.28.

[655] *Ibid.*, at p.30.

Interviewer: 'Don't try and suggest that I'm getting myself confused.'

The interviewer gets unduly heated, and, having tested the suspect's version repeatedly, it is difficult to see why this tone needs to be adopted with a youth who calls the officer 'sir', has no previous convictions and is cooperative ... Compared to the suspect, the officers seem ill-mannered. The legal representative who is present contributes almost nothing to a long interview.[656]

> *Case 36 (Belgrave Road)* The legal adviser intervenes at times to safeguard his client's interests but at other times he is like a third interviewer. He certainly does a lot in the interview to facilitate the officers' task. There are conspiratorial nods between the lawyer and one of the interviewers (particularly at the end of the interview), and the impression given is of partnership rather than adversariness.[657]

Baldwin reports that '(i)n many instances lawyers sat in silence when the situation seemed to cry out for them to intervene or raise some objection to the nature of the questioning'. Five of the ten defendants in my sample who said that the adviser did nothing complained that the questioning had been unfair. This explains Bottomley *et al*'s finding that 72 percent of police officers claimed that the presence of a legal adviser would make no difference to the way in which they would conduct an interrogation.[658]

McConville and Hodgson found that '(d)espite the fact that the police might resort to psychological manipulation, accusation and abuse, and might lose their tempers with the suspect, legal advisers usually continue to act as spectators and make no attempt to alter the interrogation dynamics'.[659] The adviser was seen to make an unprompted intervention in only 17.1 percent of cases, and in

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[656] *Ibid.*, at p.31.

[657] *Ibid.*, at p.33.

[658] (1991) *op. cit.*, at p.362.

[659] (1993) *op. cit.*, at p.157.

many this involved nothing more than ensuring that the suspect understood some point, or asking to see some object or document which the police showed the suspect.[660] The authors write that advisers routinely failed to protect suspects from 'improper, inappropriate and irrelevant' questions.[661]

Both Baldwin and McConville and Hodgson report that advisers were met with hostility in the few cases where they did object to confusing or coercive questioning.

> *Case 52* There is an abrupt exchange at one point in the interview when the lawyer says that the officers should not persist with a certain line of questioning. The officer responds, 'No, we won't (leave it at that), I'm afraid. We're interviewing this man. Right? And we're asking him questions and inviting his replies ... We'll continue asking him questions. You can't answer questions for him. You're here to observe and advise him. But if we want to continue questioning him, we'll continue questioning him, if you don't mind.' ... (To the suspect) 'I'm not really bothered what your solicitor says to you because I'm asking you the questions, and not him.'[662]

Case T1504

> Solicitor (interrupting): 'The first point of clarification for me. The witness identification says that ...'
>
> PC: 'Says the lad had jeans and a pony tail.'
>
> Solicitor: 'He did not see the (suspect) again?'
>
> DC: 'We're not in court; we are not here to answer questions.'
>
> Solicitor: 'Well, okay, certainly officer, but the second clarification is the wallet.'

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660 *Ibid.*, Table 9.1 at p.158.

661 *Ibid.*, at p.171.

662 Baldwin (1992) *op. cit.*, at p.34.

PC: 'The ...'

DC (interrupting in a heated manner): 'We're not on trial here; we're asking the questions, not you; we don't have to clarify anything.'[663]

VII. IDENTIFYING AND PROTECTING THE VULNERABLE

The Codes of Practice seek to provide protection for the young and the mentally disordered or handicapped by stipulating that such persons cannot be interviewed except in the presence of an 'appropriate adult'.[664] An 'appropriate adult' can be a parent, a guardian, a social worker or 'another responsible adult aged 18 or over'.[665]

This provision is based on two problematic assumptions: firstly, that the police can identify those suffering from mental disability, and secondly that an appropriate adult can protect juveniles and the mentally handicapped from unfair police questioning.

Gudjonsson *et al* stationed clinical psychologists in two London police stations to carry out clinical interview evaluation and psychological testing in respect of 156 suspects who were interviewed by the police. They report,

> '(t)aking into account those who were identified on the basis of the clinical interview alone as mentally disordered, illiterate or having language problems, a conservative estimate is that 15 percent of the total sample interviewed by the police fulfilled the PACE criteria for the presence of an appropriate adult ... Taking into account the findings from the psychological tests ... the need for an appropriate adult rises to above 20 percent.'[666]

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[663] McConville and Hodgson (1993) *op. cit.*, at pp.126-7.

[664] Code C para. 11.14

[665] Code C, para. 1.7

[666] (1992) *op. cit.*, at p.25.

The police managed to identify only four percent as needing an appropriate adult during the interview. Gudjonsson *et al* state that the explanation for this is simple: 'by observation alone over a short period of time, proper identification of mild mental handicap, even by trained clinicians, is a very difficult task.'[667]

The Codes of Practice instruct the police to inform the 'appropriate adult' that one of the purposes of his presence is to 'observe whether or not the interview is being conducted properly and fairly'.[668] The first point to make about this provision is that there is nothing to ensure that the appropriate adult is not himself suffering from some mental disability, or is not in some other way in an abnormal state.

Secondly, and in view of the fact that those with legal training routinely fail to identify and challenge unfair questions and question techniques, it is difficult to see how this task can be performed by someone with no such training. In his study of police interviews with juveniles, Evans found that in nearly three quarters of all cases parents and social workers made no contribution in the interview. In half the cases where the appropriate adult did intervene, he was unsupportive of the child. In those cases where the appropriate adult was supportive of the child, he was sometimes told by the police to stay quiet.[669] It should not be forgotten that all three defendants in the notorious Confait case repeated their confessions in the presence of their parents, and that the parents of two of the defendants signed statements expressing satisfaction with the way in which the confessions were obtained.[670]

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[667] *Ibid.*, at p.26.

[668] Code C, para. 11.16

[669] Evans, R. (1993) *The Conduct of Police Interviews with Juveniles* (RCCJ Study No. 8), at p.39.

[670] Fisher, Sir Henry (1977) *Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell*

VIII. TAPE-RECORDING OF POLICE INTERVIEWS

The Codes of Practice state that, with the exception of cases involving offences of terrorism, all police interviews with suspects must be tape-recorded.[671]

i. Informal Interrogation

An inquiry into at an experiment with tape-recording carried out in Scotland in 1980-82 indicated that there was a danger that the police could render the protection useless by engaging in 'off-tape' interviewing.[672] These findings were assessed in an article by McConville and Morrell, which revealed that initially the number of interviews declined, and those which took place were of shorter duration. The number of suspects making a statement fell from 38 percent to 20 percent. The authors argued that the decline in the number of interviews could only be explained by an initial reluctance on the part of the police to use the taping procedures. This defensive tactic soon gave way to a relatively more sophisticated one: the police began to engage in preliminary interviewing elsewhere. The number of suspects making relevant statements prior to their arrival at the station increased in Falkirk from 14 percent to 44 percent. The length of time between a suspect arriving at the station and the commencement of a taped interview also increased, suggesting a practice of lengthy preliminary off-tape interviewing.[673]

Confait and the fire at 27 Dogget Road London, SE6 (H.M.S.O) para. 2.1

[671] Code E, para. 3.1

[672] *Tape Recording of Police Interrogation: Interim Report- the First 24 Months*, A Report by the Social Research Branch of the Scottish Home Office and Health Dept. 1982.

[673] McConville, M. and Morrell, P. (1983) 'Recording the interrogation: Have the police got it taped?', *Crim.LR* (pp.158-162), at pp.160-2.

Once the tape was switched on, the police abandoned their usual tactics of interviewing and utilised instead a rather formal, rigid style of questioning. The authors argued that this was a reaction by the police to the case of *H.M Advocate v McFadden*[674], in which the Scottish High Court excluded the contents of a taped interrogation on the ground that parts of the interview had been carried out in an improper manner. The formal style of questioning produced fewer replies, but this did not matter since the police had already elicited the information they wanted. McConville and Morrell concluded that 'what has happened is that the police have managed to give the appearance of accepting taping by recording an acceptable number of interviews. *McFadden* taught the police the lesson that there were real dangers in recording the traditional interrogation. What is recorded, therefore, is what is acceptable to the courts and what would pass public scrutiny.'[675]

Some of the early research into the impact of PACE indicated that the police were hostile to the idea of recording interviews.[676] Researchers have since reported that, despite this initial hostility, officers have responded well to the reform and have not resorted to 'informal interviewing'. Irving and Mckenzie, for example, undertook research at a Brighton police station in 1989 and concluded that 'there have been no indications of illicit interviewing during the study periods'.[677] Willis asked police officers, both before and after the introduction of taping, to indicate on a form the number of times they

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[674] (1980) Unreported.

[675] McConville and Morrell (1983), *op. cit.*, at p.162.

[676] Maguire, M. (1988) 'Effects of the PACE provisions on detention and questioning: preliminary findings', *British Journal of Criminology* (Vol. 28; pp.19-43) at pp.39-40.

[677] (1989) *op. cit.*, at pp.157-8.

interviewed a suspect, whether inside or outside the station. The results showed that interviews outside the station remained more or less constant.[678]

However, this has been disputed by other researchers. Sanders *et al* state that whilst it may be difficult to gauge the frequency with which 'informal' interviewing occurs, they were left in no doubt that it did take place. Evidence of this came from direct observation, from suspects, who complained of being interviewed in the police car and/or in the cell, and from solicitors and police officers, who acknowledged the existence of such practices. One solicitor, echoing many others, told the researchers, 'they will nearly always have a chat with them about what's gone on. I can hardly think of a case where they haven't'.[679]

McConville *et al* were told by officers that 'informal interviews' took place, in the police car or in the cell, in cases where they were considered necessary to establish rapport with the suspect. Although much depends on the individual custody officer, the researchers learnt that some were willing to facilitate informal interviews by allowing officers to visit the suspect in his cell, or by allowing the suspect to be taken to the interview room without a record being made of this on the custody sheet. The authors conclude, 'it is quite clear that official records of interrogations, even if "verified" by contemporaneous notes

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[678] Willis writes, 'This goes to support the anecdotal evidence available to the researchers that the police officers involved in the trials have taken to tape-recording with commitment and enthusiasm' (Willis, C. (1984) *The Tape-Recording of Police Interviews with Suspects: An Interim Report* (Home Office Research Study No. 82) at p.32. See also Willis C. *et al* (1989) *The Tape-Recording of Police Interviews with Suspects: A Second Interim Report* (Home Office Research Study No. 97) at p.27).

