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BOOK COMMENT

THE POLICE AND THE PUBLIC, Albert J. Reiss, Jr. New Haven and London: Yale University Press, 1971. Pp. xv, 228. \$7.95.

The "revolution" in criminal rights since *Mapp v. Ohio*¹ has produced considerable comment concerning the proper role of the police. *The Police and the Public* is a contribution to this literature by Yale sociologist Albert Reiss, Jr. Written primarily from a sociological perspective, the book is based in part on empirical data collected by Professor Reiss and his staff during their study of several urban police departments from 1962 to 1968.

Although the book speaks only tangentially to the constitutional standards that control police operations, this hardly means that sociological study is not relevant to an evaluation of legal rules. Lawyers and judges presumably are trained to deal with legal logic and precedent, but they are much less able to assess the actual effect a given rule has on individual and group behavior. Sociological data and study may be useful in determining whether the definition of constitutionally permissible police conduct rests on realistic assumptions with respect to efficient and socially useful police operation. Furthermore, sociological inquiry may resolve the question of whether rules which are aimed at producing a given type of police conduct are in fact efficacious.

The behavioral scientist performs a useful role in gathering and interpreting empirical data, and it is essential that lawyers recognize that legal rules should, where possible, be based on behavioral data, not merely on assumptions regarding conduct.² Some of the data which Professor Reiss has gathered and interpreted is of undeniable relevance to attorneys, but many of his conclusions about rules of law and the operation of the criminal justice system are poorly supported and difficult to accept. It is useful to consider, in evaluating this book, to what extent the end product might have been substantially improved had it resulted from an interdisciplinary undertaking, with attorneys and behavioral scientists equally involved.

One general consideration relevant to the determination of constitutional rules is the societal utility of a given type of government action. *Terry v. Ohio*,³ for example, rests in part on the proposition

¹ 367 U.S. 643 (1961).

² See, e.g., Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971).

³ 392 U.S. 1 (1968).

that field investigation and interrogation is an essential part of police work because of its utility in crime prevention.⁴ Empirical data is certainly germane in determining to what extent police-instituted field investigation is actually necessary.

The Police and the Public concludes that the police are most efficient when serving a reactive rather than a proactive function; that is, they are more efficient when responding to citizen calls than when initiating intervention.⁵ For example, figures covering the operation of a New Orleans tactical unit and canine corps show that these divisions "reported 47,834 stops of citizens of whom 25,230 were frisked, resulting in a frisk rate of 53 percent and an arrest rate of 17 percent. The 25,230 frisks yielded only 113 weapons, creating a weapons-productivity rate of less than half of 1 percent."⁶

Apparently the police practice in New Orleans was to allow frisks even if the officer did not have reasonable grounds to believe that he had stopped an armed individual.⁷ This practice created even greater inefficiency than was found in cities where constitutional rules were more closely followed.⁸ Because these rules are based on the probability that police will find what they are looking for, this finding is hardly surprising.⁹ More important, these statistics

⁴ *Id.* at 22-23.

⁵ A. REISS, *THE POLICE AND THE PUBLIC*, 100-02, (1971) [hereinafter cited as REISS]. In some situations, the law has, although perhaps only unconsciously, legitimized reactive police work more than proactive police work. For example, when the police utilize an undisclosed informer, who arguably is part of the police structure, the intervention is more proactive than reactive. *Cf. id.* at 87, discussing the informer who is not only undisclosed but also anonymous to the police. The police must support this informer's reliability, although it is not altogether clear at present how much proof is necessary. *Compare* *United States v. Harris*, 403 U.S. 573 (1971) with *Spinelli v. United States*, 393 U.S. 410 (1969). But the same is not true when the police derive probable cause from a named citizen who provides information, the assumption in the latter case being that the disclosed citizen-informer is reliable and acting wholly out of a sense of social duty, or because he himself has been victimized. *See* *United States v. Bell*, 457 F.2d 1231 (5th Cir. 1971); *Brown v. United States*, 365 F.2d 976 (D.C. Cir. 1966). Decisions of this type are not based on any articulated preference for reactive police work, but rather on a mistrust of the typical anonymous informer, whom the courts perceive to be more a part of the criminal underworld than the police structure. *See In re Boykin*, 39 Ill. 2d 617, 237 N.E.2d 460 (1968). *But cf.* *United States v. Harris*, *supra*. Nevertheless, it is probably safe to conclude that courts will be less suspicious of police conduct when it is motivated by a neutral citizen.

