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Roger J. Traynor

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## LAWBREAKERS, COURTS, AND LAW-ABIDERS\*

ROGER J. TRAYNOR\*\*

A recluse who confined his reading to the headlines that regularly scream of crime might well imagine that ordinary people live in constant fear of injury or death at the hands of violent criminals. Only if he went out into the world would he discover that they stand in danger of much else that is fearful, and he might be surprised that on the whole they stand it rather well. He would see that law-abiding people not only overwhelmingly outnumber those engaged in crime but that they have well-armed police forces on their side, alert to track down lawbreakers.<sup>1</sup> He would see that in the courts lawbreakers are regularly brought to justice. He would see that places of detention everywhere are chronically overcrowded. He would realize that if the millenium ever arrived when every lawbreaker is found out, our present walls of confinement would never hold them all. We would then have to envisage crime control in larger terms than incarceration, unless we wanted to billet lawbreakers in our homes.<sup>2</sup>

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\*\*Chief Justice of the Supreme Court of California. A.B. 1923, Ph.D., J.D. 1927, University of California.

1. In 1964 the population of the United States was approximately 191 million. U. S. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1964) [hereinafter cited as U.C.R.]. As of December 31, 1964, there were 214,356 adult prisoners confined in state and federal institutions for felony offenses. The ratio of prisoners confined to the civilian population was 112.5 per 100,000. See U. S. DEP'T OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS 1 (1965).

In 1964, the national clearance or police solution rate of reported crimes was 24.5 per cent. National clearance rates for the crimes of murder, forcible rape, and aggravated assault, however, were all over 66 per cent of those reported. U.C.R. 21-22. It is reasonable to suppose that the clearance rate will increase in proportion to improvements in the compensation and training of police personnel and in scientific methods of crime detection.

In 1964, the national police employee rate for all cities was 1.9 police per 1,000 people. In the suburbs it was 1.3 per 1,000 people and in the sheriffs' departments it was .9 per 1,000 people. U.C.R. 32-33.

2. "[A]rrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses." Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

Meanwhile the scare headlines are reinforced by scare articles and speeches in such large force as to induce at least transient frights even in ordinary people. The alarmists would make recluses or vigilantes of us all, destroying the confidence of people in their own powers of observation and thought. It is time we confront the fearmongers who are confusing the public's perspective on the age-old problem of crime and confounding the confusion by singling out courts as scapegoats.

To begin with, crime is no new phenomenon in our own country or any other.<sup>3</sup> We keep more records on it than many countries do, and they are steadily improving. Hence what appears to be a formidable record of crime in this country also bears witness to such a formidable bent for statistics as to suggest not that we harbor more outlaws per thousand than other countries do, but that we harbor more bookkeepers.

If few countries are affluent enough to hire enough scribes to keep up with crime, our own is far from keeping up with it all. What little we are learning hurts us, but it hurts us no more than what we formerly did not know.<sup>4</sup> Today's statistics have so far advanced beyond the records of the past as to afford no basis for invidious comparisons of the crime of today and that of yesterday. Moreover, they are meaningful only in the context of other data revealing revolutionary changes in our way of life. Where once we were a nation predominantly of rural dwellers, and most people knew their neighbors, we are now predominantly a nation of urban denizens jostling our way among strangers with a minimum of urbanity.<sup>5</sup> Where once we built up tolerance for steam whistles, for the

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3. On the recurrence of crime waves in the United States, see notes 16-25 *infra*. Many scholars warn against drawing hasty conclusions from crime statistics. See Beattie, *Criminal Statistics in the United States*, 51 J. CRIM. L., C. & P.S. 49, 54 (1960); Bell, *What Crime Waves?* Fortune, Jan. 1955, pp. 96, 98; Wechsler, *A Caveat on Crime Control*, 27 J. CRIM. L., C. & P.S. 629, 637 (1937). See also Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., C. & P.S. 171, 187 (1962). As to the seriousness of the crime problem in other countries see Neville, *The New Mafia is Deadlier*, N.Y. Times, Jan. 12, 1964, § 6 (Magazine) p. 22; Samuels, *Crime Wave in "Law-Abiding" England*, N.Y. Times, May 3, 1962, § 6 (Magazine) p. 64; Newsweek, Sept. 14, 1964, p. 42 (Japan); U. S. News & World Report, April 26, 1965, p. 13 (Canada).

4. We have taken only the first tentative steps toward applying statistical and empirical research to the problems of criminal law. See Beattie, *supra* note 3, at 65; Foote, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 468-473 (1964); Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 27-36 (1957); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 33 (1961).

5. In the first fifty years of this century the ratio of urban to rural dwellers in the United States was reversed from 40/60 in 1900 to 64/36 in 1950. The 1960 census reported an urban majority of 70 per cent, but with a definite shift from

clickety-clack of industrial machines and their giant roars and sputters, we must now also build up tolerance for the chattering computers. Upward goes progress, uprooting everything in sight. Down goes our sense of identity.

There are revolutionary changes also in the make-up of the population. The least disturbing is that people live longer, for however spry they remain, their exuberance knows some bounds. There is a relatively quiet readjustment, even when they lose their innocence by association with grandchildren who no longer wish on a star but compute its distance by rocket. The salient change is the current accent on youth.<sup>6</sup> The young are dominant not only in number but in voice; they make themselves heard as well as seen. They act their age, in the double sense. They act with the unruly energy of youth and react to the turbulence of the age in which they live. It should come as no surprise that they dominate the annals of crime.<sup>7</sup>

The crimes of the young against society bear close relation to their youth. One of their most common offenses is automobile theft,<sup>8</sup> and in that offense they reflect a value that their elders appear to prize even more dearly than liquor, cigarettes, cosmetics, and the vicarious sex offer-

central cities to their surrounding suburbs. U. S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 15 (1965).

6. Those 65 years old and over constituted 4 per cent of the population in 1900 and 9 per cent in 1960. Nevertheless, in 1960 for the first time in American history, the median age of the American population decreased because there was a larger proportionate increase in the under-20 age group than in any other. Of approximately 180 million persons living in the United States in 1960, 69 million were 19 years of age or under. See IRISH & PROTHRO, *THE POLITICS OF AMERICAN DEMOCRACY* 31 (3d ed. 1965); U. S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 33 (1965).

7. "A review of total arrests of persons under the age of 18 reveals a continued upswing in their involvement with police. The nationwide increase in all arrests, again excluding traffic for persons under 18 was 17 per cent. In cities . . . , arrests of these young persons rose 17 per cent. Suburban and rural areas recorded 21 per cent and 22 per cent increases each. Thirty per cent of the total arrests in suburban areas were for persons under 18, 20 per cent in cities and in the rural areas young people made up 19 per cent of arrests for all criminal acts." U.C.R. 24 (1964). In short, the age group of people under 18 accounted for more than 20 per cent of total national arrests. The group ranging from ages 18 to 29 accounted for almost another 30 per cent of total national arrests. U.C.R. 108. See also GLUECK & GLUECK, *PREDICTING DELINQUENCY AND CRIME* (1959).

8. In 1964, there were 463,000 automobile thefts, a 16 per cent increase over 1963. The police were able to arrest the person or persons responsible in 26 per cent of these cases. Sixty-four per cent of those arrested for auto theft were under 18; 89 per cent were under 25. "The increase in auto theft arrests for persons under 18 in the past 5 years has more than doubled the growth of the young age population 10-17 years which is primarily identified with this crime." U.C.R. 19-20 (1964); see Savitz, *Automobile Theft*, 50 J. CRIM. L., C. & P.S. 132, 133 (1959).

ings that multiply like rabbits to attend tax-deductible repasts,<sup>9</sup> and of course more dearly than intangible values that have no price tag, let alone the accoutrements of status.<sup>10</sup>

The significant fact about young offenders is that their first offense is often their last.<sup>11</sup> Nevertheless first offenses swell the statistics of crime known to most only by their totals. The public is rarely informed that a substantial number of the crimes of the young are not only first and last offenses, but also nonviolent crimes against property, not people.<sup>12</sup> The spotlight is on the occasional violent crimes of the young. In this regard we do well to remember that in a time of accelerating mobility the hostile encounters on our streets are less between Greek and Greek, or even between Greek and barbarian, than between recently-arrived young strangers who see each other as barbarians and are quick to give and to take offense.<sup>13</sup> Moreover for all their bravado, it is the young who bear the most damaging wounds of upheavals in family relations attendant upon the widespread upheavals of a mobile society.<sup>14</sup> They also feel with particular sharpness the mass violence of this century's wars. It may be deplorable, but it is not wholly inexplicable, that they sometimes react violently to so emotionally disturbed a world, riddled with the hostilities of their elders.