[679] Sanders *et al* (1989) *op. cit.*, at pp.140-2.

and attested to by third parties such as solicitors, constitute only a partial representation of what transpired'.[680]

Maguire and Norris report that some officers were prepared to admit to 'taking the "scenic route" back to the police station in order to speak to arrested people off the record, making "deals" and offering inducements before the tape recorders were switched on, and employing various psychological tricks'.[681] Some of those spoken to even went so far as to state that an officer 'would not be doing his job' if he did not take advantage of every possible opportunity to establish some rapport with the suspect.[682]

One in five (15 out of 79) of the defendants spoken to in the present study indicated that informal questioning had taken place. A variety of locations were given: the police car, the search room, the cell, the fingerprint room, outside the interview room, and in the interview room but before the tapes had been switched on or after they had been switched off. They said that they were told to make matters easier for themselves by admitting the offence, or that the police promised to get the whole thing sorted out quickly if an admission was made.

Case 2/05/B/A/Dis.

> Def: '... they were popping questions all the time in the car, and when they were taking my fingerprints they tried to get me into a little chit-chat.'

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680 McConville, M. *et al* (1991) *The Case for the Prosecution*, at p.58. The police have in fact been caught engaging in informal interrogations on camera - see McConville, M. (1992) 'Videotaping interrogations: police behaviour on and off camera', *Crim. LR.* (pp.532-48).

681 Maguire, M. and Norris, C. (1992) *The Conduct and Supervision of Criminal Investigations* (RCCJ Study No. 5), at p.41.

682 *Ibid.*, at p.46.

Case 2/08/W/A/OAP

The defendant said he was questioned whilst being taken from his cell to the interrogation room, outside the interrogation room and whilst he was having his fingerprints taken: 'They were just saying "We know you done it", "Why don't you tell us", "What's all this no comment crap", and "It will be better for you".'

Case 2/18/W/A/Drugs

Defendant had said 'no comment' to all police questions: 'They tried to fill my head with all sorts of rubbish after they had switched the tape off - said that in the past people have gone to prison who were innocent but because they didn't make a statement they ended up going inside. I just said 'no comment'. Then they tried the emotional blackmail thing, saying that my sister could be arrested for allowing me to sell hashish and cannabis and that stuff from her address.'

Case 1/61/B/A/Dis.

Def: 'Two of them came into my cell and told me that they didn't believe a word I had said, saying that the bike was as bent as hell, and that I wasn't who I said I was and that I wasn't going anywhere until they had got to the bottom of it.' (This incident was said to have taken place between two formal interrogations).

Case 1/76/A/J/Dis.

The defendant was arrested on suspicion of possessing a stolen passport. He was interviewed, and refused to accept the allegation that the passport was stolen. The defendant said that he was returned to his cell, and shortly afterwards one of the interviewing officers came to see him. 'He said that if I said where I got it from, he would personally see to it that everything was sorted out as quickly as possible. Otherwise I'd be here for ages until they had made enquiries from the passport place at Peterborough.'

In addition to the testimony of suspects, I directly observed evidence of informal questioning. Officers were seen conversing with defendants outside the interview rooms, and sometimes even in the charge room. It becomes difficult to resist the inference that questions relating to the offence are being asked when officers take suspects to one corner of the charge room and speak with them at length. Sometimes it was unnecessary to draw inferences.

Field-Note Extract 32 (Grimeston) Case 1/53/A/J/Dis.

> The defendant was brought in on suspicion of having stolen a car. He was pushed down on to a bench in the custody room and two PCs sat down on either side of him, hedging him in. The defendant was clearly frightened. The officers began to question him about the car, loudly demanding that he tell them where he had stolen it from. D told them what had happened, claiming that he had not known the car was stolen and had merely accepted a lift in it. D was heard to ask for a glass of water but was ignored. At this point one of the officers became extremely angry: he put his face very close to D's and began to poke his finger at D in a very aggressive manner, whilst repeatedly shouting, 'That's not the truth is it? Is it?!' D said that it was the truth, and that he desperately wanted a drink of water. The officer shouted, 'Tell us the truth and we might think about it!'

The Codes of Practices do not ban such questioning, and the fruits of these interviews can be admitted in evidence. Statements made outside the context of an interview must, however, be recorded, timed and signed both by the officer and the suspect, if he is willing.[683] Some have argued that recording will never be an effective safeguard for the suspect unless PACE includes a provision prohibiting the use as evidence of any incriminating statements not backed by tape.[684] Such a measure would make it difficult for the police to fabricate incriminating remarks and attribute them to the suspect ('verbals'). It would not, however, deal with the very real possibility that some suspects may confess on tape as a result of pressures put on them prior to the formal interrogation.

This danger is highlighted in a recent study by Evans, who found that in more than 76 percent of cases a confession was made almost immediately once the tape was switched on, despite the fact that in many of these cases the suspect had not even been told of the offence for which he was suspected. He writes that not only was it implicit in these type of interviews that informal questioning had taken place, but that officers openly admitted to it. The result is that the

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[683] Code C, para. 11.13

[684] Christian, L. (1983) *Policing by Coercion* (GLC Police Committee).

informal interrogation feeds into the formal one, making it impossible to know what type of pressures have been applied to bring about the final admission. Evans gives an example of a suspect who is asked, immediately after the tape is switched on, 'What did you do then?', and replies, 'We walked into the store and proceeded to take items without paying.'[685]

ii. Police Summaries of Tape-recordings

The value of tape-recording as a protection for the suspect is further called into question by the fact that the tapes are very rarely heard by anyone other than the police. The Home Office, in an effort to reduce the amount of time spent in court listening to the tapes, has issued guidelines which require the police to prepare 'an accurate and reliable account of the relevant parts of the interview'.[686] Baldwin and Bedward discovered that although the original tape-recordings are freely available, both the Crown Prosecution Service and defence lawyers rely exclusively on the summaries.[687]

In most forces the summaries are compiled by the interviewing officers, and this naturally raises the issue of whether the summaries provide a fair and accurate account of what was said by the suspect. Baldwin and Bedward carried out research in the West Midlands and discovered that 16.5 percent of all interview summaries omitted so much relevant detail that they could not be described as fair summaries, and in a further 33.1 per cent of cases the record was found to be 'misleading, distorted or of poor quality'.[688] In a large number of these summaries it was found that the police had omitted denials and explanations put forward by the suspect.

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[685] Evans (1993) *op. cit.*, at pp.28-30.

[686] H.O Circular 76/1988, para. 23, issued 17 August 1988.

[687] Baldwin, J. and Bedward, J. (1991) 'Summarising tape-recordings of police interviews' *Crim.LR* (pp.671-79).

[688] *Ibid.*, at p.674.

Baldwin has recently carried out a larger survey involving four police forces, only to discover that in some forces the situation is worse than that in the West Midlands. In 29 percent of cases too much relevant detail was omitted, and in a further 21.5 percent the record was 'misleading, distorted or of poor quality'.[689] Baldwin further discovered that where biases were present in the record, it was three times more likely that they would favour the prosecution rather than the defence.[690] He writes that 'the more summaries one examines, the more convinced one becomes that police officers suffer from an understandable, and probably ineradicable, tendency to view matters through a prosecution prism.'[691]

The unreliability of police interview records is further attested to by the findings of Evans. He took 164 summaries of police interviews with juveniles and compared them with the tape-recordings. He found that in 13 cases the police record stated that a full and frank admission had been made, when in fact the tape showed that the suspect had clearly denied the offence. In a further 5 cases the police recorded a full and frank admission, when the tape showed that the admission fell short of a full confession. In 13 cases the police failed to record that the suspect had made a full denial.[692]

IX. THE CUSTODY OFFICER AS GUARDIAN OF THE SUSPECT'S RIGHTS

As explained in Chapter Three, PACE seeks to ensure that the suspect is treated in accordance with the Act and the Codes of Practice by placing his

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[689] Baldwin, J. (1992) *Preparing Records of Taped Interviews* (RCCJ Study No. 2), at p.8. The author states that the study was conducted in a way 'deliberately geared to producing the best possible results' (at p.7).

[690] *Ibid.*, at p.15.

[691] *Ibid.*, at p.22.

[692] Evans (1993) *op. cit.*, at pp.40-1.

welfare in the hands of a 'custody officer'.[693] This officer, who must not in anyway be involved in investigating the crime for which the suspect has been arrested,[694] is entrusted with a number of important duties: he must notify suspects of their rights,[695] decide whether there exists sufficient evidence to charge the defendant,[696] decide whether there is legal power to detain the suspect without charge,[697] and decide whether to grant bail to those charged.[698]

It has been argued by some that the creation of independent custody officers has succeeded in ensuring that suspects are granted their rights and protected from mistreatment. Irving and McKenzie found that 'custody officers had taken a firm grip on the management of the cell block and CID officers had submitted to the new formalities about access to prisoners and the other regulations governing interrogations'.[699] Dixon *et al* state that custody officers protect suspects from investigating officers by cultivating independence, and report that one can see 'what almost amounts to a custody officer subculture'.[700]

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[693] S39

[694] S36

[695] Code C para. 3.1

[696] S37(1)

[697] S37(2) and (3)

[698] S38

[699] (1989) *op. cit.*, at p.117. They emphasise that custody officers 'were not prepared to allow any contact between suspect and investigating officer, save in the formal interrogation situation'(at p.102).

[700] Dixon, D., Bottomley, A., Coleman, C., Gill, M. and Wall, D. (1990) 'Safeguarding the rights of suspects in police custody', *Policing and Society* (Vol.1; pp.115-40), at p.137. This is an odd claim given that many COs are 'acting COs', and most are COs only for a particular period of time and then return to normal police duties.

These findings are disputed by McConville *et al*, who write that custody officers 'so much share police cultural values that they will weaken the suspect's position or give a further push to the emergent police case.'[701] Detention was authorised in almost 100 percent of cases in their sample, and the authors argue this is partly to be explained by the fact that custody officers are 'emotionally committed to believing (the arresting officer's) version of events ... because ... group solidarity, police culture and professional friendships dictate mutual reinforcement of authority'.[702] They found that in some cases custody officers actually recorded non-legal reasons for detention, which indicates that they attach very little significance to the controlling legislation.[703]

My own observations lead me to be extremely sceptical about claims that custody officers act to ensure suspects are granted their rights and protected from mistreatment by investigating officers. I found, for example, that it is misleading to describe custody officers as independent, not only in the general sense argued by McConville *et al*, (i.e that they share police values and priorities), but also in the sense that they are not independent of particular cases. They were regularly seen to advise investigating officers about what charge or charges to prefer, and to give hints on how to conduct the interrogation. This comes about because the custody officer is usually the only Sergeant available in the charge room, and PCs seek to take advantage of his experience and superior knowledge of the law. Custody officers are naturally sympathetic to whatever it may be that the arresting officer is seeking to achieve by the arrest, and will lend their support and encouragement.