⁶ REISS at 92. These figures cover the period from April 15 to December 31, 1967.

⁷ *Id.* at 93-94.

⁸ *Id.*

⁹ Probable cause has been defined as "the facts and circumstances within [the knowledge of the police] and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925). "Reasonable

indicate that rules confining police intervention to those situations in which there is at least some degree of articulable probability do not restrict efficient police operation. On the contrary, it would seem that probable cause or reasonable suspicion rules may simply be saving the police from an enormous number of useless and unprofitable encounters.

Moreover, if proactive police work is generally inefficient, as *The Police and the Public* concludes, it is questionable whether the latitude given to the police by *Terry* to stop and frisk citizens with less than the traditional requirement of probable cause makes sense.¹⁰ If the police are largely inefficient when behaving proactively, why should a constitutional rule, supposedly created by balancing the need for *effective* police work against the attendant invasion of citizen privacy,¹¹ allow police invasions on less than the usual requirement of probable cause? An arguable alternative would limit the police stop and frisk power to those situations in which police are investigating a crime that has been committed and presumably reported, thus deemphasizing statistically futile attempts to prevent as yet uncommitted crimes by police investigation of "suspicious" behavior.¹² *Terry* itself does deal with successful preventive police work,¹³ but if success in that one case was statistically fortuitous, it should not form the basis of a general rule of law.¹⁴

suspicion," the standard for stop and frisk utilized in *Terry v. Ohio*, 392 U.S. 1 (1968), requires less than probable cause, but still depends on the presence of some identifiable facts. See note 13 *infra*.

¹⁰ Once the stop is made, the frisk becomes necessary to protect the police officer. This does not answer the question whether the officer should be authorized to make the initial stop; if the frisk is valid, it must be because the stop is a proper exercise of police authority. See *Terry v. Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring).

¹¹ *Id.* at 22-27. Cf. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹² The recently promulgated ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION (Tent. Draft. 1972) [hereinafter cited as STANDARDS] concludes that the police have a "limited capacity . . . to perform in a preventive role . . ." *Id.* at 57. Nonetheless, the mere presence of police may promote a feeling of citizen security. *Id.* at 68-69. The latter function is adequately fulfilled if the police are highly visible; it does not require the kind of intervention envisioned by the stop and frisk cases.

¹³ In *Terry* a plain clothes detective observed two individuals on a downtown street corner in mid-afternoon. One walked up and down, peering into a store window, and then returned to his companion. The other individual then walked by the store, peered into the window and also returned. This sequence was repeated about a dozen times. The two suspects then talked to a third individual; about ten minutes after he had left, they followed him down the street. Believing that an armed robbery was soon to take place, the detective confronted the suspects, directed them inside the store, frisked them, and found weapons in their possession. Since the feared robbery never took place, and because there was no definite evidence that it in fact had been planned, the only charges that could be brought were weapons code violations.

¹⁴ Although we expect a court, as a jurisprudential matter, to decide only the case

Another dimension of the problem is illustrated by data which indicate that police are put in greater physical jeopardy in proactive situations; that is, an officer is more likely to sustain injury in a situation where he chooses to intervene, than he is in a situation where he has been reactively dispatched.¹⁵ This hypothesis seems consistent with Reiss' view that citizen resistance is essentially a response to the perceived arbitrariness of police intervention.¹⁶