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9. In 1964, approximately 72 million passenger cars were registered in the United States. The average urban family spends more than \$700 a year in the purchase and operation of an automobile, a figure exceeded only by the amounts spent on food and housing. See U. S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 346, 549 (1965). See also BLOCH & NIEDERHOFFER, *THE GANG* 183-185 (1958); KEATS, *THE INSOLENT CHARIOTS* (1958).

10. In recent years, education has gained status on the basis of its monetary value. See HARRIS, *THE MARKET FOR COLLEGE GRADUATES* 34-43, 117-146 (1949); Miller, *Annual and Lifetime Income in Relation to Education: 1939-1959*, 50 AM. ECON. REV. 962 (1960); Morgan & David, *Education and Income*, 77 Q.J. OF ECONOMICS 423 (1963).

11. See Laulecht, *A Study of Recidivism in One Training School*, 1962 CRIME & DELINQUENCY 161; Manning, *Significant Characteristics of Recidivists*, 4 N.P.A.A., 211, 213 (1958).

12. "The young age group, 10-17 years, makes up about 15 per cent of our national population but commits 43 per cent of all the property crimes—burglary, larceny and auto theft—based on police solutions." U.C.R. 22. On the other hand, based on police solutions (clearance rates), persons under 18 were responsible for only 5 per cent of all murders, 9 per cent of aggravated assaults and 14 per cent of forcible rapes. U.C.R. 87, Table 10.

13. BLOCH & NIEDERHOFFER, *THE GANG* 14, 161-182 (1958); CLOWARD, *DELINQUENCY AND OPPORTUNITY* 194-199 (1960).

14. See S. & E. T. GLUECK, *FAMILY ENVIRONMENT AND DELINQUENCY* (1962); S. & E. T. GLUECK, *UNRAVELLING JUVENILE DELINQUENCY* (1950); E. T. Glueck, *Toward Improving the Identification of Delinquents*, 53 J. CRIM. L., C. & P.S. 164 (1962). See also ERICKSON, *CHILDHOOD AND SOCIETY*, 306-325 (2d ed. 1963).

We may never reach a definitive consensus on the interpretation of crime statistics enveloped in so complicated a background. Nevertheless we have a responsibility at least to read the statistics in the perspective of correlative data.

There is an aggravated complication: statistics encompass violations of a growing host of statutory prohibitions, crimes per se even when they involve no victim and no violence. Whatever the wisdom of such statutory prohibitions as are prompted by community mores, it may still remain debatable whether the behavior prohibited should be labelled a crime and punished as such or dealt with in some other manner.<sup>15</sup> Those who are quick to say, whenever something displeases them, that "there ought to be a law," fail to realize that each new law increases the chances that they too may become lawbreakers.

Even in simpler times crime was a problem complicated enough to resist solution.<sup>16</sup> Since the early days of the Republic alarmists have described the crime of their day as a wave, without any reminder that where there's a wave there's an ocean. Waves have been pounding against domestic tranquility since the Founding Fathers, aware of how lively a deadly sin could be, began the alphabet of undomesticated crime with the Scarlet Letter A. The gluttonous among them, the prideful, the covetous, the angry, the envious, the slothful, all these deadly sinners went on record against lust. This righteous company proceeded from flaming A's to firedoomed W's, and for the witches punishment was swift and severe enough to satisfy the most vengeful law-abiders. One can imagine that

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15. See ALLEN, *Problems of "Socializing" Criminal Justice in the Borderland of Criminal Justice* in *THE BORDERLAND OF THE CRIMINAL LAW* 1, 3-5 (1964); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 67 (1964).

16. Professor Arthur E. Sutherland, Jr., who has canvassed past records, reminds us that "the available data suggest that the characteristic crimes of the late eighteenth century were the same offenses that today cause outcry against constitutional immunities. Little public emotion stirs today because of such late-vintage crimes as Food, Drug, and Cosmetic Act violations, or ingenious offenses under the Securities Exchange Act. People, quite understandably, get angered and alarmed at robbery, rape, and murder. Our forefathers committed these same crimes of bodily violence and depredation. The Bill of Rights of 1791 and state constitutions and statutes, adopted and enacted and reenacted from that time to our time, were devised precisely to make prosecution and conviction of these and other crimes more difficult. . . . The Founding Fathers . . . knew exactly what they were about. The question is whether we intend to carry out their mandate." Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 34-35 (1965); see also SEMMES, *CRIME AND PUNISHMENT IN EARLY MARYLAND* (1938); WEISS & WEISS, *CRIME AND PUNISHMENT IN COLONIAL NEW JERSEY* (1960).

even the slothful who would bestir themselves for no other entertainment, would not miss the closing night of a witch who would go up in smoke.

Generation after generation the waves of crime went on pounding.<sup>17</sup> The nineteenth century was no less violent than the eighteenth.<sup>18</sup> In the relatively tranquil years of the early twentieth century, still tinged with mauve, crime regularly made headlines to break the peace.<sup>19</sup> World War I came and went, but crime continued.<sup>20</sup> The years of Prohibition from 1920 to 1933 put criminals in business and brought home the sorry lesson that crime pays when it consists of supplying prohibited goods or services to self-styled law-abiding citizens.<sup>21</sup> When the era of Prohibition ended crime continued, highlighted now by the dubious activities of those who had flourished on a law that purported law-abiders mocked. They were now as well able as the latter to hire legal counsel and they became the first-class citizens of crime, paying for buffer lawyers to counter police and prosecutors as no penniless or ignorant wretch could do. Another generation would pass before we recognized a right to counsel for all, and even then it took additional litigation to extend it to appeals.<sup>22</sup>

17. See HAWTHORNE, *THE SCARLET LETTER* (Modern Library ed. 1950); UPHAM, *SALEM WITCHCRAFT* (American Classics ed. 1959).

18. See BOIES, *PRISONERS AND PAUPERS* 2 (1893); Kamisar, *When Wasn't There a "Crime Crisis"?* (unreported speech given to the Twenty-eighth Conference of the Third Judicial Circuit of the United States on Sept. 9, 1965); see also ARNOLD, *THE SYMBOLS OF GOVERNMENT* 165 (1935).

19. Hillyer, *Prevention of Crime vs. Coddling the Criminal*, 4 J. CRIM. L., C. & P.S. 453, 455 (1913); Spurr, *The Third Degree*, 16 Case & Com. 371, 374 (1910); see Comments of Charles Nott on *Coddling the Criminal*, 2 J. CRIM. L., C. & P.S. 108 (1911). See also Potter, *The Privilege of Crime*, 10 ME. L. REV. 117 (1917).

20. See Pam, *Annual Address of the President of the Institute of Criminal Law and Criminology*, 10 J. CRIM. L., C. & P.S. 327 (1919); Veiller, *The Rising Tide of Crime*, 51 WORLD'S WORK 133 (1925-26); see Johnson, *The Law Protects the Criminal*, *Good Housekeeping*, March 1927, p. 20.

21. See ALLSOP, *THE BOOTLEGGERS AND THEIR ERA* 30-38 (1961); HIBBERT, *THE ROOTS OF EVIL* 331-338 (1963).

22. In 1932, the Supreme Court held that under special circumstances, a defendant in a capital case was deprived of his Fourteenth Amendment rights by the failure to appoint counsel to represent him. *Powell v. Alabama*, 287 U.S. 45 (1932). In 1942, the Supreme Court held in *Betts v. Brady*, 316 U.S. 455 (1942), that a state does not deprive a criminal defendant of due process by its failure to appoint counsel to represent him in felony cases unless it leads to a conviction lacking in "fundamental fairness." Such fundamental fairness might be lacking when there were "special circumstances" that required the services of an attorney. The special circumstances exception so vitiated the *Betts* doctrine, that there was arguably a denial of due process every time the defendant might have been better off had he had counsel. See *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Hudson v. North Carolina*, 363 U.S. 697 (1960). In cases involving capital offenses—a "circumstance" always requiring the appoint-

Meanwhile the depression thirties came and went, and crime continued.<sup>23</sup> World War II came and went, the Korean War came and went, and crime continued.<sup>24</sup> The fifties ushered in the beginnings of an affluent society, but not the end of crime. We learned that it attended affluence as it had attended depression and the years of so-called normalcy.<sup>25</sup>

In the sixties we have soared in circles beyond the earth and travelled in circles around the earth, but we have not put down crime at home. We have wanted to soar and circle enough to devote all resources necessary to those ends. We have had no such earnestness about getting at the causes of crime so that we could move toward effective control. Too many people have cavalierly dismissed the inquiry and research of knowledgeable people, retailing instead the fanciful claim that due process rules are the source of all our woes.<sup>26</sup>

In the clamor against such rules we have lost sight of two overwhelming facts. First, they become relevant only in a small fraction of

ment of counsel—the Court held that the right to counsel accrued at preliminary hearing and arraignment. *White v. Maryland*, 373 U.S. 59 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961). There were further inroads on *Betts* in a series of decisions holding that a defendant had an unqualified right to retain counsel at his own expense. *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Chandler v. Fretag*, 348 U.S. 3 (1954). These cases, in conjunction with those protecting an indigent from the discriminatory consequences of his poverty, see e.g. *Griffin v. Illinois*, 351 U.S. 12 (1956), hastened the demise of *Betts*. See Israel, *Gideon v. Wainwright: The "Art" of Overruling* in 1963 SUP. CR. REV. 211, 242-248. In 1963, *Betts* was overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963). In a companion case, the Supreme Court held that indigent criminal defendants were entitled to assigned counsel on appeal. *Douglas v. California*, 372 U.S. 353 (1963); see also *People v. Brown*, 55 Cal.2d 64, 69, 357 P.2d 1072, 1075 (1960); *People v. Hyde*, 51 Cal.2d 152, 154, 331 P.2d 42, 43 (1958).

