On the Tactics of Police-Prosecution Oriented Critics of the Courts

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INTRODUCTION

Lack of public understanding of the police purpose and what the police must do to accomplish it [and] . . . ignorance of the facts involved in the war against crime in a free society continue unabated . . . because the police are not a vocal, scholarly group that devotes much time to presenting in a favorable light the facts that bear on the problem. The literature in consequence is principally devoted to the case against police; little has been written in their defense. The press, the literature, and even case law are all directed at incidents that discredit the police.1

So claims Orlando W. Wilson, Superintendent of the Chicago Police Department. If this situation ever existed, he had done his best to remedy it. Since March of 1962, the Superintendent has testified before the Senate Committee on the District of Columbia,2 published an article in a leading professional journal,3 addressed a panel discussion group of the American Bar Association,4 and been “interviewed” by a national magazine.5 He seems to adhere to the view that the best defense is a good offense. His principal targets have been the courts.

Chief Wilson is not alone. For example, in recent months, Stanley R. Schrotel, Chief of the Cincinnati Police Department, and President of the International Association of Chiefs of Police, who shares Wilson’s unhappiness about the inarticulateness of policemen,6 testified before

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4 Wilson, How Do We Live with Mallory, Mapp and Sun? (unpublished comments of Aug. 13, 1963, in the University of Minnesota Law Library).


6 See 1963 Senate Hearings 290-91.
the same Senate committee,\textsuperscript{7} was “interviewed” by the same national magazine,\textsuperscript{8} and appeared on “Meet the Press.”\textsuperscript{9}

To head off the growth of crime, maintains Chief Schrotel, “the most important thing for honest people to do” is to “be alert and vocal in defense of all the forces of law and order. They should make as much noise as the highly vocal elements who seek to derogate the police image by constant harassment.”\textsuperscript{10} In the meantime, the Chief is making a great deal of “noise” on his own.

Perhaps that he is \textit{adding} to the “noise” would be a more accurate description. For it has been some time now since anyone has cared to question the lung power of such lusty critics of the courts as Chicago Crime Commission Director Virgil Peterson, Professors Fred Inbau and John Barker Waite, Prosecutors J. F. Coakley and Edward Silver, Chiefs Robert Murray and William Parker.\textsuperscript{11} This “noise” is the subject of this article.

\textbf{Crime Causation: One Scapegoat Finds Another}

There was a time when William H. Parker, Chief of the Los Angeles Police Department, seemed to appreciate the complexities of the “crime problem.” In a 1952 speech, he warned that “I will disappoint anyone who expects to find here an easy formula for preventing crime.”\textsuperscript{2} Moreover, he pointed out: “Law enforcement officers are neither equipped nor authorized to deal with broad social problems. We do not control economic cycles; we are not equipped to deal with racial, religious, or political prejudice...”\textsuperscript{13}

Along these same lines, he observed two years later:

\begin{quote}
The police service has benefited greatly from... improved technology. ... But the answer has not yet been found.
\end{quote}

Despite the technology that has been acquired through no small effort and expense, the police service today fulfills its task with no greater success than it did a quarter or half-century ago. This is a damaging accusation, but it is susceptible of proof. As inaccurate as our statistics are, they leave little doubt that the crime rate has been on the increase for the past several decades—the identical years in which the American police have shown their greatest technical progress. It is

\textsuperscript{7} Ibid.
\textsuperscript{8} “Will City Streets Ever Be Safe Again?” U.S. News & World Report, April 8, 1963, p. 80.
\textsuperscript{9} Transcript of “Meet the Press,” presented on NBC, May 5, 1963, on file in the University of Minnesota Law Library.
\textsuperscript{10} “Will City Streets Ever Be Safe Again?” supra note 8, at 83. See also text accompanying note 203 infra.
\textsuperscript{11} Citations to the writings and speeches of these commentators are scattered throughout this article.
\textsuperscript{12} Parker, “Crime and Belief,” in Parker, Police 11-12 (Wilson ed. 1957).
\textsuperscript{13} Ibid.
highly doubtful that our present crime rate is any lower than that which accompanied the brawling, lusty period of the nation’s formation—years in which organized police protection scarcely existed.

... . . Indeed, our most accurate crime statistics indicate that crime rates rise and fall on the tides of economic, social, and political cycles with embarrassingly little attention to the most determined efforts of our police.14

Those familiar with Chief Parker’s recent contributions to the literature may be surprised at these sober appraisals of crime and its causes. Conspicuously absent from these early observations are any references to “handcuffing” rules of evidence, “misguided” courts, and “starry-eyed” liberals. But this, I repeat, was 1952 and 1954.

A short month after the second of Parker’s forementioned observations, the Supreme Court of the United States castigated his police department for making repeated illegal entries into an alleged bookmaker’s home, first to install a secret microphone and then to move it into the bedroom and the bedroom closet, in order to listen to the conversations of the occupants—for over a month.16 Although he insisted that state law authorized such invasions of privacy, Chief Parker “stopped it voluntarily . . . because I would not let a policeman go out and play footsie with the gates of a Federal prison.”16 A year later, in the famous People v. Cahan,17 the California Supreme Court overturned precedents of more than thirty years’ standing to adopt the exclusionary rule in search and seizure cases.