Professor Reiss concludes from this data that it is the "illegitimacy" of the assertion of police authority that creates the danger to the officer.¹⁷ In most cases, however, citizens cannot know whether an officer's intervention conforms to technical legal standards. The constitutional legitimacy of police intervention depends upon information known to the police. As a result, citizens are in a poor position to judge whether police conduct is legal. Citizens may perceive as illegitimate what is in fact legal, and the real question is to what extent the law *should* allow and encourage police conduct particularly likely to give rise to adverse citizen reaction. Although the empirical evidence is not clear or persuasive on this point,¹⁸ it should at least be considered whether the law should affirmatively encourage police conduct that is not particularly efficient and is at the same time likely to increase the risk to the policeman (and presumably to citizens as well). More precisely, should *Terry*

before it, the Supreme Court has occasionally deviated from a strict case-by-case decisional system and relied upon generalized behavioral and statistical data. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966) (discussion of police practices recommended in police manuals, but not used in the cases being decided); *Brown v. Board of Education*, 347 U.S. 483 (1954) (studies of psychological effect of school segregation).

¹⁵ REISS at 60-62. Thus, although the stop may be less useful and justifiable in situations where intervention is police-motivated, the danger to the officer may be greater. *See also* note 10 *supra*.

¹⁶ REISS at 56-60.

¹⁷ *Id.* at 62.

¹⁸ For example, there is some indication that citizen reaction against police intervention occurs in arrests for minor offenses:

First, arrests for minor violations are more likely to provoke citizens to claim that authority is being exercised *arbitrarily* and *unjustly*, because many others escape arrest in such situations. Facts may be more controversial in such situations, particularly as revealed by complainants or when there is disagreement between a complainant and an alleged offender. Furthermore, bystanders are more likely to interfere for precisely the same reasons, a judgment or feeling that the officer is making an "arbitrary arrest," an arrest on grounds about the persons, rather than the facts related to the offense; grounds of race or class position, or other matters relating to the status of the offenders. Indeed, often these bystanders are not "offended" by such conduct; they are culpable. *Id.* at 57 (emphasis in original).

This data indicates to some unclear extent that citizen reactions against the police are based on displeasure with substantive rules of law as well as opposition to police procedure, or perhaps more accurately, that substance and procedure are interrelated.

have expanded the proper exercise of this type of activity by permitting police intervention on less than traditional probable cause? The data offered by *The Police and the Public* is hardly conclusive,¹⁹ and it is clear that the utility of police patrol in crime prevention needs further study by lawyers and behavioral scientists.²⁰

After attempting to establish what police do, and how they operate most effectively, Professor Reiss considers the forces which motivate police conduct and misconduct. His findings place in question the effectiveness of existing legal mechanisms for controlling police conduct. Presently, attempts are made to control police behavior through judge-made rules defining, for example, the permissible limits of interrogation and search and seizure. These rules are enforced by excluding from any subsequent criminal trial evidence unlawfully obtained by police if the person subjected to the illegal police action is in fact brought to trial.²¹ But despite the exclusionary rule, police misconduct continues to be a problem. The New Orleans police stop and frisk procedure²² indicates that a police department can make the strategic decision to violate constitutional rules, free from any significant external penalty. If evidence is found, it may not be used in a subsequent prosecution; but if the police are interested in prevention, not prosecution, the exclusionary rule has limited impact.²³ The exclusionary rule is imperfect at best, and there is considerable feeling that it should be replaced or supplemented.²⁴ But the implications of *The Police and the Public* go even further and suggest that the exclusionary rule may be counter-productive — its mere existence may *increase* police misconduct.

Professor Reiss' basic thesis is that more "civil" police behavior can be achieved through increased professionalization of the police. Because most professional groups are primarily responsible for setting and monitoring their own standards, external review of police practices, through judicial exclusion of evidence, is inconsistent with the professional model.²⁵ An important difference, however, de-

¹⁹ The data has been gathered, unfortunately, without regard to any legal question involving stop and frisk.

²⁰ See STANDARDS at 56-67.

²¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²² See notes 6-8 *supra* & accompanying text.

²³ See STANDARDS at 157.

²⁴ See, e.g., *id.* at 158.