23. See *Hearings Before a Subcommittee of the Senate Committee on Commerce*, 73d Cong., 2d Sess. (1933) (Investigation of the Matter of So-Called "Rackets" With a View to Their Suppression) [hereinafter cited as *1933 Hearings*]; VOLLMER, *THE POLICE AND MODERN SOCIETY* 1 (1935).

24. See *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 78th Cong., 1st Sess. 126 (1944) (Remarks of Congressman Sam Hobbs); *Newsweek*, April 1, 1946, p. 24; Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46, 64 (1957); Waite, *Why Do Our Courts Protect Criminals*, *American Mercury*, Jan. 1956, p. 55.

25. *Hearings Before the House Committee on the District of Columbia*, 88th Cong., 1st Sess. 291 (1963) (Remarks of Stanley R. Schrotel, Chief of Police of Cincinnati, Ohio); *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 527 (1961); ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 103 (1961); Sondern, *Take the Handcuffs Off Our Police*, *Reader's Digest*, Sept. 1964, p. 64.

26. See Peterson, *The Crooks Get All The Breaks*, *Saturday Evening Post*, Sept. 23, 1961, pp. 10, 13; *U.S. News & World Report*, Aug. 26, 1963, p. 38.



cases that come to trial.<sup>27</sup> Second, more often than not there are no useful leads whatever to the criminal in a known crime and he disappears into a sea of human beings as unrevealing as the sea itself. Sometimes when a suspect is found the case against him cannot be substantiated and the crime still remains unresolved. Moreover, we have no idea how much crime goes unreported as well as unsolved. Law-abiders as well as outlaws often report no evil that they have seen or heard.<sup>28</sup>

If an unresolved crime is sensational enough, the public may grow restless for any solution and become prey to indiscriminate suspicions or fantasies of community control that would miraculously search out the criminal or at least someone who bore a resemblance. Sooner or later, however, depending on its emotional allure, the unresolved crime fades out of people's minds. As to the cases that do go to trial, the public soon forgets the many that the state wins against the accused, either because he pleads guilty or because the prosecution proves his guilt beyond a reasonable doubt.<sup>29</sup> Whatever the public emotion engendered by the trial, it usually simmers down to righteous satisfaction once the accused is finally adjudged guilty.

It is quite another story when a known suspect is accused and brought to trial and then thwarts prosecution by pleading irregularities in his detection, detention, or trial that compel exclusion of convincing

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27. For example, a recent study of 1,000 indictments in New York State's Kings County by Judge Nathan Sobel of the New York Supreme Court revealed that confessions "constitute part of the evidence in less than 10 per cent of all indictments." The assertion "that confessions are essential to conviction in any substantial number of cases is simply carelessly nurtured nonsense." Sobel, *The Exclusionary Rules in the Law of Confessions, A Legal Perspective—A Practical Perspective, Part VI*, N.Y.L.J., Nov. 22, 1965, pp. 1, 4-5. Former New York City Police Chief Michael Murphy, however, finds that confessions are essential to the solution of 50 per cent of homicides. See N.Y. Times, Nov. 20, 1965, p. 1, col. 5. See also report of study by staff of New York County District Attorney Frank Hogan indicating that admissions had been made by 62 of 91 defendants in pending homicide cases and that 25 of these or 27 per cent could not have been indicted had there been no confessions. N.Y. Herald Tribune, Dec. 2, 1965, p. 31.

28. "Reluctance on the part of victims due to embarrassment, fear, low value of property stolen, etc., are some of the reasons for this situation." U.C.R. 22.

29. Of 32,569 adult felony defendants in California in 1964, 65.5 per cent pleaded guilty and an additional 25.6 per cent were found guilty by the judge or jury; hence there was a total of 91.1 per cent convicted felony defendants. CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, CRIME IN CALIFORNIA 121 (1964). See also, *Hearings Before the Senate Committee on the District of Columbia*, 89th Cong., 1st Sess. 62-65 (1965); Pye, *Reflections on Proposals for Reform in Federal Criminal Procedure*, 52 GEO. L.J. 675, 679 (1964); Note, 112 U. PA. L. REV. 865 (1964).

evidence of guilt. Perhaps to black out the large failure to inquire into the causes of crime, alarmists then rouse the public to righteous indignation with a vengeance. Short shrift is made of the likelihood that an accused who escapes on procedural rules and not on the merits will in time be successfully prosecuted.<sup>30</sup> Instead there is castigation of any court that insists on applying rules and procedures consistently, regardless of who is accused.<sup>31</sup>

Those who call in bold stereotype for swift and severe punishment have always been willing to tailor procedures to that objective. Why not coerced confessions? they asked in an earlier day. Why not double jeopardy? Why not shortcut the Fifth Amendment?<sup>32</sup>

Many proposals emerged after World War I to make the punishment fit the crimes, in a tenor suggesting that a court was an arm of the police. As a Chicago judge typically put it, with no nonsense about constitutional rights: "A bit of extra-legal activity is better than having vigilantes on the waterfront."<sup>33</sup> Innocuous as such extra-legal activity sounds in miniature, the consequences would loom large indeed if every judge took it upon himself to do his bit by pinchhitting as a vigilante in the courtroom.

There were also vociferous calls for narrowing the period between arrest and sentence to a week, or still better a day, and for cutting down

30. For example, of the first twenty-two defendants whose convictions were reversed by the United States Supreme Court because their confessions introduced at trial were coerced, eleven were subsequently reconvicted. See Ritz, *Subsequent Developments in Cases Reversed by the Supreme Court*, 19 WASH. & LEE L. REV. 202, 208-210 (1962).

31. Felons are permitted to "walk into court fearlessly and walk out to pursue their careers of crime—without punishment." Peterson, *The Crooks Get All The Breaks*, Saturday Evening Post, Sept. 23, 1961, p. 10; see Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L., C. & P.S. 175-177 (1963); Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 86 (1962); Coakley, *Restrictions in the Law of Arrest*, 52 NW. U.L. REV. 2, 14-15 (1957).

32. See Carman, *A Plea for Withdrawal of Constitutional Privileges From The Criminal*, 22 MINN. L. REV. 220 (1937); Comments of Curtis Lindley on *Needed Reforms in Criminal Law*, 1 J. CRIM. L., C. & P.S. 109 (July 1910); Spurr, *The Third Degree*, 16 CASE & COM. 371, 372 (1910); Stevens, *Archaic Constitutional Provisions Protecting the Accused*, 5 J. CRIM. L., C. & P.S. 16 (1914).

33. Chicago Tribune, Oct. 3, 1930, quoted in Note, 16 ST. LOUIS L. REV. 148, 155 (1931). See Waite, *Cooperation—Judiciary and Police*, 4 MICH. S.B.J. 273, 284 (1925).

probation and parole.<sup>34</sup> There were calls upon trial courts to nullify the bail system, ostensibly to speed up justice.<sup>35</sup> There was little concern that without a bail system even those who were eventually acquitted would meanwhile be subjected to punishment,<sup>36</sup> thus serving the dubious lesson that those who erroneously get caught in the toils of the law must pay for the error of the law's ways. The crime-conscious, in more than one slip of the pen, revealed their preoccupation with the lawlessness of "the more ignorant and vicious classes of the population."<sup>37</sup> They seemed unaware of how ironically their own untutored strictures moved in vicious circles.

The vagrant ways of such class subconsciousness found apt illustration in the thirties, when millions of unemployed were on the streets. Vagrancy laws multiplied, void of meaningful definition and vague of purpose.<sup>38</sup> It was even recommended that anyone who came within their

34. See Child, *On the Criminal Side*, Saturday Evening Post, April 15, 1940, p. 24, 162; Howell, *Inefficient Courts and the Crime Wave*, 75 REVIEW OF REVIEWS 35 (1927); Johnson, *supra* note 10, at 216; Rose, *Why Justice Limpers in Pursuing Crime*, 60 AM. L. REV. 321 (1926); Sims, *Fighting Crime in Chicago: The Crime Condition*, 11 J. CRIM. L., C. & P.S. 20, 28 (1920).