These decisions furnished the Chief with the “easy formula for preventing crime” he had once thought nonexistent. They apparently caused the Chief to forget all about (1) “economic, social and, political cycles”; (2) his concession—prior to these cases—that improved technology had failed to lower the crime rate; and (3) the apparent fact that “the crime rate has been on the increase for the past several decades.”

The Chief continued to talk about the continuing rise in crime “since 1954, which was the year of Irvine, and the year before Cahan.”18 He continued to bemoan that “we are spending a tremendous amount of

These fears were somewhat exaggerated. See Letter of Feb. 15, 1955, From Warren Olney III, then Assistant United States Attorney General, on file with the Stanford Law Review, reprinted in part in Comment, 7 Stan. L. Rev. 76, 94 n.75 (1954).
18 Wiretapping-Eavesdropping Debate 533. [Emphasis added.]
money without the real reward that we should be getting in the way of services rendered, 19 but now the reason was obvious: by preventing police, \emph{inter alia}, from intercepting communications "by electronic means ... we are making it almost impossible for these agencies to meet the challenges that they face." 20

Happily, \emph{not all} law enforcement spokesmen view restrictive rules of evidence as a principal cause of increased crime, or at least, not \emph{always}.

In December of 1962, page one stories in the Minneapolis newspapers 21 quoted local police authorities to the effect that somehow a current "burglary wave" was largely the product of the "tighter restrictions" imposed on state and city police by \emph{Mapp v. Ohio}. 22 Relevant statistics published some months later indicated that burglaries had increased about ten per cent, but when the figures were released and the police asked to account for them, the response was: "The burglars had a lot better weather this year; no snow." 23

Bank robberies in the Nation's Capital almost doubled in the fiscal year ending June 30, 1963. 24 Here, surely, was overwhelming "proof" that no police force—however carefully selected, however well trained—could withstand the combined effects of the search and seizure restrictions and the \emph{McNabb-Mallory} rule! 25 Or was it? Evidently the Director of the Federal Bureau of Investigation thought not. He never mentioned any rules of evidence. Every one of the twenty-two bank robberies which had occurred in the District in the past fiscal year, explained J. Edgar Hoover, had taken place at a branch-type facility. Such banks, he pointed out, are much more vulnerable to robbery; they "have fewer security features and less police protection"; the escape routes from the branch sites are more easily accessible and better concealed. 26

Why, on some occasions, do the police offer such unsensational, equally plausible reasons for the increase in crime? I venture to say, largely as a matter of self-defense. They fear the public will blame them.

As students of the crime problem have pointed out: "whenever the newspapers carry a sensational headline about the rising tide of juvenile

19 Id. at 527.
20 Ibid.
25 \textit{McNabb v. United States}, 318 U.S. 332 (1943), as reaffirmed by \textit{Mallory v. United States}, 354 U.S. 449 (1957), operates to exclude from federal prosecutions statements elicited during unreasonably prolonged precommitment detention, whether or not they appear to be voluntarily made.
26 Washington Post, note 24 supra.
delinquency nationally, or about some shocking youth-gang depredation locally," the question "likely to be raised in countless American homes" is: "Why don't the police put a stop to it?"27

No police force, of course, can "put a stop to it." The men on the "firing line" do not greatly affect the crime rate; not any more than do the courts. Here, as elsewhere, it is tempting "to reconcile the delusion of our omnipotence with the experience of limited power" by explaining seeming failure in terms of incompetence, even betrayal.28 Here, as elsewhere, a "mood of irritated frustration with complexity" finds expression in "scapegoating."29 The great irony is that although the police deeply—and rightly—resent being made the "scapegoats," too many of them have too few qualms about making the courts the "scapegoats."

In a recent speech, one in which he seriously doubted that the public "can live" with the exclusionary rule, Superintendent O. W. Wilson voiced dismay at the persistent increase in crime. The fault, he suggested, lies with the courts.30 But, in the very same speech, he took pains to point out that a major source of antagonism against the police is "a tendency to blame [them] . . . for a high incidence of crime instead of recognizing that there are many crime causes, such as slum conditions, narcotic addiction, lack of parental responsibility, unemployment, cultural inequalities, and other social factors over which the police have no influence or control."31

Hasn't the Superintendent missed something? Hasn't he overlooked the fact that the courts have no influence or control over any of these "social factors" either?

"CHANGE" IN SUBSTANTIVE STANDARDS—OR SIMPLY COMPLIANCE?

Police and prosecutors strenuously resist what they like to call "tighter restrictions" on their powers. But more often than not, what they are really bristling about is tighter enforcement of long standing restrictions. Thus, many in law enforcement reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written! They talked as if and acted as if the exclusionary rule were the guaranty against unreasonable search and seizure. What disturbed them so much was that courts were now operating on the same premise.