Dixon has argued that it is wrong to use detention figures to impeach the independence of custody officers. Detention is routinely authorised, he argues,

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[701] (1991) *op. cit.*, at p.55. See also McConville (1992) *op. cit.*, at p.540.

[702] *Ibid.*

[703] *Ibid.*, at p.45.

because S37 makes it possible in almost every case for the arresting officer legitimately to claim that it is necessary to secure evidence by questioning.[704] It cannot be denied that the legislation gives arresting officers enough leeway to make this claim, but the issue is whether custody officers make a genuine effort to scrutinise such claims. During the course of observations I saw no case in which they did so. Firstly, very few arresting officers bothered even to inform the custody officer of the circumstances of the arrest, indicating simply a broad category ('Theft'; 'S4'; 'criminal damage'), and custody officers, without exception, authorised detention without seeking any further information. It is submitted that the reason they did not seek such information was because their mind was made up.

Field-Note Extract 33 (Grimeston).

> I discussed with the CO an incident which had taken place in the police station reception. A young black man had been arrested for breach of the peace after he had asked why, despite repeated requests, the police had failed to return a watch which had been taken from him when in he had been in custody on a previous occasion. There was some dispute as to what was said by the young man and what was said by the officers at the desk who had arrested him. The CO said 'Well, it doesn't matter what he said, because he's a criminal'. I stated that his past convictions, in my view, were irrelevant to the issues of whether the arrest was justified and whether detention should be authorised. The CO replied,'Of course it's relevant. He's got a criminal mentality. It shows that he can't be trusted - that he's a liar.'

Secondly, custody officers both failed to scrutinise the need for detention and, as the above case demonstrates, also authorised detention when there was no legal power to do so.

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[704] Dixon (1992) *op. cit.*, at p.525.

Field-Note Extract 33 (Grimeston).

The arresting officers told the custody officer that the defendant had been arrested for breach of the peace. The defendant, perfectly calm, explained to the custody officer the full circumstances of the arrest.

CO: 'I've heard what the officers had to say, and I think you should be detained here until such time as I feel that a breach of the peace is not likely to recur upon your release.'

Def: 'I just want my watch. If you want me to come back, I'll come back, O.K? There never was any peace breached; I was leaving the station.'

CO: 'I don't want to get into that. I think you should calm down. When I'm satisfied that you've calmed down, I'll let you go.'

Def: 'But I *am* calm.'

CO: 'Well, I don't think that at this present time you are. Don't worry, you won't be charged, I'm just going to place you in the cells for some time.'

The defendant tried for some time to persuade the CO that his detention was totally unnecessary, but to no avail. Clearly upset and frustrated, he resigned himself to his fate and went quietly with the jailer. He was given no idea as to how long he would be kept for. Approximately five hours later he was released without charge.

This case provides an example of summary punishment through illegal detention. There was, from the outset, no intention to charge[705], or to 'secure or preserve evidence' or 'to obtain evidence by questioning'.[706] The defendant in this case was not a suspect but a detainee - a category not known to the law. Rather than acting to protect the suspect, the custody officer's main concern appeared to be that of legitimating the arrest.

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[705] S37(1)b

[706] S37(2),(3)

In one observed case a defendant, arrested for causing criminal damage to the door of the police station, was detained for more than eight hours, despite the custody officer himself acknowledging that there was sufficient evidence to charge him immediately and release him on bail. In another case, the defendant was arrested on suspicion of stealing a car or of knowingly allowing himself to be conveyed in a stolen vehicle. Detention was authorised despite a decision that the defendant would not be charged because there was no evidence against him. One of the arresting officers informed the custody officer that he wanted to interrogate the suspect in order to persuade him to name the driver of the stolen car, and the custody officer agreed to this.

If custody officers are there to protect suspects, it would not be unreasonable to expect them to listen to the few suspects who have the courage to speak and complain about the circumstances of their arrest. In actual fact, as demonstrated in the previous chapter, they showed marked hostility towards those who sought to challenge police dominance over the proceedings. The defendant in Case 2/14 sought to explain that his arrest was wrongful, but was told to 'shut up' by the custody officer. As one defendant said of the custody staff, 'They don't listen to what you're saying anyway. All they want to do is bang you up in a cell and forget about you.'

As already recounted, in one of the cases I observed[707] the custody officer undermined the suspect's right of access to legal advice by persuading the solicitor over the telephone not to attend the station because the suspect was 'drunk' and 'very obnoxious'. In yet another case[708] the custody officer unlawfully delayed access to legal advice by seven hours, and then lied to the solicitor about what time the suspect had made the request.

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[707] 2/14/W/A/POO *Supra.*, at pp.167-8.

[708] *Supra.*, at p.248.

I observed that custody officers at Grimeston frequently allowed investigating officers to escort suspects to and from the cells, and nor did they do anything to stop questioning of suspects in the charge room, even when such questioning was accompanied by threats.[709]

On four occasions I witnessed the custody officer agree to, or acquiesce in, a disposition which on the available facts was either clearly unwarranted, or at least called for some further enquiry.

Field-Note Extract 34 (Nasherford).

> The defendant was arrested on suspicion of burglary, and complained vigorously that the arrest was unreasonable and unlawful because there was nothing to suggest that he had been involved. He was interrogated, and the C.O then bailed him to appear at the station pending further enquiries. The C.O afterwards told me that it was definite that D would not be proceeded against because there was absolutely no evidence to link the defendant with the offence, and no likelihood that further enquiries would unearth such evidence. In these circumstances the condition that the defendant report back to the station served no purpose other than to lend some credence to the action of the arresting officers.

Field-Note Extract 35 (Nasherford).[710]

> The defendant was arrested for swearing at an officer whilst the officer was in the processing of arresting someone. The colleague of the arresting officer explained the facts to the CO.
>
> CO: 'So he got arrested for telling PC X to "fuck-off"?'
>
> PC: 'Well, that's about it.'
>
> CO: 'So what does he (PC X) want to do about it?'
>
> PC: 'I think he wants him, Sarge, he was really annoyed.'

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[709] Case 1/53/A/J/Dis., supra., at p.270.

[710] For full facts see *supra*., at p.148.

The youth was eventually brought out and charged, not only with 'using insulting and abusive language', but also with 'assaulting a police officer in the execution of his duty'. The youth was bailed to appear at court, and as he left the CO said to me, 'Evil bastard, like his brother'. On my inquiring I was told by the officers present that one of his brothers was in prison for aggravated burglary.

Field-Note Extract 36 (Nasherford).[711]

The defendant had originally been arrested for Breach of the Peace, but was charged with assault after being physically assaulted by some male officers for swearing at a WPC. One of the officers involved in the assault changed the charge on the board from 'BOP' to 'Assault' in full view of the CO. The defendant was charged with assault before being released from custody, and this charge was accepted by the CO.

Field-Note Extract 37 (Nasherford)

The defendant (who described himself as a traveller) told me that he and group of his friends were stood on a street corner, 'larking around'. The police had started 'hassling' them, and an officer accused him of pushing a female passerby and of touching her bottom. He was arrested when he denied the accusation.

The defendant was brought into the custody area by officer B, who told the CO that D had been arrested for Breach of the Peace and that his colleague, PC X, would be dealing with the case. PC X came into the CO's office shortly afterwards and, in the presence of the CO, had the following conversation with officer B on the telephone:

'Oh, I thought we were arresting him for not letting that bloke past. Wasn't he stood there blocking this bloke's way? I thought he was begging from him ... So you're saying it's breach of the peace? ... Well, lets just put that they were all stood around, fighting and swearing in public ... If you're not going to put anything about the bloke I'm going to leave him out as well ... The crowd? Well, I'm not going to say anything about them, I mean we've got no members of the public willing to say he was making a nuisance of himself. I'm just going to put there were members of the public who were intimidated by his behaviour ... Oh, of-

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[711] For full facts see *supra.*, at p.167.

course! "I found his language and behaviour threatening and frightening, and feared for my personal safety"...' (much laughter).

The CO accepted a charge for Breach of the Peace.

Finally, all the incidents in which suspects were subjected to unnecessary violence, belittlement and humiliation, outlined in the previous chapter, took place in full view of custody officers.

X. THE ROLE OF THE COURTS IN PROTECTING SUSPECTS

Sections 76 and 78 of PACE give the courts a limited power to exclude improperly obtained evidence, thereby allowing the judiciary to exercise some control over the police. It has been argued in some quarters that judges have become less tolerant of police impropriety, and have used these provisions to safeguard suspects' rights.[712] The evidence for this claim is weak.

As was shown in Chapter three, PACE took a minimalist approach to the regulation of interrogative tactics, making no effort to deal with the finding that, in psychological terms, police interrogation is by its nature coercive and oppressive. The area is governed primarily by S76, which, in addition to simply re-iterating the common law rule that a confession obtained through 'oppression' must be excluded, states that a confession obtained 'in consequence of anything said or done which was likely, in the circumstances existing at the time, to render (the confession) unreliable' must be excluded.

The courts have not used S76 to lay down any specific guidelines on what the police can and cannot do in the interrogation. The replacement of 'voluntariness' with 'unreliablity' has made little difference. As Irving pointed out when the Bill

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[712] Dixon (1992) *op. cit.*, at pp.517-8; Zuckerman, A. (1989) *Principles of Criminal Evidence*, at p. 325.

was first published, unreliablity is a vacuous test.[713] The court is still left with the question of deciding which circumstances render a confession unreliable. As such, the courts have reverted to looking to see if it was a voluntary statement, although the old criteria of 'threat and inducement held out by a person in authority' has been dropped.[714]

Not only have the judges failed to use the flexible term 'unreliability' in a way designed to protect suspects, but they have in fact re-defined 'oppression' such that only the most reprehensible behaviour by the police will lead to the exclusion of evidence. Prior to the Act, the courts had defined 'oppression' as something which saps free will,[715] or so affects the mind of the suspect that his will to remain silent crumbles.[716] This degree of pressure, however, is no longer sufficient to persuade a court to exclude confession evidence.