²⁵ REISS at 126-28. Professor Reiss points out that external control is exerted to some extent in all professional situations, but that "the traditional professions have tried to retain virtually complete control of standards of practice, arguing essentially

tracting from the force of Reiss' analysis, is that the typical "client" of a professional does not have interests that are in conflict with those of the professional. The "client" of the police, however, has been subjected to police action which has either thrust him into the criminal justice system, put him under investigation, or somehow limited his conduct. The citizens with whom the police have the most direct contact, those analogous to the attorney's clients or the doctor's patients, generally have concerns antagonistic to those of the police.

Typically, a profession will be anxious to create and enforce standards of conduct for its members to make the profession attractive to potential clients. In a situation where client interests are different from the interests of the profession, it is unrealistic to expect the same impartial internal control. As a result, a more pervasive, neutral, external review system is required. Arguably, increased "professionalization," in part through added emphasis on internal review, will reduce police misconduct; but will it reduce it enough to obviate the conflict of interest problem or the need for external review in general? In dealing with citizen liberties, it seems dangerous to emphasize internal review *before* misconduct has been reduced.²⁶

Regardless of whether external control over the police is desirable, its mere existence may in fact have a substantial effect on police behavior. Professor Reiss characterizes the role distinctions among attorneys, courts, and the police as conflicts among subsystems within the criminal justice system.²⁷ External control may motivate retaliatory police behavior against the other subsystems. One obvious example is police harassment of citizens. In Professor Reiss' opinion:

Counterstrategies necessarily emerge to limit the control exercised by another subsystem. A major technique is to withhold information or output. Withholding information is particularly effective when there are restrictions on organizational capacity to develop information. The police can effectively control prose-

that members of a profession are the most qualified to judge the competence of other members." *Id.* at 127.

²⁶ Whether "professionalization" is a useful goal is itself open to question. Exactly what "professionalization" means is not very clear. STANDARDS at 197. Furthermore, professionalization comprehends increased discretion. But it has been suggested that adequate protection of citizen rights from police abuse can be achieved only if police discretion is limited by the promulgation of precise administrative guidelines and regulations controlling police action vis-à-vis citizens. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 813-14 (1970). In addition, the increased acceptance of police unionization, see, e.g., STANDARDS at 170-71, is not necessarily consistent with a professional model.

²⁷ REISS at 117.

cutors in this way, since most prosecutors have little organizational capacity to develop information. Withholding output obviates the necessity to play according to the others' rules. For example, the police need only conform to the rules of prosecutors and judges on matters it sends to them, but not in those matters it handles by internal means such as harassment by refusal to arrest or book, or failure to request prosecution, thereby dropping charges.²⁸

Succinctly stated, exclusion of evidence at trial has little preventive effect if the police have no interest in prosecution. This conclusion — that police harassment which does not aim at prosecution cannot be stopped by the exclusionary rule — is hardly novel. The most obvious response is to develop a mechanism by which the judicial subsystem can react to prevent this type of police misconduct.²⁹ But the implications of Professor Reiss' conclusion go further: he indicates that the mere existence of external control by the judicial subsystem *motivates* police misconduct of a type which the courts have difficulty in controlling.

To the extent that this is true, any type of judicial supervision will be futile, since the police will presumably continue to seek ways to avoid external control. What is not clear, however, is why it is necessarily true that police harassment, with no aim at prosecution, is a *reaction* to judicial supervision of police conduct. Was police harassment any less prevalent before *Mapp* was decided, when the courts presumably were scrutinizing police conduct less closely?³⁰ Data correlating an increase in judicial scrutiny of police conduct through evidentiary exclusion with an increase in police harassment not reachable by judicial controls seems necessary to establish that the police are reacting against the judicial subsystem.

Harassment certainly may be, as Professor Reiss later points out,

²⁸ *Id.* at 119.

²⁹ See, e.g., Chief Justice Burger's suggestion that a damage remedy be established by statute. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 421-24 (1971) (Burger, C.J., dissenting). A remedy such as this, if it works, arguably would permit the discarding of the exclusionary rule. Until now, however, it has not been shown that there is or can be a viable alternative remedy. See also note 49 *infra* & accompanying text.