29 Id. at 109, 115.
30 Wilson, supra note 3, at 176.
31 Ibid.
The post-Cahan comments of the Los Angeles Chief of Police illustrate the point:

The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute "probable cause." As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Of course, the "framework of limitations" was imposed by the state and federal constitutional guarantees, not the exclusionary rule. Of course, so long as the state and federal constitutions were operative, a criminal offense never justified "affirmative police action" unless and until there was "sufficient information to constitute 'probable cause.'" Is it unfair to ask the Chief why, prior to the 1955 California decision, he permitted his officers to take "affirmative action" without bothering to arm themselves with sufficient information to constitute "probable cause"? Or to ask him why the police would only work within the "framework of limitations" imposed by law "so long as the Exclusionary Rule is the law of California"?

In 1961, the states lost their option to adopt or reject the "exclusionary rule." The landmark case of Mapp v. Ohio handed down in June of that year, finally required—as a matter of federal constitutional law—that all states exclude from criminal prosecutions evidence obtained by means of an unreasonable search and seizure.

The impact of the Mapp case in Minnesota, which, like New York, had up to that time admitted illegally seized evidence, is, I think, typical, and, once again, quite revealing. The Minneapolis Star reported:

Primary result of the decision in Minneapolis is expected to be a sharp increase in the number of search warrants issued. Joseph A. Hadley, head of the city attorney's criminal division from 1929 to 1954, said he could remember only two search warrants issued in that period. The city attorney's office has no record of any issued since 1954.

When, some months after Mapp, a Minnesota trial court excluded illegally seized evidence for the first time in the state's history, the assistant prosecutor handling the case commented: "To make a search

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82 Parker, "The Cahan Decision Made Life Easier for the Criminal," in Parker, Police, supra note 12, at 117.
83 Parker, "The March of Crime," in Parker, Police, supra note 12, at 131. Consider, too, Brooklyn District Attorney Edward Silver's statement, ABA, Summary of Proceedings of Section of Criminal Law 26 (1962) that the Mapp case "established the rule that all evidence obtained by illegal search and seizure is in violation of the Constitution... and is inadmissible in a state court."
and seizure incident to an arrest, the arrest will now have to be based on more than mere suspicion. When, a year later, the city appeared to be in the grips of the aforementioned "burglary wave," the police at first blamed it on the "tighter restrictions" imposed by Mapp. Lamented the head of the Minneapolis detective bureau: "I'd have 20 guys in jail right now if we didn't have to operate under present search and seizure laws."

These stories made page one. Off page one was found the observation of the state attorney general that:

[T]he Mapp case does not reduce police powers one iota. It only reduces potential abuses of power. The adoption of the so-called "exclusionary rules" does not affect authorized police practices in any way. What was a legal arrest before, still is. What was a reasonable search before, still is.

I wonder how many citizens understood that if the police had reasonable grounds to believe these "20 guys" had committed burglaries, they could arrest them under present search and seizure laws? I wonder how many were aware that if the police lacked such authority, not Mapp but the same state and federal constitutional provisions which had been on the books long before Mapp was ever handed down prevented them from making the arrests? I wonder how many realized that the police never had the authority to violate the law, only the incentive? And that the principal contribution of Mapp was simply to reduce that incentive?

When this point was made at a recent discussion of Minnesota police procedures, it evoked some illuminating responses from the two law enforcement panelists present, Minneapolis City Attorney Keith Stidd, and St. Paul Detective Kenneth Anderson—responses which demonstrate well how those state courts which admitted into evidence the fruits of illegal searches and seizures seemed to approve, even encourage, police misconduct:

CITY ATTORNEY STIDD: [Other speakers] have used the expression that

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36 See note 21 supra.
37 Ibid. (Calvin Hawkinson, who has since been appointed Chief of Police). [Emphasis added.]
39 Unfortunately, the exclusionary rule does not completely remove the incentive; its deterrent capabilities are limited. A decade after his brilliant criticism of Wolf v. Colorado, 338 U.S. 25 (1949), see Allen, "The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties," 45 Ill. L. Rev. 1 (1950), Professor Francis Allen pointed out that the overruling of Wolf would have little, if any, impact on the substantial police activities directed to ends other than the formal prosecution and conviction of offenders, e.g., "prevention" and harassment. See Allen, "Federalism and the Fourth Amendment: A Requiem for Wolf," in 1960 The Supreme Court Review 1, 37-40. See also Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 The Supreme Court Review 46, 54-55.
prior to the *Mapp* decision the police were violating the law all along. I don't think it is really proper for us to put it that way when the courts of our state were telling the police all along that the federal rules [barring the use of illegally seized evidence] didn't apply in Minnesota. . . . The [illegally seized] evidence was being brought into [Minnesota] courts and the courts were receiving it . . . . Technically, there might have been a violation, but the [Minnesota] courts were accepting this evidence; they were getting convictions on it. I don't believe we should be critical of the police and say, see how illegal and unlawful they were all this time.

. . . .

**Detective Anderson:** The point is that the county attorneys and defense attorneys who tried these cases in Minnesota were well aware of what the procedure was, that this was in violation of the federal rule, and . . . no police officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open . . . oftentimes we picked locks. Now, we didn't like this, but this is what the mores of society dictated . . . . That this is okay, it's been going on in Minnesota since it became a state, practically, and if you didn't want to perform that way, we just couldn't use you as a police officer.