In *R v Miller*[717] the Court of Appeal accepted medical evidence that the length and style of questioning to which the defendant, a paranoid schizophrenic, was subjected had produced a state of involuntary insanity during interrogation. The court ruled, however, that since the police had not deliberately sought by their method of questioning to bring about a disordered state of mind, it could not be said that they had interrogated in an oppressive manner. The leading case on the definition of 'oppression' is that of *Fulling*.[718] The Court stated that 'no other word in the English language expresses such detestable wickedness', and

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[713] Irving, B. (1985) 'Research into policy won't go' , in E. Alves and J. Shapland (eds *Legislation for Policing Today: The Police and Criminal Evidence Act (Issues in Criminological and Legal Psychology* No.7; pp.58-68), at p.60.

[714] *Harvey* (1988) *Crim.LR* 241. The courts had already began to abandon strict application of the "threats and inducements" test before PACE, see *Rennie* (1982) 1 All ER 385.

[715] *Priestley* (1966) 50 Cr.App.Rep. 183.

[716] *Praeger* [1972] 1 All ER 1114.

[717] [1986] 3 All ER 119.

[718] [1987] 2 All ER 65.

went on to rule that a confession could not be excluded under this head unless it could be shown that there had been impropriety on the part of the police, the imposition of unjust burdens and the exercise of authority in a harsh and unjust manner.[719]

Furthermore, the courts have sought to restrict the scope of S76. In *Sat-Bhambra*,[720] for example, the court refused to consider the application of S76 on the ground that the statements made by the accused were not 'wholly or partly adverse' to him when made. They only became so at the trial. In *Goldenberg*[721] the defendant had taken drugs prior to the interrogation and was suffering withdrawal symptoms during questioning. The court ruled that the reference in the section to 'anything said or done which was likely ... to render unreliable any confession...', did not extend to anything said or done by the suspect himself.

Section 78 of the Act gives the court discretion to exclude any evidence 'on which the prosecution proposes to rely ... if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'[722] Combined with S67(11) of the Act, which states that the Codes of Practice are admissible in evidence and should be taken into account by the court, S78 gives the court a potentially wide ranging power to ensure that the police comply with all provisions which confer rights on the suspect and seek to protect him from mistreatment.

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[719] Ibid p.69, per LCJ.

[720] (1989) 88 Cr. App. R. 55.

[721] (1989) 88 Cr. App. R. 285.

[722] It was held in the case of *Mason* [1987] 3 All ER 481 that the 'evidence' referred to in the section includes confession evidence.

Unfortunately, and despite initially promising indications, the courts remain as reluctant to exclude evidence as they were before PACE. Police violations of Section 58 (governing access to legal advice) provides a good illustration of judicial attitudes.

The Court of Appeal stated in the case of *Samuel*[723] that access to legal advice can only be delayed if the police have a belief, based on the specific circumstances of the case, that access to a solicitor probably *would* (not *might*) lead to that *particular* solicitor either knowingly or inadvertently alerting other as yet unarrested suspects. The Court added,

> Solicitors are intelligent professional people; persons detained by the police are frequently not very clever and the expectation that one of the happenings set in paragraphs (a) to (c) (of section 58(8)) will be brought about in this way seems to contemplate a degree of intelligence and sophistication in persons detained, and perhaps naivety and lack of common sense in solicitors, which we doubt often occurs.'[724]

In the later case of *Alladice*,[725] however, the court was no longer so sure. Their Lordships accepted that the defendant had been unlawfully denied access to a solicitor, but Lord Lane, referring to the decision in *Samuel*, stated, 'we do not share that court's apparent scepticism about solicitors being used as unwitting channels of communication'.[726] Furthermore, the court expressed the view that suspects should not have the right to a solicitor *and* the right of silence. It argued,

> 'the effect of section 58 is such that the balance of fairness between prosecution and defence cannot be maintained unless proper comment is permitted on the

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723 [1988] Q.B 615.

724 *Ibid.* at p.626, per Hodgeson J.

725 (1988) 87 Cr. App. R. 380

726 *Ibid.* at p.384

> defendant's silence ... it is high time such comment was permitted together with the necessary alteration to the words of the caution.'[727]

Unable to do anything about the right to silence, the court set itself the task of whittling away the right to legal advice by introducing a causation test. It ruled that a confession can only be excluded where the defence can show that it was obtained as a result of the refusal to allow the defendant to see a solicitor.[728] As the defendant had testified that he knew of his right to remain silent, there was no reason, the court said, to believe that he would not have made the confession if access had been allowed.

This argument was taken one stage further in the case of *Dunford.*[729] The defendant was illegally denied access to a solicitor, but the Court refused to exclude his confession on the reasoning that he had previous experience of arrest and detention and must therefore have known of his right to remain silent. There was nothing a solicitor could have told him which he did not know already. It appears, therefore, that those suspects who have a criminal record can be denied legal advice with impunity. The logical conclusion of this argument would be for the court to rule that because all defendants are told of their rights by the police on arrival at the station, access to a solicitor is unnecessary in all cases!

The courts have shown some willingness to exclude statements where the police have breached provisions requiring contemporaneous recording of interviews,[730] but this has usually been in cases where the reliability of the confession was at issue. In such cases the courts have taken the view that by

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[727] *Ibid.* at p.384-385, per Lord Lane LCJ.

[728] *Ibid.*, at p.385

[729] (1990) 91 Cr. App. R. 150

[730] See *Absolom* (1988) 88 Cr.App.R. 332; *Delaney* (1989) 88 Cr.App.R. 338; *Canale* (1990) 91 Cr.App.R. 1; *Keenan* [1989] 3 All ER 598.

failing to record, the police have deprived the court of the ability to judge whether the confession should be excluded under S76.

In general, the judicial approach has been to try and reduce the scope of operation of the recording provisions. In the case of *Brezeanu and Francis*,[731] for example, the court ruled that there was no obligation on the police to allow the suspect to inspect the record because the interview had not been conducted in the police station. In *Maguire*[732] it was held that the recording provisions do not apply where the purpose of the questions is to 'elicit an explanation which if is true or accepted would exculpate the suspect.' The court accepted that the arresting officer was not seeking to secure a confession when he said to the suspect, 'Look, you've been caught. Now tell us the truth ... it's for your own good. Don't be stupid.' The distinction is clearly without substance. The police will always argue that the interview was an opportunity for the suspect to 'explain himself', but, as this case illustrates, the 'purpose' behind the questions is that the suspect will make a confession or incriminate himself in some way.

XI. CONCLUSION

The rights of the suspect are very much in the control of the police, and are incorporated into the system of rewards and punishment which operates at the station. Suspects are not far wrong when they state that the police have unlimited power to refuse their request to use the telephone or to have someone informed of their arrest. In most cases the suspect will not even know whether the police have acted on his request to have someone informed, and there is little he can do if the police fail to do so. If a defendant asks to use the telephone, the police can ignore the request or not act upon it for some considerable time. The grant of such rights, therefore, does not operate to empower suspects. The police know they can block requests with impunity, and

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731 [1989] *Crim. LR.* 650

732 (1990) 90 Cr.App.R. 115

thus they do not view the rights in question as posing a threat to their control over the suspect. A request will not normally be refused therefore, unless it is made by an 'obnoxious' individual who, as part of his general refusal to be submissive, demands that he be accorded his rights.

The right to silence poses more of a challenge to police needs and, if routinely exercised, would take away one of the major purposes behind bringing defendants to the station. This is the reason why the police make it very difficult for defendants to exercise this right. Those who attempt to stay silent are punished by lengthier detention and, if the accounts of suspects are to be believed, on occasions by refusal of bail, preferment of a more serious charge and search of premises.

The right to legal advice has done little to improve the position of the suspect. The majority of suspects are not prepared to extend their stay in the cells by making a request for legal advice, others are persuaded by the police that it will do little for them, and some have their request ignored by the police. Only a few of those who make a request succeed in making contact with a qualified legal adviser, and a substantial proportion of these receive advice over the telephone only. The quality of advice received by suspects is frequently very poor, with some not being given any legal advice at all. This is due to the fact that a large number of those who deliver advice are not adequately trained for the job, and some lack legal qualification. The situation is exacerbated by the refusal of the police to part with vital information, such as the precise offence in relation to which the suspect will be questioned. Advisers, even when they attend the station, do not always attend the interrogation. If they do attend the interrogation, they very rarely challenge police interrogation tactics, regardless of how unfair or oppressive such tactics may be.

Custody officers are not the guardians of suspects' rights, but work to achieve police goals. They routinely detain without even a request being made by the arresting officer and regardless of whether they have power to do so. They were

seen regularly to advise investigating officers on charges and questioning, and they either facilitate informal questioning by allowing investigating officers access to the cells, or turn a blind eye to it when it takes place in the charge room. They were seen to allow questioning to take place even after a decision had been made to charge or release the defendant, and to agree charges which were not warranted. Furthermore, they always failed to intervene when suspects were, in my view, unnecessarily man-handled and mistreated by arresting officers.

Tape-recording has not succeeded in providing the court with a full record of the dialogue which takes place between the police and the suspect. There are numerous opportunities to pressurise suspects prior to the formal interrogation, and the evidence suggests that the police will engage in informal questioning if they feel that an 'off the record chat' will help them achieve the outcome they seek. Furthermore, tape-recordings are hardly ever used by defence lawyers, who rely almost exclusively on summaries prepared by the police which frequently omit details which would be of assistance to the defence.

CHAPTER EIGHT

CONCLUSION: UNDERSTANDING THE FUNCTIONS OF THE POLICE STATION

The purpose of this chapter is to draw together the arguments and evidence presented in the preceding chapters, and to assess whether current police powers enhance or endanger the 'fairness' of the criminal process. There are two issues which need to be addressed in order to carry out this assessment:

i. Do current procedures help to ensure that the court arrives at the correct outcome?

ii. Do the procedures pay sufficient regard to the civil liberties of suspected persons?

I. THE STATION IN THE PROSECUTION PROCESS

Few would argue with the proposition that for a set of procedural rules to be described as fair they must contribute to the achievement of a correct decision. Procedures which do this are apt to be described as 'fair' on the ground that they enhance reliability, and the importance of incorporating them into the decision-making process will be urged on this ground also. Thus, when attempting to assess the fairness of police station procedures, the issue is partly one of deciding whether police powers to arrest, detain and interrogate the suspect contribute to ensuring that the court arrives at the factually correct outcome.