35. See Veiller, *How the Law Saves the Criminal*, 51 WORLD'S WORK 310, 316 (1925-26). Judge Learned Hand stated: "Our dangers do not lie in too little tenderness to the accused. Our procedure has been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

Commenting on the complaint that "the safeguards of the accused operate as unreasonably technical obstacles to conviction of the guilty," Professor Dession observed that the notion is without foundation, "as all who have any experience in the trial of criminal cases well know. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys far more investigative assistance and resources generally. But the notion persists." Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22, 40 (1950). See also Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 60 YALE L.J. 1149 (1960).

36. In a profound study of the conflicting values in crime control Professor Herbert Packer observes that those who hew to the line of speedy justice would let the chips fall where they may for disciplinary purposes. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 39 (1964).

37. Editorial, *The Coddling of Criminals*, 8 VA. L. REG. 52, 56 (1922). See also Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 451 (1948).

38. See Note, *Who Is a Vagrant in California?* 23 CALIF. L. REV. 506 (1933); Note, 35 COLUM. L. REV. 1292 (1935). See also 1933 *Hearings* at 306-307 (Judge Thomas Green of Chicago). Vagrancy statutes have remained popular in various states even today. See Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960). They have been recently challenged on the grounds that they are unconstitutionally vague and constitute punishment for mere "status" rather than for a crime. See the dissent of Justice Douglas from the

wide sweep should have the burden of proving that he had a legitimate job.<sup>39</sup> Such laws were often of little consequence to well-counselled racketeers engaged in illegitimate pursuits. It could be overwhelming for anyone unfortunate enough to have no job at all, and hence in no position to make a convincing racket about invisible means of support. Perhaps to close the gap between the illegitimately busy rich and the idle poor, extremists proposed that any attorney be imprisoned who without a court assignment undertook a criminal defense for pay and then lost it through no fault but his client's.<sup>40</sup> In their view, guilt by association was bad enough, but still worse when gilt-edged.

If public enemies roamed the land too often with impunity, at least they were well-publicized and sooner or later many of them were brought to justice if only because they could no longer evade the consequences of tax evasion.<sup>41</sup> There was no comparable publicity about how the police proceeded to bring suspects to book. Dubious techniques came to light only as determined lawyers fought occasional cases all the way to the United States Supreme Court. They were techniques to chill even those law-abiders who most fervently declare themselves for severe prosecution and punishment.<sup>42</sup> More frightening still, police officials defended such techniques as in the normal course of their business.<sup>43</sup> In the words of

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dismissal of the writ of certiorari in *Hicks v. District of Columbia* (D.C. Cir. 1964), *cert. granted*, 379 U.S. 998 (1965) (No. 711, Misc., 1964 Term; renumbered No. 51, 1965 Term), *writ dismissed as improvidently granted*, 34 U.S.L. WEEK 3291 (U.S. Feb. 28, 1966).

39. See 1933 *Hearings* at 135, 209.

40. See 1933 *Hearings* at 148. There was also alarm at post-conviction remedies. In the view of Colonel Joseph A. Gerck, Chief of the St. Louis police force, "resort to . . . writs of habeas corpus" was "embarrassing and retarding the administration of justice." *Id.* at 283. In the view of J. Edgar Hoover prisons had become "crime's law schools" and "hardened convicts" hunted for the "rat-holes" of "legal technicalities" that might mean "freedom." Hoover, *Crime's Law School*, *American Magazine*, Nov. 1940, p. 55.

41. See Johnson, *Organized Crime: Challenge to the American Legal System—Part II*, 54 J. CRIM. L., C. & P.S. 1, 16-18 (1963). The effectiveness of these early tax evasion prosecutions can be seen in current criminal practices. "The mafiosi had also learned four principles from the Capone era. . . . 1. Always have a good lawyer. 2. Never plot or carry out violence against a federal officer. 3. Pay federal income taxes. 4. Never trust anyone except a Sicilian mafioso." SONDERN, *BROTHERHOOD OF EVIL: THE MAFIA* 69 (1959).

42. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936). See also Brownell, *It Could Happen to You*, *American Magazine*, May 1949, p. 24.

43. Complaining about the exclusion of a confession "obtained after long mental and physical fatigue," one police official stated "We are permitted to do less every day. . . . Pretty soon there won't be a police department." Reported in

one typical rationalization for violating the Constitution: "Nobody thinks of hedging firemen about with a lot of restrictive laws that favor the fire."<sup>44</sup> The analogy does not hold water. The firemen confront a catastrophe taking place before their very eyes and can train their hoses on obvious flames or smoke. In contrast, there are usually so many elements in the scene of a crime that no single witness can assimilate them all, and often witnesses conflict as to what happened. The police sometimes arrive on the scene only after the crime has been perpetrated, sometimes long after. Moreover, it should give caution that seemingly obvious suspects sometimes prove to be innocent<sup>45</sup> just as the seemingly innocent sometimes prove guilty. Even when appearances do not seem inscrutable, they can still be deceiving.

There is another fatal defect in the fire analogy. We can fight fire with fire, but it is intolerable to fight crime with crime. Precisely because the police do not always track down criminals in full public view the way firemen fight fires, we must have reasonable assurance that they will not resort to lawless methods.<sup>46</sup> What assurance we have proceeds in the main from rules of the United States Supreme Court. By indirection these rules seek to deter activities of police or prosecutors that are inimical to constitutional or other guarantees of a fair criminal process but that are not subject to any punishment even when they disregard an express prohibition. By the forties and early fifties such rules were gathering force as the only noteworthy restraining influence on lawless

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People v. Rogers, 303 Ill. 578, 588, 136 N.E. 470, 474 (1922). See also Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); Peterson, "Case Dismissed," *Atlantic Monthly*, April, 1945, p. 69.

44. See Hopkins, *The Lawless Arm of the Law*, 148 *Atlantic Monthly* 279 (1931) (statement by Buffalo Police Commissioner Austin J. Roche).

45. See Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965). See generally BORCHARD, *CONVICTING THE INNOCENT* (1961); FRANK & FRANK, *NOT GUILTY* (1957); KENNEDY, *TEN RILLINGTON PLACE* (1961); RADIN, *THE INNOCENTS* (1964); REIK, *THE COMPULSION TO CONFESS* (1959).

46. See, e.g., DEUTSCH, *THE TROUBLE WITH COPS* 63 (1954); MYRDAL, *AMERICAN DILEMMA*, 540-542, 975 (1944); SALISBURY, *THE SHOOK-UP GENERATION* 218-223 (1938); Bain, *Policemen and Children*, 33 *SOCIOLOGY & SOCIAL RESEARCH* 417, 418 (1949); Samuels, *I Don't Think the Cop is My Friend*, N.Y. Times, March 29, 1964, § 6 (Magazine) pp. 28, 30.

As early as 1931, United States Attorney General William D. Mitchell was quoted as saying: "Nothing has a greater tendency to beget lawlessness than lawless methods of law enforcement." Hopkins, *The Lawless Arm of the Law*, *Atlantic Monthly*, Sept. 1931, pp. 279, 287; see Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 *CORNELL L.Q.* 436, 456-458 (1964).

police action.<sup>47</sup> By the sixties they had become an influence of far-reaching consequence,<sup>48</sup> though still akin to that of permissive parents who now and again announce a rule to improve behavior in the wake of particularly reprehensible behavior about which someone has complained.<sup>49</sup>

Such rules, designed to give meaning to the Constitution, are hardly unreasonable. As Judge Henry J. Friendly puts it, in a critique by no means blind to the imperfections that may be found in some judicial opinions:

[T]here are few brighter pages in the history of the Supreme Court than its efforts over the past forty years to improve the admin-

47. Thus the Supreme Court defined coercion to include a variety of factors such as constant and prolonged interrogation, refusal to permit defendant to communicate with his friends and relatives, failure to inform defendant of his constitutional rights, deprivation of physical comforts, and psychological pressure. See, e.g., *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Watts v. Indiana*, 338 U.S. 49 (1949); *Haley v. Ohio*, 332 U.S. 596 (1948); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Ward v. Texas*, 316 U.S. 547 (1941); *Chambers v. Florida*, 309 U.S. 227 (1940). It found a violation of due process when the police used conscience-shocking methods such as stomach pumping to obtain evidence. *Rochin v. California*, 342 U.S. 163 (1952). Working within the confines of the rule in *Betts v. Brady*, the Supreme Court held that in certain cases, the absence of counsel violated a criminal defendant's right to a fair trial. See, e.g., *Palmer v. Ashe*, 342 U.S. 134 (1951); *Gibbs v. Burke*, 337 U.S. 773 (1949); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948). Compare *Glasser v. United States*, 315 U.S. 60 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938). When the police resorted to misrepresentation to obtain a guilty plea, the Supreme Court held that such action denied defendant the right to a fair trial. *Smith v. O'Grady*, 312 U.S. 329 (1941).

48. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (comment by prosecutor on defendant's failure to testify violates due process); *Pointer v. Texas*, 380 U.S. 609 (1965) (Fourteenth Amendment makes Sixth Amendment's guarantee of defendant's right "to be confronted with the witnesses against him" applicable to the states); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (right to counsel extended to police interrogations); *Jackson v. Denno*, 378 U.S. 368 (1964) (voluntariness of confession must be decided by someone other than jury that tries issue of guilt); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (compulsion of testimony by one jurisdiction requires immunity from prosecution in all jurisdictions); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment's privilege against self-incrimination applicable to the states); *Massiah v. United States*, 377 U.S. 201 (1964) (questioning of suspect after indictment in absence of counsel proscribed); *White v. Maryland*, 373 U.S. 59 (1963) (Sixth Amendment's right to counsel extended to preliminary hearing in state courts); *Fay v. Noia*, 372 U.S. 391 (1963) (extension of federal habeas corpus for state prisoners); *Townsend v. Sain*, 372 U.S. 293 (1963) (extension of right to evidentiary hearing for state prisoners in federal habeas corpus proceeding); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment's right to counsel made applicable to states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule extended to states); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (conviction devoid of evidentiary support is invalid under due process).

49. See Ares, *Criminal Procedure in 1964 ANNUAL SURVEY OF AMERICAN LAW* 327 (1965); Bator, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 464-466 (1964).

istration of criminal justice. How can any lawyer not be proud of the decisions condemning convictions obtained by mob rule, testimony known to the prosecutor to be perjured, coerced confessions, or trial by newspaper? There is nigh unanimous applause for the insistence that persons charged with serious crime shall receive the assistance of counsel at their pleas and trials. . . . [T]he fingers of one hand would outnumber the instances where I disagree with decisions, as distinguished from opinions, in this area.<sup>50</sup>

Would that all court critics could articulate whatever disagreements they have with decisions or opinions as dispassionately as this constructive commentator proceeds to do. Then in a rational atmosphere we could get down to cases and look up from them for the long-range view.

Instead, with each new judicial rule that strengthens guarantees against oppressive procedures before trial, alarmists charge the courts anew with criminal-coddling. An atmosphere thick with coddling charges is rendered even thicker by the counter-irritating paeans in praise of courts as if they were embarked on a crusade to enlarge a variety of liberties ambiguously described as civil, as a bulwark against any and all incivilities of an imagined police state. Nothing could be more misleading, for the courts take no such initiative. Far from being crusaders, they must remain passively at attention, though clamor surround them, though it reach their very windows. A court has no authority to mix in any melee between those suspected of lawbreaking and the police. Only when others take the initiative in submitting a case to it can it focus its attention on the details of a particular problem.<sup>51</sup> Only then can it utter words that become a rule, and even then, only within the severe constraints of law and custom that control jurisdiction.

In sum, no court can say what it pleases, let alone do what it pleases. It cannot even speak at all unless it is spoken to. One can hence note with some misgivings that the thin ranks of court defenders include zealots who ignore the sober reasoning of judicial opinions in their zeal to inflate judicial rules into soapbox slogans not only for *liberté, égalité*,

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50. Friendly, *The Bill of Rights As A Code Of Criminal Procedure*, 53 CALIF. L. REV. 929, 930-931 (1965).

51. See Bator, *supra* note 49, at 464 (courts work in an "episodic way" taking only a "bite" of the problem); Packer, *Policing the Police*, New Republic, Sept. 4, 1965, pp. 17, 18.

*fraternité*, and the spacing,<sup>52</sup> or denial<sup>53</sup> of *paternité*, but also for any other imaginable rights, privileges, immunities, and recreations of free-wheelers with a bent for taking all the liberties they can.

A redeeming feature about such noise is that at least it suggests, in however addled a manner, that there are two sides to the question of judicial rules bearing upon pretrial procedures, in a debate still largely dominated by those who hurl diatribes against the courts. All too many in this dominant group are aware of how defenseless are their targets. Lawyers at least, and well-informed journalists, know that a judge cannot engage in a verbal free-for-all. He is reluctant to make even the most dispassionate answer to even the most irresponsible diatribes. He is more likely to nourish the hope that they may expend themselves in time. In any event their rabid phrases, defying legal analysis, lend themselves most appropriately to dissection by psychologists and semanticists.

The responsibility rests with lawyers less to join issue with irrational attacks than to clear the air for intelligent and well-reasoned critiques that are as essential to the development of the law as the judicial opinions themselves. Although that responsibility has been borne nobly by a small company of legal scholars, it is high time for the reinforcements that are now appearing in the distance.<sup>54</sup> Meanwhile, time has helped vindicate

52. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

53. *Hartford v. Superior Court*, 47 Cal.2d 447, 304 P.2d 1 (1956).

54. In his message to Congress on March 8, 1965, on the need to combat crime (see 111 CONG. REC. 4253 (daily ed. Mar. 8, 1965)) President Johnson urged Congress to amplify federal law enforcement, to assist local law enforcement agencies, and to appropriate funds to study the origins and nature of crime. N.Y. Times, March 9, 1965, p. 1, col. 1. Thereafter a President's Commission on Law Enforcement and Administration of Justice was established composed primarily of local, state, and federal law enforcement officials, judges, and professors. See N.Y. Times, July 31, 1965, p. 1., col. 6. Congress also enacted the Law Enforcement Assistance Act of 1965 (79 Stat. 828, 18 U.S.C.—( )) providing for federal grants to state and local law enforcement agencies to improve training programs for their personnel. In addition, the Act empowered the United States Attorney General "to make studies with respect to matters relating to law enforcement organization, techniques and practices, or the prevention or control of crime . . . and to cooperate with and render technical assistance to State, local or other public or private agencies, organizations, and institutions in such matters."

The President delivered a second major message on crime to Congress on March 9, 1966. He stressed the importance of continued cooperation between the state and federal governments under the Law Enforcement Assistance Act and promised that grants would be made to state and local law enforcement agencies to help recruit and train additional personnel. The President noted that the National Crime Commission was engaged in numerous studies to provide empirical data on problems of crime and law enforcement. The elimination of those social



the judicial rules of an earlier day designed to deter lawless state action at the pretrial stage. Those who berate the courts now, driven to reformulate their censure, concentrate on the two most recent restraints on such action. One might better speak of two restraining influences exerted, as in earlier cases, only in sequence of a legal challenge to the legality of some pretrial state action in the criminal process.

Let us summarize these influences one after the other, and note in sequence the vociferous reaction each has aroused. The first restraining influence is the rule directed at unreasonable, hence unconstitutional searches and seizures. It bears emphasis here, as with earlier deterring rules, that there are no effective criminal sanctions against illegal police activity; hence courts can do little to enforce prohibitions against unreasonable searches and seizures. The most they can do is to exclude evidence that has been thus obtained in violation of the Constitution. In 1961, in *Mapp v. Ohio*,<sup>55</sup> the United States Supreme Court extended the exclusionary rule, already applicable in federal courts, to all state courts.

The other restraining influence emanates from the rules governing police interrogation of those accused of crime. Again, it bears emphasis that courts are in no better position to enforce prohibitions against illegal police interrogation than they are to enforce prohibitions against unreasonable searches and seizures. Again, about the most they can do is to exclude evidence at the trial that has been thus obtained illegally. Of the two salient rules designed to exert this restraining influence on illegal police interrogation, the first, enveloped in the *McNabb*<sup>56</sup> case of 1943 and the reinforcing *Mallory*<sup>57</sup> case of 1957, rested on the United States Supreme Court's authority to monitor the administration of federal criminal justice. The later rule of *Escobedo v. Illinois*<sup>58</sup> rested on constitutional grounds.

The *McNabb-Mallory* rule excluded in federal prosecutions any statement elicited from the accused during an illegal detention, namely,

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injustices that may be a cause of crime was also made a goal of the President's program. See 112 CONG. REC. 5146 (daily ed. Mar. 9, 1966).

Private organizations have also been active. The American Bar Foundation's Survey of the Administration of Criminal Justice in the United States has resulted in the publication of LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965), and four other books are in preparation.

55. 367 U.S. 643 (1961).

56. *McNabb v. United States*, 318 U.S. 332 (1943).

57. *Mallory v. United States*, 354 U.S. 449 (1957).

58. 378 U.S. 478 (1964).

a detention violating the federal rule that an arrested person be brought before a magistrate without unnecessary delay. The *Escobedo* rule extended the Sixth Amendment right to counsel, already applicable to criminal prosecutions in state courts via the Fourteenth Amendment, to police interrogations. Hence the rule excludes from state as well as federal trials, statements of the accused elicited by police interrogation

where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. . . .<sup>59</sup>

There was a formidable hue and cry against courts following the *Mapp v. Ohio* rule extending to state processes the United States Supreme Court's restraining influence against unconstitutional searches and seizures. The wailing reached a feverish pitch following the *Escobedo* rule,<sup>60</sup> reaching beyond the earlier *McNabb-Mallory* rule<sup>61</sup> to exert a restraining in-

59. *Id.* at 490-491.