The Supreme Court of Minnesota sustained this time after time after time. Now, your judiciary o.k.'d it; they knew what the facts were. Your trial judges, your defense attorneys, knew, too.  

At the risk of laboring the point, consider if you will the impressions of the Administrative Assistant to the District Attorney of New York County:

The experience of all who are employed in law enforcement demonstrates that as long as evidence discovered through illegal searches or items seized unlawfully were admissible in the course of criminal trials, inevitably police—sometimes, I fear, working under the orders of prosecutors—continued to engage in that "direct action" that produced the evidence . . . .

Let me give just one example. Several years ago I tried a case in which one of the ablest and fairest police officers I have ever had the pleasure of knowing testified. He was an extremely high ranking official who had been in command of an important unit of the New York City police force for a long period; a major function of the unit he commanded was to arrest persons found to be in possession of certain items of contraband. Although he was universally respected by all who came in contact with him, both in and out of law enforcement, at that time it was so blithely and matter-of-factly assumed that police would rarely bother to get search warrants, that these questions and answers took place upon his examination during the trial, without the batting of an eyelash:

Q. Now, in all the time that you were in the [name of police unit] as its commander, did you ever use a search warrant in entering a person's apartment, home, flat, loft or anything, for the purpose of investigating [crime]? A. No.

Q. I didn't hear you. A. No, I never did.

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Q. Did you ever see a search warrant, in all the time that you were in the [name of police unit]? A. No, we never used and never applied for one. [Brackets in original.]

The nature, depth, and lasting quality of the changes wrought by the exclusionary rule, e.g., the extent to which the notions underlying the fourth amendment are being or will be integrated into the policeman’s value system, will be the subject of debate for many years. But if the incidents I have related are typical, and I think they are, prior to the adoption of the exclusionary rule, state and constitutional provisions had had virtually no effect on police attitudes and actions at even the most superficial level; they had not even achieved “public conformity without private acceptance . . .”

The police response to the Cahan and Mapp decisions was soon followed by a “repeat performance” in the Nation’s Capital. In July of 1962, a special District of Columbia committee of three distinguished lawyers, headed by Charles A. Horsky (now Presidential Adviser on National Capital Affairs), culminated their sixteen-month study of the problem with the findings that “arrests for investigation” were unconstitutional, unwise, and unnecessary. The Committee recommended that “the practice should stop, and stop immediately.”

Robert V. Murray, Chief of the District of Columbia Police Department, was stunned. He recalled: “Back in 1947 a study was made by a committee from the Bar Association of investigative arrests. At that time they said investigative arrests were unconstitutional, and recommended that such arrests not be continued. Nothing was done about it.” Why, Chief Murray, seemed to wonder, was something being done about it now?

The Chairman of the Senate District Appropriations Subcommittee, was wondering the same thing. He warned District officials, including Board of Commissioners, President Walter N. Tobriner: “I hope no action will be taken to implement this report.” He went further. In

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41 Kuh, “The Mapp Case One Year After: An Appraisal of Its Impact in New York,” 148 N.Y.L.J. No. 55, p. 4, col. 2 (1962). After noting this entry “on the ‘plus’ side of the Mapp ledger,” Mr. Kuh, I should point out, goes on to discuss a number of “‘minus’ entries.”


43 District of Columbia Commissioner's Committee on Police Arrests for Investigation, “Report and Recommendations,” 22-41 (1962) [hereinafter cited as The Horsky Report]. The report did not deal with “arrests for investigation” “in the field,” only those “which result in a person being taken to a police station and ‘booked.’” Id. at 4 n.2.

44 The Horsky Report 69.


effect he issued a second warning, this one to Chief Murray to resist implementation of the report or else! "As long as you need more money from Congress," he told the Chief, "you will find people here interested in listening to you. But when your backbone becomes twine string, you are going to be in trouble when you come to Congress."47

Several months later, Commissioner Tobriner disclosed that "there is no doubt in any of the Commissioners' minds that such arrests ['for investigation'] are unconstitutional."48 This did not end the matter. Evidently the resolution of constitutional issues is not so simple. The police, Commissioner Tobriner added, would be permitted to continue the lawless practice until some "acceptable constitutional substitute" was found.49

After some halting starts, and in "defiance" of a House District Committee resolution urging still further delay so that legislation increasing police interrogation powers could be considered, the long-debated "ban" finally went into effect, March 15, 1963.50 The Washington Star tempered its criticism of the Commissioners with the observation: "Arrests for investigation are illegal and with the issue raised they had no choice except to ban them. Nothing is gained, however, by trying to gloss over the practical consequences in a city that is already ridden with crime. This ban will hamper the police."51

The ranking Republican member of the House District Committee was less temperate. He branded "the ban" "an arrogant action on the part of the Commissioners"52 and a surrender to "political" and "racial" pressure.53

How many people, I wonder, realize that the order "banning" investigative arrests does not affect prior legal norms one whit, only effectuates them? How many comprehend that, although it has only recently been enforced, "the ban" has always existed? Not, I suspect, many among the millions of Look readers who were simply told that "a new city rule imposes additional restraints on Washington police. Arrests for 'investigation,' a fruitful source of information on crime, are now banned."54

A curious consistency pervades the thinking of many police and prose-
CORNELL LAW QUARTERLY

If they pay no attention to "the law" unless and until they feel the sanction, it is no less true that when they seek to change "the law" they bother only with the sanction. Whether they resist change or strive for it, "the law" itself counts for nothing. Only the sanction matters.