I will address this issue here using the framework provided by the assertions, outlined in the Introduction, on which police powers are based. These are, briefly, that the police are committed to finding the truth; that any dangers which may arise from the police becoming prosecution-minded can be averted by the

introduction of safeguards; and that existing police powers are vital to combatting crime.

i. The Police Can Be Trusted To Find The Truth

The police were allowed to acquire wide powers of detention and interrogation because many judges and legal commentators were of the view that the police are neutral investigators who can help discover the truth. This is the theory to which most police officers subscribe, and as such they find it difficult to understand why the criminal process affords protections to defendants. The right to silence, the right to legal advice and the heavy burden of proof are seen by the police as impeding the search for the truth. Sir Robert Mark, one time Commissioner of the Metropolitan police, wrote that 'the establishment of the truth rather than the determination of technical guilt ought . . . to be required of everyone involved in a criminal inquiry'.[733] Implicit in this remark, and in many of the remarks which officers made to me during the course of the field-work, is the notion that only the police have the expertise required to find the truth.

Field-Note Extract 38 (Nasherford).

> Custody Officer: 'The whole thing should be about finding the truth, at the moment it can't be said that it is. It's all about lining the pockets of solicitors - I mean I don't mind suspects having their solicitors here so long as the solicitors are going to help us to get to the truth. But that's not what they do: their whole purpose is to extend the grey area between guilty and innocent so that they can get in there and make money.

As far as the police are concerned, legal rules which are informed by adversarial principles simply do not make sense. Officers become passionate in their criticisms of procedural protections because they feel that rather than

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[733] Sir Robert Mark, (1977) *Policing a Perplexed Society*, at p.37.

rewarding their selflessness and placing *trust* in their ability to find the truth, the system chooses instead to challenge and scrutinise their decisions.

It was shown in Chapter Three that this theory of the police as 'ministers of justice' is fundamentally flawed. The police are usually committed to securing the conviction of those whom they arrest, and therefore carry out their investigations with the aim of building as strong a case against the defendant as they possibly can. Indeed, in some cases the legal process is reversed: the police make a decision to arrest and then construct 'facts' in order to support a charge which they believe to be appropriate.[734] It is quite natural for the police, as law enforcement officials, to be readily convinced that those whom they arrest are guilty, to believe that they have the expertise to distinguish the guilty from the few who are innocent, and to develop work routines which pay insufficient regard to material which points to possible innocence. The police are aware that a strong case is one which is free from internal inconsistency, and will therefore select, marshall and present evidence in a way which makes it appear that the prosecution theory of the case presents the only possible way of making sense of the puzzle of 'what happened'.[735]

In fact, far from behaving as 'ministers of justice', the police act as committed adversaries of the accused. This finds support from events surrounding a number of notorious miscarriages of justice.

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[734] McConville and Hodgson have written that the '(r)esult of this is that ensuing procedures relating to detention and interrogation, instead of being underpinned by legal justification, are used in order to prop up an otherwise precipitate and unlawful arrest' (McConville, M. and Hodgson, J. (1993) *Custodial Legal Advice and the Right to Silence* (RCCJ Study No. 16), at p.198).

[735] See Devlin, P. (1979) *The Judge*, at p.72; McConville. M. and Baldwin, J. (1981) *Courts, Prosecution and Conviction*, at pp.190-1.

In the case of Timothy Evans, the police persuaded witnesses to change their testimony so as to make it compatible with the false confession which they had earlier extracted from Evans. They then suppressed the original witness testimony.[736] In the case of Laslo Virag, the police, on the basis of identification evidence, became convinced that Virag was the culprit. So convinced were they of Virag's guilt, that they decided to burn forensic evidence which flatly contradicted their suspicions.[737] In the Confait case, the police persisted with the prosecution of the defendants even after it became clear that the confessions which they had extracted could not be true in light of the available forensic evidence. With regard to the latter case, McConville and Baldwin have written that it represents 'simply a well documented illustration of a process that overlooks, indeed even legitimates, misconstruction, one sided investigation, and partisan selectivity.'[738]

Although the police argue that their version of the 'truth' ought to be uncritically accepted, their role in the criminal process renders it imperative that they should not be allowed to become the final arbiters of what represents the correct factual outcome. The criminal process ought to be structured in a manner which encourages routine dismantlement and critical review of case files prepared by the police. The legal rules and practices, however, encourage exactly the opposite - routine endorsement of police constructed cases. The first set of

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[736] Kennedy, L. (1961) *Ten Rillington Place*, at pp.129-33.

[737] See *Report to the Secretary of State for the Home Department for the Departmental Committee on Evidence of Identification in Criminal Cases* (1976) H.M.S.O.

[738] (1981) *op. cit.*, at p.192. Some of the miscarriages of justice which have recently come to light are also attributable to police concealment of vital evidence. See, for example, the cases of Judith Ward (*The Independent* 5 June 1992, at p.1), the Guildford Four (*The Guardian* 20 October 1989, at pp.1-3; Edwards, S. (1989) 'From scapegoats to sacrificial lambs: the Guildford Four affair', *New Law Journal* pp.1449-64), Stephen Kiszko (*The Times* 18 February 1992, at p.5) and, most recently, that of the Taylor sisters (*The Independent* 12 June 1993, at p.1).

legal rules which contribute to this structural flaw are those which empower the police to arrest, detain and interrogate suspects.

Granting the police such powers results in individuals being brought onto police territory, locked into a system of rewards and punishments and subjected to psychologically oppressive interrogation techniques. They are forced to defend themselves against charges which are imprecise, or not yet even formulated. I was often told by police officers that it was wrong for suspects to be allowed to get together with their legal advisers and make up a 'story', or to remain silent and then present an 'ambush' defence in court. McConville and Hodgson have correctly observed that these

> 'carefully cultivated images of defendants and their advisers are more evident in the work of the police themselves. It is the police who most frequently seek to conceal and manage information; it is the police who tactically decide whether it is more profitable to speak or remain silent; and it is the police who, through selective disclosure, seek to ambush the defendant'.[739]

The result is that defendants are routinely manipulated in to making confessions, and sometimes in to accepting inadvertently police accounts of 'what happened'. Once the police manage to pressurise the defendant into endorsing their version of the 'truth', the case file is closed and unlikely to be opened again. This is because those who confess rarely contest the charges in court: their case has already been adjudicated upon by the police, they have accepted responsibility, and it becomes extremely difficult to establish innocence at trial.[740] In fact, defendants are strongly discouraged from re-opening the

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[739] *Op. cit.*, at pp.198-9.

[740] In a recent study for the Royal Commission on Criminal Justice, McConville found that no fewer than 93.6 percent of those who made a confession entered a plea of guilty at trial, and a further 4.1 percent were convicted after trial (see McConville, M. (1993) *Corroboration and Confessions: The Impact of a Rule Requiring That No Confession can be Sustained on the Basis of Confession Evidence Alone* (RCCJ study No. 13), at pp.32-3.

file, usually by those paid to defend them.[741] This is so because the courts regularly impose a substantial penalty on those who challenge police allegations and demand public adjudication.[742] Defendants are needed in court only so that they can proclaim their guilt in public, and thereby endorse the correctness of all that which has preceded the trial.

The potential for miscarriages of justice is further increased by the fact that English law allows a conviction to be founded on an uncorroborated confession, regardless of whether the defendant has sought to retract the confession at trial.[743] This means that the police can use problematic questioning techniques to extract a confession from a possibly suggestible individual and, if that individual can then be persuaded to plead guilty, the court will accept the plea with no scrutiny of the confession whatsoever.

In a recent study aimed at assessing the impact of a rule requiring corroboration of confessions, McConville found that in 41 out of 524 cases (13.4 percent), the prosecution brought no evidence before the court other than the confession of the accused.[744] In 14 of these cases it was uncertain whether

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[741] See Baldwin, J. and McConville, M. (1977) *Negotiated Justice*.

[742] McConville and Baldwin (1981) *op. cit.*), took a group of defendants who pleaded guilty and compared the sentences they received with a group of defendants who pleaded not guilty but who were convicted after trial. Apart from the plea entered, the cases falling in the two groups were similar. It was discovered that those who pleaded not guilty suffered a 'very considerable penalty' (at pp.198-9).

[743] *Wheeling* (1789) 1 Leach C.C. 311. PACE introduced a slight qualification to this general rule. Section 77(1) of the Act provides that where the prosecution case relies substantially on the confession of a mentally handicapped accused, and the where the confession was not made in the presence of an independent person, the judge must inform the jury of the need for caution.

[744] McConville (1993) *op. cit.*, at p.61.

any corroborative evidence could have been found.[745] Thirteen out of these 14 defendants appeared for trial, and all of them entered a guilty plea.[746] McConville writes that in 7 of these cases, specific reference was made in the police file 'to features of the suspect's personality which cast doubt upon the capacity of the suspect to give a knowing and intelligent account of any involvement in the suspected offence.'[747] Accordingly, the confession provided 'an insecure foundation on which to rest a conviction in a criminal case.'[748]

In almost three quarters of cases involving juveniles, the system does not even bother with the legitimating ritual of the courtroom. These cases are disposed of by means of a police caution.[749] The police frame the charges, interrogate the suspect, decide whether guilt has been established, and pass the sentence. There is no truly independent scrutiny of the interview record, and it has been found that in nearly a quarter of these cases the police impose the punishment even though the defendant has not accepted the allegations.[750] Evans provides an excellent description of this system of justice: 'the system is neither 'adversarial' or 'inquisitorial'. It is a system of 'summary' justice where the fate

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[745] *Ibid.* at p.67.

[746] *Ibid.*, at p.71.

[747] *Ibid.*, at p.72.

[748] *Ibid.*, at p.73. The organisation JUSTICE has claimed that up to 15 defendants per year sentenced to four years or more on indictment have been wrongfully convicted - see *Miscarriages of Justice* (1989) at p.1. The Society of Prison Officers has estimated that there might be up to 700 innocent persons in prison after conviction (see *The Independent* 19 March 1992, at p.31).

[749] Evans, R. (1993) *The Conduct of Police Interviews with Juveniles* (RCCJ Study No. 8), at p.3.

[750] *Ibid.*, at p.41. This statistic takes no account of those cases where the confessions made were unreliable due to the type of questioning tactics and question formats utilised.

of the defendant lies almost entirely in the hands of the police and the professional groups who contribute to inter-agency consultation.'[751]

ii. The Dangers Which Arise From Police Partiality Can Be Neutralised By The Introduction Of Safeguards

Many observers of the criminal process, whilst accepting that the police are not neutral, have argued that suspects are protected from injustice by the safeguards which have been introduced by PACE. Close analysis of the content of these protective rules, together with their actual impact, demonstrates that they do not in anyway challenge the ability of the police to use interrogation to construct a partial and selective 'truth'.