60. "Most police and prosecutors heatedly argue they are rapidly losing legal ground in their battle against lawlessness." *Wall Street Journal*, Nov. 26, 1965, p. 1, col. 1. "[I]t is time we gave . . . [the police] some weapons by which they can try and safeguard the honest citizens which is the purpose of the entire police force." *Hearings before the Senate Committee on the District of Columbia*, 89th Cong., 1st Sess. 47 (1965). "The abusive decisions . . . are largely distillations about 'rights of the guilty,' which support technicalities of little practical value in protecting the innocent." *Wall Street Journal*, April 26, 1965, p. 6, cols. 1-2. See, e.g., Parker, *A Lawman's Lament*, 40 *LOS ANGELES B. BULL.* 603 (1965); Powell, *An Urgent Need: More Effective Criminal Justice*, 51 *A.B.A.J.* 437, 439 (1965). Compare Hoover, *Police Problems*, 7 *ST. JOHN L. REV.* 46, 54 (1932) with Hoover, address given at Loyola University, Nov. 24, 1964, reported in 111 *CONG. REC.* A511 (daily ed. Feb. 8, 1965).

61. "[T]he ruling . . . is one of the greatest handicaps that has ever confronted law-enforcement officers." *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 78th Cong., 1st Sess. 1 (1944) (remarks of Major Edward Kelly, Superintendent of Police in the District of Columbia). "In the opinion" of the International Association of Chiefs of Police, "the effect of the decision rendered by the Supreme Court in the *McNabb* case" was "to render law enforcement procedures so difficult that it will be practically impossible to maintain law and order and to satisfactorily protect our citizens against criminal activities." *Id.* at 43. "[T]he *Mallory* decision affects law enforcement to this extent, that most of the murders, the rapes, and robberies that I have come in contact with would have gone unsolved and unpunished under the *Mallory* decision." *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee of the Judiciary*, 85th Cong., 2d Sess. 124 (1958) (remarks of Police Chief

fluence on police interrogation. One might have thought from the hue and cry that it was a *hu e cri* against felons who had made away with the last rounds of ammunition held by law-abiders besieged on all sides by lawbreakers who made up in monstrosity what they lacked in numbers. There was rarely a pause for perspective. The monsters in the headlines towered over any earthworms who made the scene by developing a harmless new wriggle or by taking an abrupt twist for the worse. Anyone who did take a panoramic view was bound to note that virtually no one had actually seen policemen in handcuffs. Anyone who followed their activities closely knew that they were still quite able to handcuff others and that they did so when necessary. Moreover anyone who could understand law reports and still troubled to read them knew that courts, however scrupulously they conduct a criminal trial in accord with the Constitution and rules of law, still waste no encouraging words of sentimentality on criminals.

Articulate comment about the *Mapp* rule directed at unconstitutional searches and seizures was drowned out in the din about handcuffing the police.<sup>62</sup> At best, complained the foes of the rule, it was "misguided sentimentality."<sup>63</sup> Usually they denounced it as much worse, as a danger to "social safety"<sup>64</sup> or even as an aid to a "predatory army."<sup>65</sup> A relatively charitable comment that no "intelligent human being in all the world except a judge"<sup>66</sup> would subscribe to such a rule, seems at least indirectly to concede that a judge can have intelligence, leaving to the reader the innuendo that it is occupationally warped.

There has been a great deal of woofing about that occupational warp. There is loud dismay that judges far removed from the jungle of crime are in earnest that the mantle of the Constitution falls becomingly even

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Robert Murray of the District of Columbia). See also Scott, *The Mallory Decision and the Vanishing Rights of Crime Victims*, 4 *Police* 28 (July-Aug. 1960); Waite, *Police Regulation by Rules of Evidence—Results of the McNabb Case*, 42 *MICH. L. REV.* 909 (1944).

62. See ABA, *SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW* 103 (1961) (remarks of Keith Mossman, then Executive Vice President of the National District Attorneys' Association); Wilson, *Police Authority in a Free Society*, 54 *J. CRIM. L., C. & P.S.* 175 (1963).

63. 8 *WIGMORE* § 2184 at 36 (3d ed. 1940).

64. Waite, *Arrest of Felons*, 31 *MICH. L. REV.* 749, 765-766 (1933).

65. See Parker, *The Cahan Decision Made Life Easier for the Criminal*, in Parker, *Police* 113, 115, 120 (Wilson ed. 1957); Peterson, *Restrictions in the Law of Search and Seizure*, 52 *NW. U.L. REV.* 46-47 (1957).

66. Carman, *A Plea for Withdrawal of Constitutional Privileges from the Criminal*, 22 *MINN. L. REV.* 200, 206 (1937).

on the creatures who roam the jungle. The emotional argument goes that in protecting the rights of creatures who have shown no respect for the rights of others, the judges have not only left the side of the angels but have taken sides with the apes. The implication is clear that the best way to deal with apes is to ape them.<sup>67</sup>

More than one scholar has pointed out how frequently the alarmists invoke the sordidness of criminals to justify the view that the police should be free from the restraining influence of the most recent judicial rules.<sup>68</sup> Rarely do they say aloud, though logic would compel it, that the police should then be free of much more. Thus, though they have no hesitation in decrying the judicial rule excluding evidence obtained in unreasonable searches and seizures,<sup>69</sup> they are loath to state the logical corollary affirmatively. It must appear even to them as a question: Should the police be free of the restraining influence of the Constitution, of the Fourth Amendment's prohibition against unreasonable searches and seizures? *Sub rosa*, their answer must be yes; else they have no argument against the judicial rule operating as a sanction for the Fourth Amendment.<sup>70</sup>

They cannot forever make their argument half public and half *sub rosa*. They cannot forever openly abuse the judicial rule without also openly abusing the Constitution. Meanwhile they seek to allay public misgivings about unreasonable searches and seizures by blowing the bellows on public concern about crime. Should the guilty go free, they ask, when they could be convicted if only the courts would admit illegally obtained evidence?<sup>71</sup>

67. The classic statement against this view was made by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion). See also Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 159, 176 (1953).

68. See Hall, *supra* note 67, at 153, 159-161; Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 24-26, 39 (1964); Wechsler, *A Caveat on Crime Control*, 27 J. CRIM. L., C. & P.S. 629, 635-636 (1937). See also TREBACH, *THE RATIONING OF JUSTICE*, 54-58, 232 (1964).

69. "Instead of welcoming an affirmation of an important constitutional right and turning promptly to the task of training police officers in the law which they are sworn to uphold and obey, the outcry was against the strictures of the new law." Steinberg, *A Comparative Examination of the Role of the Criminal Lawyer in Our Present-Day Society*, 15 W. RES. L. REV. 479, 490 (1964).

70. See Kamisar, *Some Reflections on Criticizing the Courts and "Policing the Police"*, 53 J. CRIM. L., C. & P.S. 453, 455-456 (1962); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255-256 (1961); cf. Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 445-446 (1964).

71. "Let the police have the authority to do what the public expects them to do in suppressing crime. If we followed some of our court decisions literally, the public would be demanding my removal as Superintendent of Police and—I might

There are no easy answers to hard questions.

The hard answer is in the United States Constitution as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them.<sup>72</sup>

Let no one conclude that judges are insensitive to public concern with crime or to the possibility that the guilty may go free when illegally obtained evidence against them is excluded. They are all too aware of it, but they are also aware that what is at stake is not the advantage to the accused in the particular case but the security to be preserved for all law-abiders against unreasonable searches and seizures. "The understandably impatient law-abiders, who approve official retribution without restraint against wrongdoers, do not visualize themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history."<sup>73</sup> It is for the judges, through the enforcement of judicial rules, to remind law-abiders that courts stand not only between them and the excesses of lawbreakers, but also between them and the excesses of government. The rule directed against illegal searches and seizures, for example, gives assurance to every law-abider of first-class protection for his first-class mail. He may take the right to such protection for granted, but it required trial and a judicial rule to vindicate it.<sup>74</sup> A law-abider can best grasp the significance to him of such rules by imagining how precariously situated he would be without them. Officers of the state could then lawlessly break open his mailbox as well as his mail; they could break down his door as lawlessly as his mailbox; they could seize his records and other belongings as lawlessly as they made entry; they could lawlessly search his very person.

More than one judge dismayed by the excesses of lawbreakers has also had reason to be dismayed by the excesses of government.

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add—with justification." Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L., C. & P.S. 175, 177 (1963). See also Wilson, *Two Views of Chicago—I. How the Police Chief Sees It*, Harper's, April 1964, pp. 140, 144.

72. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 322.

73. *Id.* at 319.

74. *Ex Parte Jackson*, 96 U.S. 727 (1877). The protection for first-class mail has recently been codified. 74 Stat. 657, 39 U.S.C. § 4057 (1964).

It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine. It was the cumulative effect of such routine that led [the California Supreme Court] at last in the case of *People v. Cahan* to reject illegally obtained evidence. It had become all too obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way. We summed up the sorry experience that led us to conclude that the exclusionary rule was now imperative: We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.<sup>75</sup>

It is not easy for a judge to overrule himself as I did in *People v. Cahan*,<sup>76</sup> after thirteen years of confronting evidence from flagrantly unreasonable searches and seizures. In a series of cases thereafter the court set about to formulate common-sense standards of reasonableness, and it soon became apparent that there was ample latitude left to the police for search and seizure within reasonable bounds.<sup>77</sup> Action within such bounds requires more thought but not necessarily more trouble than lawless action.

The great advantage of police compliance with the law is that it helps create an atmosphere conducive to a community respect for officers of the law that in turn serves to promote their enforcement of the law.<sup>78</sup> Once they set an example of lawful conduct they are in a position to set up lines of communication with the community and to gain its support. There is hope in the paradox that more than one neighborhood has opened its doors to the police when confidence has spread that the police will not lawlessly force them open. It is easier for them by far to track down a

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75. Traynor, *supra* note 72, at 322.

76. 44 Cal.2d 434, 282 P.2d 905 (1955).

77. See Draper, *The Cahan Case and Probable Cause*, 34 CALIF. S.B.J. 251; Note, *Two Years with the Cahan Rule*, 9 STAN. L. REV. 515 (1957).

78. See RUBIN, *THE LAW OF CRIMINAL CORRECTION* 434 (1963); SMITH, *POLICE SYSTEMS IN THE UNITED STATES* 10-13 (2d rev. ed. 1960); SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY*, 326, 340-341 (6th ed. 1960); Foote, *Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 44 (1957).

suspect in such an environment, without recourse to lawless action, than in an environment whose hostility thwarts them at every turn.<sup>79</sup>

The exclusionary rule of *Mapp* raises the standard of justice not only in reputedly bad neighborhoods, where illegal searches and seizures have most commonly occurred, but in purportedly good ones. An officer of the law who suffers a reproof, however indirect, for an illegal search or seizure involving even the most likely suspect in the most disreputable neighborhood, receives a warning that may redound to the benefit of even the most likely law-abider in the most reputable neighborhood. That lesson has come home with a vengeance to erstwhile decryers of court rules. The rules discouraging lawless search and seizure in the detection of lawbreakers may be invoked by those whose suspected antisocial behavior lies in nothing more sordid than tax returns.<sup>80</sup> This unexpected development has dramatized the reach of the rules. They extend their guarantees not merely to violent outlaws, not merely to nonviolent lawbreakers, but a fortiori to law-abiders. The basest wretch who vindicates such guarantees vindicates them also for his betters.

We turn now to the *McNabb-Mallory* rule and the later *Escobedo* rule, designed to exert a restraining influence on secret police interrogation. There has been little abatement of the hostility to the *McNabb-Mallory* rule aimed at limiting police detention before arraignment within lawful bounds.<sup>81</sup> That hostility has merged with the hostility to the *Escobedo* rule, which now bears the brunt of the fire.

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79. The lack of community cooperation with the police has been evident in situations where an arrest is made amid a crowd of bystanders. For example Chief of Police Schrotel of Cincinnati recently stated that "people assembled as spectators where an arrest is being made tend to side with the prisoner" and "sometimes . . . openly attack the police in an attempt to free the prisoner." *Will City Streets Ever Be Safe Again?*, U.S. News & World Report, April 8, 1963, p. 80. See also ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW 20 (1962).

80. See, e.g., *United States v. Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955); *United States v. Warlich*, 129 F. Supp. 528 (S.D.N.Y. 1955). The growing use of miniature tape recorders and electronic "bugging" devices has increased the concern of the law-abiders that the individual be protected from a lawless search. See *Osborn v. United States*, 350 F.2d 497 (1965), cert. granted 34 U.S.L. WEEK 3266 (No. 724, 1966); 112 CONG. REC. 1581 (daily ed. Feb. 1, 1966); 111 CONG. REC. 25504 (daily ed. Oct. 8, 1965); 111 CONG. REC. 23848 (daily ed. Sept. 22, 1965).

81. "The *Mallory* rule has crippled our police in their efforts to protect the community. It increases the difficulties of law enforcement, and also encourages increased lawlessness." *Hearings before Senate Committee on the District of Columbia*, 88th Cong., 1st Sess. 397 (1963) (remarks of Robert E. McLaughlin, President of the Citizens Crime Commission of Metropolitan Washington, D.C.); see

These rules seek to reconcile the practices of pretrial interrogation with the Fifth Amendment's injunction against compulsory self-incrimination by excluding at the trial evidence obtained via illegal police interrogation. They present a dilemma akin to the one presented by the exclusionary rule directed against illegal searches and seizures, namely, that an accused who is guilty may go free if the only evidence of his guilt has been obtained illegally. Again, the United States Supreme Court has undertaken to read the hard answer in the Constitution itself. What the Fifth Amendment radiates is an antipathy, born of experience, to inquisition.<sup>82</sup> We know those radiations well in the judicial system. No person, whatever his guilt, need incriminate himself at a trial. However revolting his crime, he need never confess it. He is armored with the Fifth Amendment's privilege against self-incrimination even though he is well protected against abusive inquisition by an impartial judge and by the openness of the proceeding. Reasonable men can quarrel, as some have,<sup>83</sup> with the wisdom of such a privilege when there is such protection against abuse. They can extend the quarrel to the use or abuse of the privilege in legislative investigations.<sup>84</sup> They would hardly advocate vitiating the privilege, however, by secret inquisition.<sup>85</sup>

The problem remained largely an academic one until the *Escobedo* case. Those charged with law enforcement were not much troubled about a constitutional injunction that was enforced only in a courtroom.<sup>86</sup> They could still undertake secret interrogation largely free of the restraints that attend interrogation in open court. The accused might be alone with no friend or counsel to advise him, no judicial officer to safeguard his rights, and no witnesses except police officers to testify as to what occurred.

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Knebel, *Washington, D.C., Portrait of a Sick City*, Look, June 4, 1963, pp. 15, 19. For a discussion of congressional reactions to the *McNabb-Mallory* rule, see Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 33-46 (1958). See also Bickel, *Fighting Crime*, New Republic, Sept. 18, 1965, p. 11.

82. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

83. The classic critique is still BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827).

84. Compare Meltzer, *Invoking the Fifth Amendment—Some Legal and Practical Considerations*, 9 BULL. ATOMIC SCI. 176 (1953), with Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 BULL. ATOMIC SCI. 181 (1953).

85. See McNaughton, *The Privilege Against Self-Incrimination, Its Constitutional Affection, Raison d'Être and Miscellaneous Implications*, 51 J. CRIM. L., C. & P.S. 138, 151-152 (1960).

86. Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 36-37 (1965).



Patently it was an innovation of consequence when the *Escobedo* rule extended to the pretrial stage, through the right to counsel, some assurance of the openness that attends a trial. It can be viewed as an effort to close the long-standing gap between the scrupulous observance of the privilege against self-incrimination at trial and its neglect at the pretrial stage.<sup>87</sup> We can have little quarrel with its objective, to serve as a restraining influence against secret inquisition. It suffers of course the handicap of kindred judicial rules: at best it can discourage illegal pretrial activities, but it can do little to stop them.<sup>88</sup> A restraint that is merely inadequate, however, may be better than none.

*Escobedo* presents problems as to its scope, however, that could prove intractable, as judges and law enforcement agencies strive to apply its olympian text to the local scene. Moreover, it may operate blindly to exclude confessions elicited without improper inquisition. Its most hopeful aspect is that it may serve to expedite a thoroughgoing examination of our pretrial procedures and a much-needed reconciliation of theory and practice in everyday terms.

There will still be some who would not extend the due process that seems so proper for proper people to those of unsavory mien; in their view it should operate as a sorting machine. If we believe in abiding by the law, however, we cannot tolerate any rejects in its operation. What is due, is due even the devil. Concededly it is not easy to see a devil go free for the moment, and on occasion forever, instead of going to jail, adding insult to his lack of injury by the guilty look on his face. It behooves us to note, however, that there are as yet no empirical studies indicating a correlation between whatever rules of law courts enforce for the protection of the accused and the crimes that criminals perpetrate. Moreover, those who equate due process rules with coddling of criminals have failed dismally to explain why crime flourishes even when there is no such so-called coddling, even when there is evidence of the very opposite.<sup>89</sup>

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87. See *Wood v. United States*, 128 F.2d 265, 271 (D.C. Cir. 1942); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).