³⁰ Although the exclusionary rule has been applied against the federal government for nearly 50 years, *Weeks v. United States*, 232 U.S. 383 (1914), it was not constitutionally applied in state prosecutions until *Mapp*. Thus the typical police department, making arrests usually leading to state prosecutions, could violate constitutional rights without attendant evidentiary exclusions, except where police action was shocking to the conscience of the court. See *Rochin v. California*, 342 U.S. 165 (1952). But as the *Mapp* opinion pointed out, when *Mapp* was decided, more than half of the states passing on the question had wholly or partially adopted an exclusionary rule. 367 U.S. at 651. In those states, the relevant inquiry thus is whether police harassment without prosecution increased after the state courts adopted the exclusionary rule.

a police reaction to what the police perceive as their own inability to get "justice" through proper channels because the other subsystems reject their efforts and fail to show proper deference to the officers.³¹ But this may be a result of the policeman's belief that the criminal justice system is unable to deal with groups of people whom the officer feels should be punished rather than a reflection of police dislike of search and seizure restrictions.³² Police harassment and misconduct directed against minority groups whom the police perceive as "bad" but not properly controlled through the legal system certainly predates the period of intense judicial supervision of police procedures.

Police misconduct most frequently takes the form of illegal searches and frisks.³³ And while searches and frisks can be used to harass, they frequently have a distinct prosecutorial aim. Professor Reiss' data indicates that police use of force and threats is less prevalent than illegal searches and frisks.³⁴ But if the police consciously react against judicial restrictions on their conduct, exactly the opposite behavior pattern would be expected; the police should be anxious to avoid conflicts with the courts. Threats and force can be effective in preventing crime without the need for prosecution. Searches and frisks, on the other hand, are only truly intimidating to citizens when prosecution for possession of illegal goods is likely to follow.

The second example Professor Reiss gives of police reaction against other subsystems is also of questionable validity. He states that:

Another common technique is to overload the next level. The police may do this by mass arrest, as often happens when there are issues over the policing of deviants. Overload of the system by mass arrest may be particularly troublesome to the prosecutor and the courts, as recent experience with urban riots and student dissent eloquently testify.³⁵

It is obvious that "overload" will cause problems for courts and prosecutors. It does not, however, follow that overload reflects a conscious attempt by the police to retaliate against prosecutors and the courts. In the mass demonstration situation, the overload is

³¹ REISS at 138-40.

³² Cf. *id.* at 138-39, discussing citizen vigilante control over homosexuals.

³³ *Id.* at 142.

³⁴ *Id.* Force and threats are, however, more frequently reported by citizens. *Id.* at 153-54.

³⁵ *Id.* at 119-20.

more likely caused by police perception of a need to terminate the disruptive activity by physically controlling the demonstrators and clearing the area,³⁶ a view probably endorsed by the prosecutor's office. The fact that charges later may be dropped, or that cases later may be dismissed,³⁷ is irrelevant to controlling the demonstration.

Professor Reiss also appears to consider plea bargaining a substantial factor in subsystem conflict. For example, he suggests that subsystem conflict creates barriers to cooperation and communication, exemplified by prosecutor "back-room and hallway-plea bargaining" and secret police interrogation.³⁸ This suggestion assumes, however, that the aims of the police and prosecutorial subsystems, as related to both plea bargaining and interrogation, are different. In fact, interrogation and the confessions procured thereby more likely results in alliance between police *and* prosecutor against the judicial subsystem. As far as plea bargaining is concerned, the police are at odds with the prosecutor only when the prosecutor is "bargaining away" convictions for some prosecutorial gain from which the police derive no benefit. The plea bargain is a compromise between the defendant and the system as a whole, which may save prosecutors, police, and courts considerable time and expense.

Furthermore, it is probably inaccurate to assume that no communication exists between the police and prosecutorial subsystems. This assumption also appears in Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³⁹ in which he suggests that the exclusionary rule works only against the prosecutor, since the police gain no real educational benefit from judicial opinions declaring police procedures illegal. But the police do communicate with the prosecutor's office and the prosecutor's office may on its own initiative attempt to educate the police as to the legality of police procedures.⁴⁰ The ultimate goal of police

³⁶ See REPORT OF THE NATIONAL ADVISORY COMM. ON CIVIL DISORDERS, 339 (1968).