Thus, if the current efforts to repeal the McNabb-Mallory rule, in so far as it applies to the District, succeed, Rule 5(a) will still command that an arrested person be brought before the nearest magistrate "without unnecessary delay."\(^{55}\) Warrants for arrest will continue to issue, requiring that an arrested person be brought "forthwith" to the magistrate. Opponents of the McNabb-Mallory rule are not seeking to amend Rule 5(a). They are not requesting lawful authority, within the limits marked out by the "involuntary" confession cases,\(^ {56}\) to hold an arrested person as long as necessary or convenient or desirable. All they want—and all they need—is assurance that henceforth, when they violate Rule 5(a) it will not matter.\(^ {57}\)

"Necessity," Particularly the Law Enforcement and Military Brands

As I have already pointed out, "police-prosecution minded" critics of the judiciary none too subtly suggest that rules of evidence have spawned crime "waves" and badly impaired law enforcement efficiency. As I shall dwell on later, this type of criticism reflects a "populist mentality," an attitude which collides with the "rule of law." It is characteristic of "a disposition toward ideological enthusiasm and political passions, which proclaim great crises and announce their disbelief in the capacities of ordinary institutions and their leaders to resolve them."\(^ {58}\) This current of thought and sentiment, which also manifests itself in the claim of military necessity, overlooks that:

[Our nation at the time of the Constitutional Convention was also faced with formidable problems. The English, the French, the Spanish, and various tribes of hostile Indians were all ready and eager to subvert or


\(^{56}\) For recent discussion of these limits—whether they be viewed in terms of "involuntary" confessions or at the point when the right to counsel "begins"—see Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations," 48 Minn. L. Rev. 1, 55-61 (1963); Kamisar, "What is an 'Involuntary Confession'? A Commentary on Inbau and Reid's 'Criminal Interrogation and Confessions,'" 17 Rutgers L. Rev. 728 (1963); Ritz, "Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court," 19 Wash. & Lee L. Rev. 35 (1962); Comment, 31 U. Chi. L. Rev. 313 (1964).

\(^{57}\) H.R. 7525, 88th Cong., 1st Sess. provides that "in the courts of the District of Columbia .. statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner . . . ." See 1963 Senate Hearings 1. The proposal in S. 1012, 88th Cong., 1st Sess. is that "notwithstanding the provisions of rule 5 . . . or any other rule or statute of like purport, a voluntary admission or a voluntary confession of an accused shall be admissible against him . . . ." Id. at 353.

occupy the fledgling Republic. Nevertheless, in that environment, our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights. There was no call for a garrison state in those times of precarious peace. We should heed no such call now.\textsuperscript{59}

Those who seek additional powers for the police readily identify their demands with that of "national interest," "national good," "public welfare," "public necessity," or some other symbol representative of a more universal value scheme. More often than not, when someone invokes such a symbol, "he is urging a decision, and not a reason for arriving at it. The capturing of the symbol . . . is tantamount to the capturing of the decision itself."\textsuperscript{60}

As an astute political scientist has pointed out, these symbols are "society's most effective analgesics?; "anchor rationalizations for policy-caused pain." Without such concepts, he observes, "most presidents, congressmen, governors, commissioners, managers, and mayors—and, I should hazard, commissars, premiers and generals—would become unnerved."\textsuperscript{61} Furthermore, he notes that "the most discouraging aspect of totalitarianism is not the power-lust of its leaders, but the ease with which people adjust to losses in political freedom when that loss is explained in terms of public necessity."\textsuperscript{62}

Keith Mossman, then Executive Vice President of the National District Attorneys Association, typifies the "necessity" approach:

There has never in the history of this country been a greater need for effective law-enforcement. This country can no longer afford a "civil rights binge" that so restricts law enforcement agencies that they become ineffective and organized crime flourishes. Law enforcement agencies must not be handcuffed by the false and unrealistic application and expression of individual civil liberties to the point that law-enforcement breaks down.\textsuperscript{63}

Professor Rex Collings, Jr., reflects the same mood:

We are losing the war against crime despite unparalleled police forces and investigative agencies . . . .