88. See LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 421-441 (1965); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 264 (1962).

89. See NATIONAL [WICKERSHAM] COMMISSION ON LAW OBSERVATION AND ENFORCEMENT, REPORT NO. 11 ON LAWLESSNESS IN LAW ENFORCEMENT (1931). 1961 COMMISSION ON CIVIL RIGHTS REPORT bk. 5, JUSTICE 26; SMITH, *POLICE SYSTEMS IN THE UNITED STATES* 324 (2d rev. ed. 1960).

What of the most outrageous crimes, the crimes that engender universal horror? If we stop to think, we cannot but reflect that one so insensate as to commit such a crime will hardly have been animated to do so by salient rules in the law reports on issues of constitutional import.<sup>90</sup> The so-called technical rules are phrased in technical language beyond the ken of the insensate.<sup>91</sup> We must recall also that before there were such rules the majority of crimes, for lack of physical clues or even clues as to motivation, still never reached even the police station, let alone the courts. As to known crimes and criminals, the sobering fact is that we may all be closer to them than we imagine. The Uniform Crime Reports inform us, for example, that eighty per cent of all murders are committed by members of the victim's family or by his friends. A law-abider in the company of friends or relatives should not feel easy if they make the homespun announcement, as is their wont, that they would like to murder him. All too often they do.

The law-abiders are up against a reckoning on many fronts. For all the emphasis on sensational crime, they can hardly overlook such rampant everyday crime as lifting from shops, from hotels, or from industrial plants, to say nothing of such filching as plagiarism. They cannot forever ignore the scoff-law cynicism of large-scale embezzlers or jugglers of accounts or price-fixers who explain away their dubious activities, in the event of discovery, as mere "unfortunate episodes," a term now in great vogue.<sup>92</sup> Nor can the law-abiders remain forever heedless of contemporary polls indicating the public's high tolerance for all manner of cheating outside the bounds of lawful behavior.<sup>93</sup> They cannot forever avoid inquiry

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90. "The lawyer . . . often has little psychological insight and little acquaintance with the sort of persons who most frequently come into conflict with the law. So he can easily lose sight of the irrational factors in human motivation and construct psychologically superficial explanations, based on a view that crime grows out of conscious, rational consideration as to what is most profitable." Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L., C. & P.S. 176, 178 (1952).

91. U.C.R. 7; Andenaes, *supra* note 90, at 188-189; Gardener, *The Purposes of Criminal Punishment*, 21 MODERN L. REV. 117, 125 (1958); Watson, *A Critique of the Legal Approach to Crime, and Correction*, 23 LAW & CONTEMP. PROB. 611, 619 (1958).

92. See *Estes v. Texas*, 381 U.S. 534 n.1 (1965) (fraud in the sale of farming equipment); FULLER, *THE GENTLEMEN CONSPIRATORS* (1962) (electrical industry price-fixing); N.Y. Times, Nov. 15, 1964, section 3, p. 1, col. 2 (vegetable oil scandal). See generally SUTHERLAND, *WHITE COLLAR CRIME* (1949); Newman, *White-Collar Crime*, 23 LAW AND CONTEMP. PROB. 735 (1958); *Crime in a White Collar*, 204 ECONOMIST 620 (1962).

93. See JASPEN, *THE THIEF IN THE WHITE COLLAR* (1960); Cook, *The Corrupt Society*, 196 THE NATION 453 (1963).

into the causes of white-collar crime any more than of back-alley crime, if they are as alarmed at crime as they profess.

Lawbreakers in these stations of crime are sometimes quite capable of reading and understanding judicial rules. Who would generalize that they have embarked upon their unfortunate episodes only after a careful reading of the judicial rules bearing on procedures in criminal detection, detention, and trial? Suppose so unlikely a reader; he would have to search through countless pages to come upon the rules, and in the process he would come upon more than enough countervailing instances of swift and severe punishment.

Moreover, the law-abiders must confront the well-known secret that much aberrant behavior defined as crime never comes to light either because of the discreetness of the perpetrators or the protectiveness of their group or because the behavior bears embarrassingly close resemblance to that of many people who pride themselves on being law-abiders. They must confront the mortifying fact that in some crimes requiring collaborators, such as prostitution and gambling, reputed criminals have the collaboration of reputed law-abiders.<sup>94</sup> They must further confront the mortifying fact that the proceeds of such crimes feed the gangsters of organized crime, enabling some of them to advance from their sordid enterprises to the ranks of legitimate business.<sup>95</sup>

It seems reasonable to conclude that the blame for crime lies elsewhere than with the courts.<sup>96</sup> Some part of the blame rests with the so-called

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94. Illegal gambling establishments are crowded with patrons. See N.Y. Times, March 31, 1965, p. 1, col. 4. Although the customer of a prostitute is guilty of an offense under most state statutes, see, e.g., CAL. PEN. CODE, § 266(e), he is rarely prosecuted.

95. "Infiltration of legitimate business by known hoodlums has progressed to an alarming extent in the United States. The Committee uncovered several hundred instances where known hoodlums, many of them employing the 'muscle' methods of their trade, had infiltrated more than seventy types of legitimate business." KEFAUVER, CRIME IN AMERICA 16 (1961). For an illuminating discussion of such infiltration by organized crime, see SPECIAL SENATE COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, THIRD INTERIM REPORT 17-81 (1950-1951). The underworld has "obtained such holdings by investing money received from illicit enterprises; and by force, terror and the corruption of management, union and public officials." SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, FINAL REPORT, Part 4, at 856 (1960). See also ABA, REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 20 (1952-53); U.S. News & World Report, March 20, 1964, pp. 74-76.

96. David Acheson, then United States Attorney for the District of Columbia, observed in a 1964 address: "Prosecution procedure has, at most, only the most

law-abiders who have winked at some crimes while castigating others, or who have themselves been less than respectful toward officers of the law on the highways or elsewhere. In some measure the public is to blame for having done so little to institute or support long-range measures of crime control, beginning with the formulation of modern codes of criminal law and procedure in every state. No one is more aware than a judge that judicial rules fall short of the comprehensive guidance that law officers should have. There is hope in the offering of such guidance; the American Law Institute, for example, is at work on a Model Code of Pre-Arrest Procedure. Until the public rouses itself to adopt such reforms, however, the courts have no alternative but to fill in the breach by formulating whatever guidelines they can from one isolated case to another, usually of constitutional tenor.<sup>97</sup>

There are of course differences among judges on rules of criminal procedure as on some of the other issues of our time. Nevertheless they must honor the established law of the land, regardless of their own views. The state courts are bound by the decisions of the United States Supreme Court, just as the trial courts of a state are bound by the decisions of its appellate courts. Because of that obligation our country lives up to its name, the United States. The alternative would be disunity that might culminate in anarchy.

Meanwhile we must clear the air of misleading statements about the police as well as about courts. It is as irrational to make inflammatory generalizations from recurring instances of police lawlessness as it is to attack the courts for the rules directed against such lawlessness. The police are no more the enemies of the people than the courts are friends of criminals. Though time may be working against crime, including organized crime and white-collar crime, through increasingly sharp scientific detection and computerized records, our police officers still have a heroic job to do. Why not enlarge our own concepts, as well as theirs, of our common responsibilities? Why not recruit them in adequate numbers, at compensation

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remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Acheson, Remarks at the Semi-annual Meeting, Central Eastern Area Armed Forces Disciplinary Control Board, Bolling Air Force Base, October 15, 1964, p. 4. The speech is reported in the Washington Post, Oct. 16, 1964, p. 3, col. 4. See also Washington Post, March 26, 1960, p. D, col. 7 (remarks of then United States Attorney for the District of Columbia, Oliver Gasch).

97. See Griswold, *The Long View*, 51 A.B.A.J. 1017, 1019-1022 (1965).

appropriate to the qualifications and training they must have to do their job properly?<sup>98</sup>

The truth of the matter is that countless law enforcement officers, as well as judges, are setting an example of respect for the law as they go about their respective tasks. They have the responsibility of dealing fairly even with criminals in bringing them to justice. They must also convey the importance of fair procedure to those who seem hardly to abide the law. Daily they uphold the law that in the long run militates against law-breakers of every sort. Daily they give meaning to the concept of a law-abiding society. They can only hope that it is not lost forever to the law-breakers or ever lost entirely to those who pride themselves on abiding by the law.

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98. See, e.g., Brereton, *The Importance of Training and Education in the Professionalization of Law Enforcement*, 52 J. CRIM. L., C. & P.S. 111 (1961); Gourley, *State Standards for Local Police Recruitment and Training*, 53 J. CRIM. L., C. & P.S. 522 (1962); Misner, *Mobility and the Establishment of a Career System in Police Personnel Administration*, 54 J. CRIM. L., C. & P.S. 529.