Firstly, the so-called right to silence operates to give the impression that individuals *choose* to answer police questions. The right is in fact undercut by legal rules which allow the police to imprison and subject to oppressive questioning those who refuse to answer their questions. The effect is that whilst there exists no mechanism through which the suspect can enforce his right to silence, the law allows for an immediate penalty to be imposed on those suspects who resist the police right to question.

Secondly, regulation of police interrogation tactics has been left unchanged by PACE. In fact, the law governing admissibility of confession evidence has, since the introduction of PACE, been developed by the courts in such a way as to make it virtually impossible to have a confession excluded on the ground that the questioning was oppressive. That police questioning continues to produce unreliable confessions is attested to not only by cases which have recently made

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[751] *Ibid.*, at p.48.

headline news, such as those of Richard Buckland[752] and the 'Cardiff Three'[753], but also by the findings of academic research.[754]

Thirdly, the police, who have a long history of rule-breaking, continue to resort to rule-bending and rule-breaking if they feel that adherence to the rules will frustrate the search for the truth. An example of this is provided by the ease with which the police can carry out informal interrogations and thereby conceal the fact that a confession was extracted by the use of threats or inducements. There is evidence that some police officers subvert the right to legal advice by bending the rules and discouraging suspects from requesting to speak with a solicitor, or by breaking the rules and ignoring requests for legal advice. In the small percentage of cases in which a solicitor arrives on the scene, the police can and in most cases do effectively ignore his presence. This is done by refusing to part with the information which a legal adviser needs before he can give adequate advice, and by making it clear that any attempt which the legal adviser may make to intervene in the questioning process is not welcome.

What PACE has done is to provide the police with unambiguous legal authority to use interrogation to construct cases in whichever way they see fit. 'Suspects' rights' are peripheral to this central fact. They serve merely to give false credence to confession evidence, and thereby exacerbate the dangers outlined in the previous section.

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[752] See *The Times* 23 January 1988, at p.3. Buckland was wrongly accused of murder and made a full confession to the police. He later explained that the reason he confessed was because he could not endure the stress of police questioning.

[753] The defendants had confessed to the murder of a prostitute, but the convictions were eventually overturned by the Court of Appeal, which expressed itself as horrified at the evidence of oppression during police questioning - see *Independent* 24 February 1992, at p.4. See also 'Man who was mentally ill "confessed" to 391 thefts' (*The Observer* 8 December 1991, at p.6).

[754] McConville (1993) *op. cit.*

iii. Police Powers Of Interrogation Are Vital For Law Enforcement

The police, supported by many judges and legal commentators, have frequently asserted that powers to detain and interrogate suspected offenders are vital in the fight against crime. This is a myth which derives its force from appeals to the rhetoric of crime control. As shown in Chapters Three and Four, interrogation plays a minor role in the detection of crime and identification of suspects, and, in those cases in which a confession is made, it is rarely vital to securing a conviction.

Despite the evidence presented in those chapters, procedural protections enjoyed by suspects continue to be blamed for falling clear-up rates. The suspect's right to silence at the police station has come in for particular criticism, and in 1987 the Home Secretary announced that he had set up a Home Office Working Group to draw up proposals which would encourage suspects to cooperate with their interrogators. The Group reported in 1989, and recommended that the prosecution and the trial judge should be allowed to invite the jury to draw an inference of guilt from the failure of an accused person to mention to the police any fact upon which he seeks to built a defence at trial. The Group stated that a suspect should be cautioned by the police to the effect that if he intends to rely upon a defence he should mention it at that stage; he should be warned that if he holds back the defence until trial, it would be less likely to be believed.[755]

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[755] *Report of the Working Group on the Right to Silence* (1989) Home Office.

As Roger Leng has observed in a recent study for the Royal Commission on Criminal Justice,[756] these proposals are based on the following arguments and assumptions:[757]

1. By remaining silent during police interrogation, a significant number of criminals deprive the police of an adequate opportunity to investigate and thereby avoid being charged.

2. A significant number of criminals remain silent in the interrogation, and then secure an acquittal by presenting 'ambush' defences in court, i.e defences which the prosecution could not have anticipated and which they are then in no position to investigate and refute.

3. It is an advantage to the prosecution to have defences raised in interrogation because they can be, and are, investigated by the police.

Through a rigorous statistical analysis of a sample of 848 cases, Leng has demonstrated that each of these arguments is misconceived. He argues that in order to assess the impact of these proposals it is important to count only those incidences of silence which would be affected by the Working Group's recommendations. Therefore, a suspect should only be said to have exercised his right to silence if:

1. He is successful in maintaining silence on a particular matter;

2. He fails to disclose a relevant defence which he later raises in court and

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[756] Leng, R. (1993) *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (RCCJ Study No. 10).

[757] *Ibid.*, at pp.4-5.

3. His silence relates to his own involvement.[758]

Using this definition, Leng estimated that suspects exercised the right in 38 out of 828 cases (i.e in 4.5 percent of the sample). The outcome was known in 34 of these cases: in 16 (47 percent) there was a conviction; in 3 (9 percent) there was a not guilty verdict; in 6 (18 percent) proceeding were dropped, and in 9 (26 percent) the defendant was not charged (No Further Action).[759]

The assumption has been that a significant number of cases result in NFA because suspects exercise their right to silence. However, Leng found that in only 9 out of a total of 268 cases in which there was NFA did the suspect remain silent.[760] No action was taken in four of these cases because the police were satisfied that the suspect was innocent.[761] In the remaining five cases, the NFA resulted from evidence deficiency, but in three of these cases the deficiency was unrelated to the suspect's silence. In the remaining two cases the police did not consider the NFA to be a failure because the defendant was going to court charged with other offences.[762]

Furthermore, there is little evidence to support the view that, if those who presently remain silent could be persuaded to speak, this would present the police with an investigative advantage. There was no disadvantage to the police in the suspect remaining silent in 6 of the 9 'silent' NFA cases. This was because (1) the evidence was circumstantial and there was nothing the police could have done had the suspect denied the offence (inscrutable defences), or (2) the case was overwhelming and it made no difference to the police that the suspect remained

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[758] Anything a suspect may say about the involvement of others will in any case he ruled inadmissible as hearsay.

[759] *Ibid.*, at p.18.

[760] *Ibid.*, at p.24.

[761] *Ibid.*, at p.27.

[762] *Ibid.*, at p.28.

silent. In only three cases was there the *possibility* that had the suspect spoken, he would have lied and been caught out lying.[763]

As shown earlier, the police frequently portray acquittals as failures of justice where criminals escape their just deserts by taking advantage of procedural protections afforded by the system. Leng examined all 58 cases in his sample which were discontinued due to evidential deficiency or in which the defendant secured an acquittal. In only 8 of these cases had the defendant exercised his right to silence at the police station. It was found that in 'the majority of these cases the evidence was weak ... it was not clear that there would have been any clear advantage to the police if the defendant had chosen to deny the allegations in interview rather than remaining silent.'[764] This was because, in the absence of strong independent evidence, there was nothing the police could have done to undermine the denial. [765]

Leng has also shown that 'ambush' defences exist only in the police imagination. Some 25 defendants were acquitted, but only three of these had exercised their right to silence. There was no ambush defence in any of these cases. Only one defendant raised an ambush defence out of the 34 who were convicted after trial. Leng has suggested that those who complain of ambush defences have fallen into the error of confusing such defences with those which the prosecution did not (as opposed to could not) anticipate.[766]

Proposals to modify the right to silence are further based on the assumption that the police attempt to break down defences in interrogation, and that they are usually successful in doing so. It was found that the defendant raised a defence in interview in 314 cases. Although the police attempted to break down

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[763] *Ibid.*, at p.33.

[764] *Ibid.*, at p.43.

[765] *Ibid.*, at pp.40-41.

[766] *Ibid.*, at p.54-5.

the defence in 94 percent of these cases, they were successful in only in 5.4 percent of them. This is because the defences raised are usually inscrutable (i.e there exists no logical basis for refutation), or the evidence is overwhelming and the police do not try very hard to break down the defence, or because the police are pursuing some objective other than prosecution.[767]

Finally, Leng has shown that the ability and inclination of the police to investigate defences raised in interview has been exaggerated. In only 65 of the 302 cases in which a defence was raised and not broken down was something said in the interview which the police could investigate. The police took the opportunity to do so in only 45 of these cases.[768]

The relative unimportance of the police role in identifying offenders and securing evidence against them through interrogation is further attested to by a recent study carried out by Michael McConville.[769] He took a sample of 524 individuals who were charged by the police with the commission of an offence. The sample was representative of a wide range of police forces and offences. It was found that in almost half (47.5 percent) of these cases the initial information linking the suspect to the alleged offence was provided by civilians. The suspect was either arrested by a civilian (30.5 percent), named or identified by a civilian (40.6 percent) or the civilian gave a general description of the offender (12.5 percent).[770]

The police were the principal agents in identifying the offender in 37 percent of cases. Thirty-six percent of these cases (i.e 13 percent of the whole sample) involved public order offences in which the crime was committed in the presence of the police. In 35 percent of these cases (i.e 13 percent of the whole sample)

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767 *Ibid.*, at p.62.

768 *Ibid.*, at p.64.

769 McConville (1993) *Ibid.*

770 *Ibid.*, at pp.11-12.

the arrest occurred where the police, acting on 'suspicion', stopped and/or searched individuals. In 20 percent of these cases (i.e 7 percent of the sample as a whole) the police caught the suspect in the act of committing the crime.[771]

The role of police informants or alleged accomplices in providing the information necessary for the initial arrest varied from force to force, accounting for anything between 20 to 1.5 percent of arrests. Suspects themselves also provide information which led to their apprehension: 6.7 percent of arrests in one force came about in this way.[772]

Finally, the police themselves have recently accepted that confession evidence is not as vital to securing convictions as it had been in the past. In their submissions to the Royal Commission on Criminal Justice they stated that '(o)ver the last decade the importance of a confession to the conviction of a suspect has been significantly reduced ... The situation has changed to a point where the majority of those who confess are aware there is substantial evidence against them.'[773] The latest independent evidence supports this view: McConville found that in 64 percent of the cases in which the police obtained a confession there already existed strong evidence against the suspect.[774]

II. THE STATION OUTSIDE THE PROSECUTION PROCESS

The Royal Commission on Criminal Procedure accepted that the 'fairness' of procedures should not be measured solely by the extent to which they help secure a reliable verdict. It is also important, they argued, that the operation of procedures accord with a 'liberal understanding of how free persons, including

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[771] *Ibid.*, at pp.12-13.