Why . . . ? Perhaps it is because criminal justice has become badly unbalanced. Too often it is justice for defendants without regard for the needs and problems of law enforcement and the public . . . . We too often forget that criminals are at war with society. Our armed forces are heroes, but policeman is a dirty word. We overlook the times when the police and military forces simultaneously fight the same enemy.\textsuperscript{64}

\textsuperscript{60} J. Cohen, "The Value of Value Symbols in Law," 52 Colum. L. Rev. 893, 896 (1952).
\textsuperscript{62} Ibid.
\textsuperscript{63} ABA, supra note 33, at 103.
\textsuperscript{64} Collings, "Criminal Law and Administration," 1957 Ann. Survey Am. L. 93.
Chief Parker of Los Angeles is equally fond of likening the police to our military forces, and the criminal—perhaps it would be more accurate to say a person suspected or accused of crime—to an enemy soldier. Thus, he has felt "obligated" to warn that "the imposition of the exclusionary rule might render the people powerless ... against the criminal army." He told the nation, in a televised debate on wiretapping and eavesdropping that the police "are doing a more inadequate job every day despite all the advancements that have been made in the professional field of law enforcement because they are just like the U.S. Army in Korea; they are limited like the Yalu River boundary, and the result of it is that they are losing the war just like we lost the war in Korea."

Since it is characteristic of those who demand additional power for the police to freely invoke the military analogy, it is only fitting and proper that we pause to examine some recent claims of "military necessity."

In United States ex rel. Toth v. Quarles the argument was advanced that unless ex-servicemen could be tried by court-martial for crimes committed while they were in the armed forces, the discipline of the military would be disrupted and its morale impaired. The Court was not impressed. It did not fully grasp how "giving ex-servicemen the benefit of a civilian court trial when they are actually civilians" could have such adverse effects. Apparently none has materialized.

The power to court-martial civilian dependents of overseas servicemen for capital crimes was at issue in Reid v. Covert. The Government urged that in light of present conditions of world tension, the concept of military trial of civilians performing services for the armed forces, "in the field," during time of war be expanded to reach dependents accompanying the military forces overseas in time of peace. "Great potential impact on military discipline," was said to ride on the outcome. It is difficult to follow this reasoning. No one suggested that civilian dependents could commit murder and other capital crimes with impunity; only the method of trial was at stake. Moreover, the Government's own figures demonstrated that the number of dependents—and all other civilians accompanying the armed forces overseas—for whom general court-

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66 Wiretapping-Eavesdropping Debate 536.
68 Id. at 22.
70 Id. at 33-34.
71 Id. at 47 (Frankfurter, J., concurring).
CRITICS OF THE COURTS

martial for alleged murder were deemed advisable averaged a little less than two a year.\(^\text{72}\)

The claim was made in Kinsella v. United States ex rel. Singleton\(^\text{73}\) that unless the power to court-martial overseas civilian dependents in noncapital cases were sustained, a critical impact upon discipline would follow. Considering that what was involved, spread over the world-wide coverage of military installations, was about seventy cases a year (of which more than half were economic control violations or offenses simply designated "other"),\(^\text{74}\) the Court "doubted" that removing court-martial jurisdiction would "bring on such a crisis."\(^\text{75}\)

Of course, not all claims of "military necessity" have been met with skepticism. To take the obvious example, at the start of World War II some 70,000 American citizens of Japanese ancestry were imprisoned—most of them for as long as three years—without indictment or the proffer of charges—pending inquiry into their "loyalty."\(^\text{76}\) Again, the argument advanced, that of necessity, is not easy to follow. Why, for instance, did the persons of Japanese descent who made up one-and-one-fifth per cent of the West Coast population constitute a greater menace to safety than such persons in Hawaii, more than 30 per cent of the Territory's population?\(^\text{77}\)

An important point, one that many would like to forget, is that:

The basic reasons for evacuation were submerged under the impenetrable slogan of "military necessity." It was precisely this fact that made public criticism of the policy ineffective; that induced civilian heads of the War Department to foster the evacuation; that forced Justice Department officials to an unwilling tolerance of the program; that turned aside the investigatory inclinations of Congress; and that fostered relaxation of the Supreme Court's usual standards of review.\(^\text{78}\)

But:

The judgments made on the West Coast in the winter of 1942 were largely nonmilitary in character: the reasons adduced to link resident Japanese to military dangers were sociological (the Japanese are "almost wholly

\(^{72}\) Id. at 47-48.

\(^{73}\) 361 U.S. 234 (1960).

\(^{74}\) Id. at 244 & n.9.

\(^{75}\) Id. at 244.

\(^{76}\) Id. at 244.

\(^{77}\) The early phases of the program were sustained in Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944). A later phase of the detention program—the refusal to release admittedly loyal citizens except upon their acceptance of certain conditions—was invalidated in Ex parte Endo, 323 U.S. 283 (1944).


\(^{78}\) See Grodzins, supra note 76, at 298-300; Rostow, supra note 76, at 200-05, 221-23.
unassimilated”); anthropological (“the racial strains are undiluted”); and political (many Japanese were “dual citizens, owing allegiance to the Emperor”). As later research has shown, military officers did not in a single instance rely on the large mass of scientific materials that had been gathered about American Japanese...  

Whether or not there are extraordinary circumstances when neither judges nor anyone else can reject a claim of “necessity,” I take it that as bad as the statistics are, invasion by the criminal army is not so “imminent” that the decisions of only the men on the firing line are unreviewable. Therefore, I would like to examine two police interrogation “necessities”: “arrests for investigation” and precommitment delays.