³⁷ *Id.* at 339-40. Unfortunately, serious crimes may go unpunished as a result. *Id.*

³⁸ REISS at 120.

³⁹ 403 U.S. 388, 421-24 (1971) (Burger, C.J., dissenting).

⁴⁰ This writer was an assistant district attorney in Philadelphia in 1970-71. In that city, the police, on both an individual and formal basis, communicated with the prosecutor's office in an attempt to ascertain proper procedures. Furthermore, the prosecutor's office alerted the police to relevant legal decisions affecting police action. Programs also were being developed which placed prosecuting attorneys on a full-time basis at police detective divisions in order to provide continuing legal assistance to the police on a 24-hour basis. Cf. STANDARDS at 242-43, suggesting a full-time police legal advisor, independent of the prosecutor's office to enhance his objectivity.

and prosecutors is the same: to prevent the loss of otherwise valid convictions.⁴¹

Professor Reiss also suggests that plea bargaining is a major contributor to the ineffectiveness of the exclusionary rule:

Our recent work suggests that the discretion exercised by prosecutors, defense lawyers, defendants, and judges in admitting only a very small percentage of charges to trial undermines the operating foundation of the exclusionary rule. The bargain justice of the prosecutor and the court encouraging the defendant to enter a plea of guilt renders the normative power of the Supreme Court ephemeral. Not only do defendants bargain away a most fundamental right by a plea of guilt, but the prosecutor and the courts also effectively bargain away most of their power to hold the police accountable for their behavior toward citizens.⁴²

Since a plea of guilty in effect waives a defendant's constitutional objections to a search or confession,⁴³ the argument has at least superficial appeal. But it assumes that final plea bargaining always takes place before a hearing has been held on the merits of the constitutional claim. In addition, the argument assumes that the parties do not consider in the bargaining process the possible illegality of a search. A defense attorney confronted by what he believes to be a possibly illegal search or confession should be in no hurry to advise his client to plead guilty before there has been an evidentiary hearing on the admissibility of the evidence. Relevant, of course, is the importance of potentially excludable evidence to the prosecution's case.⁴⁴ And even if the initial constitutional decision is adverse to the defendant, the possibility that it may be overturned on appeal still may influence the relative bargaining position of the parties.

The fact that such bargaining levers may be available to a defendant does not mean that some of the impact of the exclusionary rule cannot be bargained away by a guilty plea,⁴⁵ and empirical data

⁴¹ Mr. Chief Justice Burger and Professor Reiss are not taking quite the same position. Chief Justice Burger suggests that the exclusionary rule is inadequate because the police and the prosecutor do not communicate. Professor Reiss, on the other hand, apparently believes that the police and the prosecutor do not communicate, in part, because of the exclusionary rule. Presumably, the judicial subsystem communicates with neither. In fact, judges do communicate, formally and informally, with the prosecutor's office, and that information frequently may be relayed, again formally or informally, to the police. See also note 40 *supra*.

⁴² REISS at 218.

⁴³ See *McMann v. Richardson*, 397 U.S. 759 (1970).

⁴⁴ Cf. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 447 (1971).

⁴⁵ See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 82 (1968).

showing the exact impact which the potentially illegally obtained evidence has on the plea bargaining process would be quite useful. The more precise question is, however, the extent to which the mere existence of plea bargaining destroys the deterrent impact of the exclusionary rule by permitting the police to assume that there will be no real penalty for illegal conduct. The conclusion that the police confidently violate citizen rights, secure in the knowledge that plea bargaining will overcome the effect of the exclusionary rule, is speculative at best.⁴⁶

It should be remembered that the exclusionary rule has been attacked, not only because it fails to adequately prevent police misconduct, but also because society is allegedly injured by the freeing of guilty persons.⁴⁷ With plea bargaining, fewer persons who are guilty of crime and who have also been subjected to illegal police practices are likely to be released without some form of punishment. If in fact the plea bargaining system leads to a compromise in which the defendant accepts some punishment, although less than he might expect after a full trial at which the questionable evidence is admitted,⁴⁸ the interests of society are not greatly disadvantaged.⁴⁹ Generally it is hard to see how the plea bargaining system, which on its own merits is admittedly far from faultless, can be accorded any more than marginal blame for police misconduct.