[772] *Ibid.*, at pp.13-14.

[773] Cited in McConville (1993) *Ibid.*, at p.60.

[774] (1993) *Ibid.*, table 4.1 at p.32.

suspects at the police station, at all stages ought to be treated.'[775] This echoed the view of the 1962 Royal Commission on the Police, which had stated that it is 'to the public good that police power should be controlled and confined so as not to interfere arbitrarily with personal freedom.'[776] The purpose of this section is evaluate the fairness of current procedures from this civil libertarian viewpoint.

PACE is based on what can be described as the 'legal-rational' model of criminal justice. According to this model, policing is concerned primarily with *crime* control, and as such it is directed towards *individuals* whom the police have *reasonable suspicion* to believe have committed a criminal offence. Persons are arrested because the police wish to gather the evidence required for a *prosecution.* According to this model, the police will want to screen out the legally innocent because they are *professionals* who seek to make the most of scarce resources.

There can be no doubt that many suspects are arrested and processed in the manner envisaged by the legal-rational model. However, much of policing, especially policing which is proactive[777], is aimed at *social* control, targeted against specific *communities*, initiated on the basis of *prejudice*, and frequently prompted by the desire of the police to impose their *authority* on groups who are seen to challenge 'respectable' notions of normality.[778] Furthermore, it is

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[775] Cmnd. 8092, at para. 1.27.

[776] Cmnd.1728, at p.9.

[777] This type of policing is concerned mainly with non-indictable, 'victimless' crimes (e.g public order, prostitution, drunkenness). These type of offences account for around half of all prosecutions (McConville, M., Sanders, S. and Leng, R. (1991) *The Case for the Prosecution*, at p.20).

[778] McConville *et al* have correctly pointed out that '(e)ven when they are 'reactive' the police use their discretion as fully as when they are 'proactive'... Information provided to the police by citizens is mediated through police values and priorities, and it is at this point that case construction begins' (*ibid.*, at p.22).

clear that the police are not always keen to screen out the legally innocent: their view of what should happen to some suspects is informed not by concepts of legal guilt and innocence, but rather by notions of *moral worth.*

As Chapter Five has shown, there exists a long-term relationship between the police and the vast majority of those who are regularly arrested and brought to the station. Police activities are routinely targeted against a narrow section of the public, namely the lower working-class (who are usually not in work), ethnic minorities and other 'out-groups' (e.g travellers, street pedlars, hippies and demonstrators). This is because the dominant belief in the police force is that criminality is inbred in those who fall into these groups, or that those who belong to these groups are somehow 'dangerous'. The situation is exacerbated by the fact that once individuals become known to the police, they are likely to be arrested again and again *because* they are known to the police. Consequently, the police and the courts spend the vast majority of their time dealing with the trivial offences of the powerless.[779]

Although the police constantly justify their actions by reference to the rhetoric of crime control, it can no longer be disputed that the police play only a minor part in the detection of property crime and crimes against the person, and that custodial questioning contributes little to ensuring that those who engage in such crimes are convicted. The fact is that the police are concerned primarily with the maintenance of public order and 'social hygiene'. Asked whether it was the enforcement of the law or the preservation of public order which was more important to the police, Geoffrey Dear, then Chief Constable of the West Midlands Police, replied, 'They're both important but I suppose in the final analysis it's got to be the maintenance of public order or the prevention of disorder.'[780] Police hostility to the 'underclass' and 'deviant' groups arises not

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[779] See 'The small scale of justice', *The Guardian* 18 March 1992, at p.25.

[780] B.B.C. *Brass Tacks* 12 July 1986.

only, or even mainly, from the belief that they regularly commit criminal acts, but because the police view the very existence of these communities as posing a moral threat to the *status quo*.

The ultra-conservative views of James Anderton, the ex-Chief Constable of Manchester, on issues of morality and order have become notorious.[781] He should not, however, be written-off as a maverick. When asked to define what he meant by the term 'subversive', Harold Salisbury, the former Chief Constable of Yorkshire, replied,

> 'Anyone who shows affinity towards communism, that's common sense, the IRA, the PLO and I would say anyone who's decrying marriage, family life, trying to break it up, pushing drugs, homosexuality, indiscipline in schools ...'[782]

Sir Keneth Newman, ex-Commissioner of the Metropolitan Police, went as far as to imply that the existence of ethnic minorities in the urban conurbations of Britain posed as serious a threat to 'order and freedom' as the did the growth of terrorism.[783] It would be surprising if these views were to be held only by those at the top of the police hierarchy. It became clear to me from speaking to rank and file police officers that the 'police psyche' is obsessed with the politics of 'moral worth': beggars and the homeless are seen as a threat to the 'decent' public and a 'blot on the landscape', blacks are seen as incapable of 'civilised conduct'; entire sections of the city are written-off as inhabited by 'social-

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[781] Prince, M. (1988) *God's Cop*.

[782] Cited in Gilroy, P. and Sim, J. (1987) 'Law, order and the state of the Left', in P. Scraton (ed.) *Law, Order and the Authoritarian State*, at p.73.

[783] 'There are two particular problems in Western societies which have the potential to affect the balance between order and freedom. The first is concerned with the growth of multi-ethnic communities. The second is related to indigenous terrorist movements.' (Speech to the European Atlantic Group, 24 October 1983).

security scroungers' and the 'obnoxious', and anyone who has a critical perspective on the police is seen to be a dangerous subversive.

Waegel has correctly observed that '(c)ategorizations made by (police officers) about race, class, ethnicity, sex and territory parallel wider cultural evaluations of morality and worth.'[784] Through their actions and statements, however, the police re-create and give authority to this popular morality.[785] From their position of influence, the police have helped to define whole communities as constituting the 'law and order' problem, and thereby have stultified criticism of the way in these communities are then treated by the police. As Kettle has observed,

> 'The police have been allowed to run their own show, make their own definitions and operate behind a rhetoric of their own choosing. Whatever they decide to do becomes, by definition, in the interests of 'law and order' and therefore of 'society' too. Whoever opposes them is, equally by definition 'anti-police' and thus hostile to 'law and order' and therefore hostile to 'society'. Some sections of society are already safely consigned to this camp: demonstrators, pickets, squatters, blacks, gays, feminists, immigrants, the Irish.'[786]

Furthermore, whilst the majority of the public may indeed share police perceptions of particular groupings in society, unlike the police they have not the

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[784] Waegal, W. (1981) 'Case routinization in investigative police work', *Social Problems* (Vol.28;pp.263-75), at p.273.

[785] Institute of Race Relations (1979) *Police Against Black People*. No-one was perhaps more aware of this power than Sir Robert Mark, who wrote that the 'post-war years have seen a gradual change in our role from mere law enforcement to ... that of contributors in the moulding of public opinion' (Foreword to Critchley, T. (1978) *A History of Police in England and Wales* (2nd. edition), at p.xiii).

[786] Kettle, M. (1980) 'The politics of policing and the policing of politics', in P. Hain (ed.) *Policing the Police* (Vol. 2), at p.59.

power to translate their views into coercive action against those whom they see as a threat.

Many police officers see themselves as representing 'Authority', and those whom they have categorised as the 'scum' and 'losers' embody all that which is anti-authority. Policing strategies, therefore, revolve around police efforts to neutralise the anti-authority elements in society by forcing them to accept 'the Authority of the cloth'. Policing has become symbolic, in which the main aim in stopping and searching black youths and those with previous convictions, or in entering run-down estates in large numbers, is not to prevent or detect crime, but to reassure themselves that their authority to do so will not be resisted. By forcing the 'obnoxious' to tolerate uncivil, unreasonable and provocative behaviour, officers reassure themselves that their 'gang' still reigns supreme. This situation of on-going confrontation is further worsened by officers who feel that their job should entail excitement, and who therefore adopt approaches which they hope will create 'action'.

The police station must be placed in the context of this police-policed relationship. Once this is done it becomes clear that, in addition to helping the police construct a prosecution case, the police station provides them with the means to inflict summary punishment. The police believe that they must have control over 'problem' communities, and control consists of being able to stop, search and question people at will. Those who are regularly policed state that they are approached by the police with a clear presumption of guilt. They must answer whatever questions the police decide to ask, be they about their own movements or the movements of friends and relatives. Those who challenge the 'right' of the police to behave in this fashion are carted-off to the 'punishment block'. The power to arrest and detain at the station allows each officer to extract the submissiveness which he feels is his due.

Once at the station, defendants are routinely humiliated through being rendered powerless. Although approximately half the defendants whom I

interviewed described their treatment as 'fair', this was because many of them had extremely low expectations of fairness. Having been through the process on numerous occasions, most of them could recall previous occasions on which they had been treated worse than on the present occasion. In many instances, therefore, 'fair' meant no more than 'normal'.

During the course of my observational research I came to learn that it was 'normal' for defendants to be told when to stand and when to sit down, when to talk and when to remain silent. It was expected that defendants would behave with complete submissiveness, hand over their property on demand, tolerate abuse and threats of physical violence if not its actual infliction, and endure incarceration in sometimes appalling conditions.[787] Police officers are under no obligation to charge or to justify to anyone other than a police sergeant why they thought it necessary to bring the 'suspect' to the station. Large numbers of those who are taken to the station are released without charge, whilst one researcher found that nearly a third of juveniles who are cautioned never admit to any offence. Although in these cases the police will tell the suspect that they have decided not to charge because there is insufficient evidence, in many of these cases it is clear both to the suspect and the police that there was never any intention to charge.

The interrogation, although rarely vital to securing a confession, provides the police with an opportunity to subject the suspect to a status degradation

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[787] The police believe that they are justified in inflicting violence on those who seek to challenge police authority. Baldwin and Kinsey were told by a police sergeant that 'whenever they (suspects) start cutting up in this station - in any station - they're lost... The only deterrent is to hit him back fucking harder than he hit you and to let him know that it's not just one - there's two and half thousand of us that'll keep on hitting him' (Baldwin, R. and Kinsey R. (1982) *Police Powers and Politics*, at p.50).

ritual.[788] As Pepinsky has noted, by forcing the suspect to accept his guilt, the police succeed in washing white their own illegalities and settling any doubts they may have had about the 'worthlessness' of the suspect.[789] Although the police state that it is only reasonable that suspects should talk when questioned, the research carried out by Leng indirectly demonstrates that the police do not want suspects merely to talk - they want to hear them confess.