When a United States Senate Subcommittee asked Chief Murray to appraise the effects of an order prohibiting “arrests for investigation,” he retorted: “There is no question in my mind that it will just about put us out of business.” This statement cannot be unquestionably accepted.

For the two years 1960-1961, only 5.7 per cent of those arrested for investigation were ever charged; to put it another way, about seventeen out of every eighteen so arrested were ultimately released.

Generally, the longer a person was held, the less likely he was to be charged. Thus, of the 1,356 persons held for eight hours or more in 1960, only one-and-one-fifth per cent were charged; of the 690 held for more than twelve hours that year, a shade under one per cent were charged.

Although the standard of “probable cause” is not required when arrests for investigation are made, it appears that such cause actually existed in over fifty per cent of the cases. Thus, it is difficult to know how many, if any, of the five or six per cent charged with a crime after an investigative arrest would have escaped the processes of the law if “the ban” had then been in effect.

If you have come with me this far, is it still beyond question that “the ban” will put the Chief “out of business”? If so, consider this: in 1960 and the first two months of 1961, arrests for investigation ran from 318 to 435 a month. In March of 1961, the month the Horsky Committee was appointed to study the problem, these arrests dropped substantially; in April, the first full month of the Committee's existence,

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79 Id. at 301-02; see Rostow, supra note 76, at 204, 219-22, 242-43.
80 As to whether the Japanese evacuation cases constituted such circumstances, compare Warren, supra note 59, at 101-02, with Rostow, supra note 76, at 214-62.
82 The Horsky Report 34.
83 Id. at 39.
84 Id. at 58.
85 Id. at 83-84 (table 1).
they dropped almost two-thirds, where they remained for the rest of the year.\textsuperscript{86}

If the practice is so "necessary" why did the mere publicity given to the Committee lead to a sudden, drastic curtailment of the practice?\textsuperscript{87} Moreover, what does the failure of the curtailment to produce an increase in the percentage of those charged signify?\textsuperscript{88} That the decline was simply a matter of police forbearance? If so, by the same token, could the practice have been increased two, three, or four times if the police felt that forbearance had gone too far?

In August of 1962, the month following the issuance of the Horsky Report, the arrests under study dropped to eighty-four, almost one-half of the 1961, and one-fifth of the 1960, figures.\textsuperscript{89} It stayed there for the rest of the year, during the "debate" over implementing the report.\textsuperscript{90}

Now, if effectuating the ban would "just about put us out of business," why, in the face of an alarming and ever worsening crime problem, were the District police rapidly and "voluntarily" putting themselves out of business?

At least so far as the constitutional questions go, the problems raised by the "arrests for investigation" are relatively simple. Not even that can be said for the matters of precommitment detention. Thus, here, the claim of "necessity" packs extra force.

There is ample difficulty in exploring what is at issue without arguing about what is not. At the recent Senate hearings, three of Chief Murray's brother officers did the latter. They testified, I submit, "for victory," not "for clarification."\textsuperscript{91} Each gave the distinct impression that whether the police could question suspects at all was at stake.\textsuperscript{92}

The \textit{McNabb-Mallory} rule does not preclude all police questioning. Chief Murray himself is authority for the proposition that "the least amount of time any judge has indicated you can hold a suspect" is two hours.\textsuperscript{93} Moreover, the two hours run \textit{from the time of arrest}, not from

\begin{footnotes}
\item[86] Id. at 7, 83-84 (table 1).
\item[87] Id. at 7:

\begin{quote}
[N]o instructions, written or otherwise, were given to the members of the Police Department when the Committee was appointed. The mere publicity given to the Committee appears to have been sufficient to change the practice of individual officers—in every precinct, bureau and squad—far more than any event of the preceding five years.
\end{quote}

\item[88] See id. at 68-69.
\item[89] District of Columbia Commissioners Press Release, Jan. 10, 1963, on file in the University of Minnesota Law Library.
\item[90] Ibid.
\item[92] See testimony of Chief Schrotel, 1963 Senate Hearings 286, 290; testimony of Sheriff Michael Canlis, member, Board of Governors, National Sheriff's Association, id. at 298-300, 302; testimony of Superintendent Wilson, id. at 307, 314.
\item[93] Joint Hearing Before the Senate and House District of Columbia Committees on the
\end{footnotes}
the time the first question is asked. And "it would be absurd to suggest that police must arrest a person before they can ask him questions." As United States Attorney Oliver Gasch told Chief Murray and his men some years ago:

Interrogation of suspects *prior to arrest* is a valuable technique, and it is widely utilized by the F.B.I.\(^9\)

....

[An instructor at the FBI school] told me that . . . they go into a man's home and say to him, "I just want to talk to you about this situation. You're not under arrest, you are free to go, but I have talked to a few people and maybe you can help me solve this crime." Now the instructor . . . a man of about 15 years' experience told me that the technique has been found quite productive by their men in many different types of cases.\(^6\)

More recently, in a briefing on arrest procedures called by Chief Murray pursuant to arrangements made with David Acheson, Gasch's successor, an assistant prosecutor reaffirmed this point, and recalled five "concrete examples" of prearrest interrogation successfully conducted by District police.\(^7\)

How much interrogation time do the law men want? Need?