Ultimately, Professor Reiss believes that it is the legitimization of police intervention and reciprocal civility between police and citizens, coupled with police professionalization, which will create the improvement in police conduct which current legal rules have not accomplished.⁵⁰ This proposition may be theoretically sound, but its practical possibilities, at least in the near future, seem to be minimal. Moreover, the potential dangers of relying on it are enormous,

⁴⁶ For the argument that "the slight and rather speculative deterrent impact to be gained by prohibiting plea bargaining in this situation would be more than offset by the resulting strain on our system," see *White supra* note 44, at 461.

⁴⁷ See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), *cert. denied*, 270 U.S. 657 (1926).

⁴⁸ See *White supra* note 44, at 460-62.

⁴⁹ Society thus might be "harméd" more by a damage remedy requiring the payment of substantial sums to individuals subjected to illegal police practices. Presumably, a substantial monetary expenditure would be necessary to create a sufficient deterrent effect. Logically, a government being forced to pay out substantial funds because of police misconduct would put pressure on the police to limit illegal practices. In the long run, police adherence to the constitutional rules would limit recoveries, ultimately reducing the financial cost. In the short run, however, before the deterrent effect sets in, it might be rather expensive.

⁵⁰ REISS at 182-85.

even, or perhaps especially, assuming a change in current legal rules to more easily accommodate the theoretical model by eliminating subsystem conflicts. While *The Police and the Public* does not attempt to answer the question of how a civil society should be created, it does attack one aspect of the problem — the present assumption that police should be trained to accept citizen incivility. Professor Reiss argues that:

[I]n a civil society no one should be trained or paid to accept incivility; to accept invectives that begin with "mother" or animal names. That is not to say that the police cannot be disciplined and trained to deal in a civil fashion with citizens who behave with incivility. They must! But failure to sanction incivility toward the police on the grounds that the police should expect, and therefore accept it, is to lay the ground for even less civility of citizens toward the police and for the police to respond in kind when opportunity presents itself.⁵¹

Initially, if the police "respond in kind," the training to accept incivility which they presently receive is not proving very effective. More important, levying sanctions on citizen incivility requires the creation and enforcement of verbal crimes directed against the police. Such legislation would raise serious questions of free speech, and create considerable potential for harassment and arbitrary enforcement.⁵² "Civility" is an excellent societal goal — whether it

⁵¹ *Id.* at 184-85.

⁵² In *Gooding v. Wilson*, 405 U.S. 518 (1972), defendant was charged with directing the following language at an officer: "White son of a bitch, I'll kill you;" "You son of a bitch, I'll choke you to death;" and to another officer: "You son of a bitch if you ever put your hands on me again, I'll cut you all to pieces." Defendant was convicted under the Georgia code which provides that "any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of peace . . . shall be guilty of a misdemeanor." GA. CODE ANN. § 26-6303 (1953). The United States Supreme Court overturned defendant's conviction, holding that because the Georgia appellate courts had failed to limit the statute to "fighting words," *see* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the statute was overly broad in violation of the first and fourteenth amendments. *But cf.* *Colten v. Kentucky*, 407 U.S. 104 (1972).

See also *Cleveland Plain Dealer*, Feb. 26, 1972, at 1, col. 1:

Foul language off and on stage brought an abrupt halt to a rock concert last night at St. Edward Catholic High School, 13500 Detroit Avenue, Lakewood.

The female vocalist and male bass player of the rock band Eli Radish were arrested and 500 rock fans were sent home early by Lakewood Police.

The fuss began during an intermission when a Lakewood policewoman stationed in the women's restroom overheard vocalist Barbara Marek, 20, using a four-letter word. Miss Marek was promptly arrested for disorderly conduct.