The degradation, however, goes further than a simple desire to hear the suspect proclaim his guilt. Interrogation allows the police to set up a situation in which they can ask the suspect *any* question they want, and in any *manner* they want, regardless of whether it relates to the original suspicion.[790] Suspects in my sample were asked about their personal relationships, asked where they got their new trainers from and how they paid for them, asked about their immigration status and asked about why they were claiming state benefits. These questions had no connection whatsoever with the original reason for the arrest. Their effect is to make it clear to the 'suspect' that he has no privacy from the police. Those few who exercise the right to silence challenge what the police believe is their right to inquire into the lives of the 'scum'. It is this, and not any concern for crime control, which explains police hostility towards the right to silence.

In a large number of cases, therefore, policing is geared, not towards the enforcement of the criminal law, but to the achievement of police defined objectives. Police actions, both inside and outside the station, are designed to send a message to certain communities, groups and individuals. The message is that challenge, resistance, and a lack of respect, will always incur punishment,

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[788] Garfinkel, H. (1955) 'Conditions of successful degradation ceremonies', *American Journal of Sociology* (Vol.61;pp.421-4).

[789] Pepinsky, H. (1970) 'A theory of police reaction to Miranda v Arizona', *Crime and Delinquency* (Vol.16;pp. 379-92), at p.391.

[790] McConville and Hodgson (1993) *op. cit.*, at pp.185-88.

even if that punishment has to be imposed through an informal, police administered system of 'justice'.

Finally, it should be clear from the above discussion that the police cannot be trusted to screen out the legally innocent. Their existing relationship with a member of the policed community, or their desire for revenge against an individual whom they believe has challenged their authority, can lead the police to frame false charges, or to select evidence which supports a more serious charge.[791] The extent to which this takes place is obviously very difficult to measure, but that instances of this took place *whilst I was present at the station* gives some indication of its frequency.

It is important to point out that arbitrary arrest and routine punishment without trial do not represent violations of the law by the police.[792] It is the law itself which allows the police to stop and search on the vaguest of criteria, it is the law which fails to stop the police from routinely arresting individuals, it is the law which allows lengthy detention without trial and it is the law which allows the police to subject individuals to questioning which is oppressive, based on a presumption of guilt and frequently accompanied by gratuitous abuse. In fact, as McConville *et al* have pointed out, it is the substance of the criminal law, biased as it is against the weak and the powerless,[793] which has helped define the police mandate.[794]

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[791] The most notorious example of this type of behaviour is provided by the case of Winston Silcott (see *The Guardian* 28 November 1991).

[792] On the relationship between the due process rhetoric of the law and the actual content of law, see McBarnett, D. (1981) *Conviction*.

[793] The bias of the law against the poor, together with the myths which are used to support this bias, is fully explored in Box, S. (1983) *Power, Crime and Mystification*.

[794] *Op. cit.*, at p.206.

III. CONCLUSION AND SOME SUGGESTIONS FOR REFORM.

The police role in pre-trial criminal justice has gained ever increasing importance since the mid-nineteenth century. There was, from the outset, recognition on the part of some judges and politicians that there is a theoretical inconsistency in allowing the police, whose interests lie with the prosecution, to interrogate suspects. They forsaw that corruption and over-zealousness could lead to officers putting undue pressure on suspects to confess. Although the Judges' Rules of 1912 showed some recognition of this problem, developments in the law governing police powers since that time have been based on the belief that the police can be trusted to act with fairness towards those suspected of crime. From 1912 to 1984, the courts relaxed the Rules through re-interpretation and non-enforcement as judges sought to give legal legitimacy to police practices.

The Police and Criminal Evidence Act of 1984 gave the police unambiguous authority to detain for the purpose of interrogation, and supplemented this by extending powers of arrest. This has had the result of accelerating a trend towards routine use of arrest, detention and questioning, and the role of the police station as a forum for guilt adjudication has been enhanced. The Royal Commission on Criminal Procedure, whose recommendations led to the enactment of PACE, sought to justify the increase in police powers by stating that such powers were necessary for effective crime control. The empirical data demonstrate that powers of detention and interrogation cannot be justified by crime control concerns because they have only a marginal impact on the ability of the system successfully to identify and prosecute suspected criminals.

The increase in police powers brought about by PACE was to be off-set by corresponding safeguards for the suspect. However, the limited self-regulatory framework brought in by the Act has failed to stop officers from arresting in the absence of reasonable suspicion. Suspects are detained even in situations where the police have no intention to charge or where there is no necessity for

questioning, and 'interviewing' officers continue to resort to the use of psychologically oppressive interrogation tactics.

Since the main body of this thesis was written the Royal Commission on Criminal Justice has published its *Report.*[795] I do not intend to provide a detailed critique of the *Report*, but it is necessary for the sake of completeness to outline the main recommendations.

The Commissioners have said nothing about the extent to which the police resort to arrest as opposed to summons;[796] they have emphasised the right of the police to use manipulative question formats and to engage in persistent questioning regardless of whether the suspect wishes to be questioned;[797] they have recommended that the police should be allowed to question after charge;[798] and they have recommended that police powers to take intimate and non-intimate samples should be increased.[799] The Commissioners have recommended little in the way of rights for suspects on the ground that the safeguards incorporated in PACE are working well.[800] The entire *Report* is based on an implicit rejection of due process concerns and ideology and, if implemented, it will result in a further move towards an administrative system of guilt adjudication.

A large number of changes are needed at all stages of the criminal justice process in order to ensure that it operates along truly adversarial lines. There is not scope in this thesis to address all the problems, and I will therefore confine

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800 Para. 3.2.

my suggestions for reform to what has been the main focus of this study, namely police powers of arrest, detention and questioning. Before making such suggestions, it is necessary to summarise the main problems with the current system:

i. The right of the police to interrogate can and does lead to the making of unreliable confessions. The mere fact of being in custody places immense psychological pressures upon suspects to confess, a situation which is exacerbated by the use of manipulative questioning techniques. There is, in addition, evidence that the police continue to resort to the use of threats and inducements. This is a problem which can never be totally eradicated so long as the police are allowed prolonged access to suspects in the private domain of the police station.

ii. Excessively wide powers of arrest and detention have resulted in the development of what I have labelled an 'unofficial criminal justice system'. By this I mean that a significant number of those arrested are not arrested on the basis of reasonable suspicion, and are not processed with a view to prosecution. They are arrested and processed because the police view them as 'undesirable' or 'unworthy', or because they have in some way challenged police authority. The purpose behind arrest and processing in these cases is to humiliate the individual concerned and to reinforce the norms of the long-term relationship between the police and policed groups and communities.

iii. The present system does no more than pay lip-service to the principle of innocent until proven guilty. It is the duty of the prosecution to make out a compelling case against the defendant, and the latter should not be under an obligation to assist the prosecution in this task. This being the case, it is wrong to allow the police to arrest and imprison individuals solely for the purpose of questioning them.

The way to tackle these problems is by restricting powers of arrest, and by abolishing the right of the police to question suspects.

The police should only be allowed to arrest an individual where it is necessary to prevent continuing criminal behaviour or secure attendance at court. If an individual is arrested, he should be presented before the magistrates within 24 hours of his or her arrest. At the hearing the police should be under a duty to justify their use of arrest by showing that they had reasonable grounds to believe that the defendant would have committed further offences and/or would have absconded if not arrested. This would lead to a significant reduction in the number of people who are arrested. The magistrates would then have the task, as they do now, of deciding whether the defendant should be given bail or remanded in custody.

The 'right' of the police to question defendants should be abolished. Those individuals who are arrested should be detained at annexes situated near to Magistrates Courts until the magistrates have made a decision regarding bail. It should be entirely the defendant's own decision, after consultation with his solicitor, whether or not he wishes to respond to the charges against him. If he decides to respond, his explanation, defence or admission should be communicated to the police via his solicitor. Only those statements which are volunteered in this fashion should be admissible in evidence at the trial. The police can, in the light of the suspect's response, decide whether or not to charge.

The case for restricting police powers in this way is compelling:

i. It would deal comprehensively with the problem of fabricated confessions.

ii. Written questions would put an end to the use by the police of manipulative interrogation tactics, including the use of threats and inducements.

iii. It would give real substance to the defendant's right to silence. The silent defendant would no longer be punished by lengthier detention, deprivation of material benefits or by being subjected to shouting and abuse.

iv. Defendants would get far more considered legal advice because solicitors would no longer be forced to operate in an environment controlled by the police. Legal advisers would, for example, be in a better position to ask the police for more information about the evidence against their client.

v. It would make it far more difficult for the police to use arrest and detention as a form of summary punishment. This should lead to better police-community relations.

vi. Fewer arrests would mean substantial savings in time and money. The time currently spent by officers in escorting defendants to the police station, completing custody records and carrying out unnecessary interrogations could instead be spent in patrolling the streets.

Few would disagree that these would represent substantial gains, but many will no doubt argue that restricting police powers of questioning in the way suggested would make it impossible for the police to carry out their task of catching and convicting offenders. This is a fear which is largely unfounded. As was shown in Chapter Four, if TIC's are discounted, it is only a tiny proportion of offences which are detected as a result of interrogation. The recent study by McConville confirms, if further confirmation were needed, that only 5 to 12 percent of offenders are identified as a result of what is said by individuals during police interrogation.[801] As regards the ability of the prosecution to secure convictions, research published in 1980 demonstrated that confession evidence was vital to the prosecution case in, at most, 30 percent of cases. This 30 percent of cases was made up of petty offences.[802] The police themselves accept, and research has demonstrated, that prosecution reliance on confessions has since diminished substantially.

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[801] McConville (1983), *op. cit.*, at p.13.

[802] Baldwin, J. and McConville, M. (1980) 'Confessions: the dubious fruits of police interrogation', *New Law Journal* 130 (pp.993-95), at p.995.

Whilst it is true that restricting police powers of interrogation will mean that some defendants (significantly less than 30 percent) who are currently convicted will be acquitted, it must be emphasised that some of these 'lost' cases will be those where the defendant would have been wrongfully convicted on an unreliable confession. If we take seriously Blackstone's dictum that 'It is better that ten guilty persons escape than one innocent should suffer',[803] then the case for change is more than made out.

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[803] Blackstone, *Commentaries on the Laws of England* (1765-9), vol.iv, p.27.

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