Learning of the arrest, bass player Dan Sheridan, 21, took the microphone to tell the audience what had happened. When he repeated the four-letter word that prompted the first arrest, Sheridan too, was arrested for disorderly conduct. . . .

should be sought through increased emphasis on verbal crime is questionable.

The Police and the Public offers at least one concrete and immediate suggestion in response to the problem of bureaucratic minimization of police accountability:⁵³

Police officers should be required to make an official record of *any* work contact with a citizen when the encounter is terminated, whether or not an arrest is made. Immediately on completion, a copy of the form should be given to the citizen as an official notice acknowledging the contact, and another copy should be filed with the department. The form must be numbered uniquely, as it is for traffic warrants, to insure greater accountability in its use.⁵⁴

The suggested form would include at a minimum: the name and address of the citizen or citizens involved; the number or name of the policeman; the location of the contact; whether an automobile was involved; the reason for the contact; its date, hour, and duration; a statement of citizen rights and whether they were communicated to the citizen; a notice telling the citizen where to register complaints; and "any special features of the decision related either to the officer's discretion or the citizen's options, *e.g.*, a citizen's inability to communicate with an officer, and why, or a citizen's refusal to sign a complaint."⁵⁵

An extensive addition to the enormous amount of paper work presently produced by a typical big city police department is certainly of questionable value. Professor Reiss argues that the practice would "cost less than school reports to parents."⁵⁶ But this is hardly an acceptable justification, especially if the procedure is not efficacious. Why expect the officer who violates a citizen's rights to fill out the form? In fact, an officer may fill out the form inaccurately, creating a record supporting his own position. An officer might fail to warn a citizen of his rights,⁵⁷ fill out the form indicating that the citizen had been warned, and give the form to the citizen, who, unsophisticated as to its meaning, or merely unsettled by the encounter, will accept the form. Having done so, the citizen may be estopped from later asserting that he in fact was never

⁵³ See generally REISS at 158-202.

⁵⁴ *Id.* at 205.

⁵⁵ *Id.* at 205-06.

⁵⁶ *Id.* at 206.

⁵⁷ Obviously the "rights" in question are not necessarily ones for which constitutional warnings now are necessary. There might be some question as to precisely of what the citizen need be warned, but that would not be a major problem, assuming the efficacy of the procedure in general.

given any warnings. He surely can look forward to some uncomfortable moments during cross-examination. Of course, in some cases a form of the type suggested may be of some utility; it certainly would be useful to provide citizens with the telephone number for reporting complaints. But is that really worth the effort? And more important, is this a significant improvement in correcting police abuses and guaranteeing police accountability?

Professor Reiss recognizes that an argument can be made that the form procedure will create data files which can be used *against* citizens. He argues, however, that in fact nothing prevents these files from being created independently: "The problem is how to protect citizens from the misuse of information, not the gathering of information *lest* it be misused."⁵⁸ But if we *affirmatively require* the police to create such files, which do not now exist, we have greatly increased the *ability* to misuse the information.⁵⁹

In conclusion, it should be understood that the standards governing police practices are not being defined and enforced with full effectiveness by lawyer-created rules. If behavioral scientists can convincingly demonstrate that a current legal approach is not motivationally sound, we should give considerable thought to remaking the rules, with both short and long-term considerations in mind. Whether or not lawyers ultimately accept or reject the kind of suggestions which *The Police and the Public* makes is irrelevant to the overall goal. Although this particular book falls far short of providing final solutions, it at least reveals some potential for interaction between lawyers and behavioral scientists.

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⁵⁸REISS at 207.

⁵⁹ Since the files will accumulate in a random manner, there will be less danger that freedom of association and expression will be limited than where files are kept concerning only certain apparently troublesome individuals or groups. See *Anderson v. Sills*, 56 N.J. 210, 265 A.2d 678 (1970), upholding the state's right to maintain files of individuals involved in demonstrations, rallies, etc., despite the potential chilling effect on first amendment rights.

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