"Whatever period of time may be necessary to accomplish the purposes that society has in mind," answers Chief Wilson.\(^8\) Forty-eight hours is reasonable, suggests a member of the Board of Governors of the National Sheriffs' Association.\(^9\) "Frequently, even 48 to 72 hours is not enough," comments J. F. Coakley,\(^10\) often called the "dean" of American prosecutors. "[A]t least 24 hours, excluding days when courts are not in session," insists the head of the International Association of the Chiefs of Police.\(^10\)

Six hours would be "a reasonable time," a period in which "the police could do an effective job," contributes Chief Murray.\(^10\) So he thought,
at least, in February of 1963. Nine months later he voiced some doubts:

I think ... there are many cases that can be ready for court in much less than 6 hours, but ... if a criminal knows that all he has to do is sit tight for 6 hours, he may sit tight for 6 hours and not say anything. I think a time limit should be decided by the judge, if it is a reasonable length of time.

... I think that if it is left without unnecessary delay, in other words the trial judge can determine whether there is any unnecessary delay ...103

This of course is what the judges are doing—right now. If when all is said and done the head of the police department which feels the brunt of the McNabb-Mallory rule is willing to "leave it to the courts"—where it now is—why have we heard so much talk about the courts "usurping" executive and legislative powers?104

A six-hour limit suits David Acheson, United States Attorney for the District of Columbia:

I think in some very high percentage of the cases a confession is made if it is going to be made at all, within an hour or two, perhaps 3 hours after arrest. ... In the great majority of cases a confession is made fairly promptly after arrest. Of course, a confession is withheld because the defendant thinks the police have nothing on him. When he finds out they do, he very frequently confesses. You get some cases like Killough in which the police can not get anything on him and he will not confess even though he is held for a few days. We certainly don’t suggest that there is any legislation that is practicable which would cope with a situation like that. ... [To say that a suspect who knows that six hours is the limit will hold out until that time has elapsed] is attributing a degree of sophistication to even a hardened criminal that very few of them seem to possess. At the present time for all practical purposes if he can hold out for 2 hours, 2½ hours, he is pretty well in the clear, but very few of them do.105

"Although 'necessity' will probably always be the justification claimed for arbitrary action, it has little to merit judicial approval unless conditions make it plausible,"106 Whether conditions warrant the claim is not easy to tell, for often "the social fact upon which such a plea must

103 1963 Senate Hearings 463-64.
105 1963 Senate Hearings 443.
be decided consists of vague references to 'experience' expounded by men whose original predilections or present interest control the conclusion they derive from their necessarily limited contact with social reality.\textsuperscript{107} When the "needs" of police interrogation vary from six hours or less to twenty-four or forty-eight or more, however, the "necessity" slogan no longer looms impenetrable. Indeed, when "necessity" varies so greatly, one recalls the words of Chief Justice Marshall in \textit{McCulloch v. Maryland}:\textsuperscript{108} "A thing may be necessary, very necessary, absolutely or indispensably necessary."\textsuperscript{109} The word "frequently imports no more than that one thing is convenient, or useful . . . ."\textsuperscript{110}

\textbf{A Closer Look at the Impact of Rules of Evidence on Crime Rates and Police Efficiency}

I have suggested that the law enforcers' cries of despair at "restrictive" rules, as well as their demands in the name of "necessity," are considerably exaggerated. Perhaps these points merit closer attention.

"Simple Logic"

No less a student of criminal law than Sir James Fitzjames Stephens once observed: "No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them."\textsuperscript{111}

If it ever were, the matter is no longer regarded as so simple. For example, the Royal Commission on Capital Punishment cited specific instances against, as well as in support of, the deterrent value of capital punishment\textsuperscript{112} and pointed out further that "several witnesses went so far as to express the view that the existence of capital punishment might, for some mentalities, be an actual incitement to murder."\textsuperscript{113} If the death penalty were a deterrent par excellence, it followed as a matter of simple logic that the more people who witnessed it the greater would be its salutary effect. But somehow it did not work out that way. Apparently

\textsuperscript{107} Id. at 16.
\textsuperscript{108} 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{109} Id. at 414.
\textsuperscript{110} Id. at 413.
\textsuperscript{112} Id. at 335-39 (app. 6).
\textsuperscript{113} Id. at 338. One of these witnesses, Professor Thorsten Sellin, discusses these cases at some length in Sellin, "The Death Penalty," 65-68 (1959), a report appended to Model Penal Code (Tent. Draft No. 9, 1959).
an "open execution" "did not reform; it brutalized"; "it became the parent, and not the destroyer of crime." 114

Critics of "restrictive" court decisions strike poses no less confident than those once assumed by proponents of capital punishment. Thus, Professor Fred E. Inbau recently asserted:

I cannot answer the... point with any statistics of my own... but some simple logic is available to support the proposition that the McNabb-Mallory rule does, and is bound to have, a crippling effect upon law enforcement in any metropolitan jurisdiction saddled with the rule.

... . . .

... To prohibit police interrogation—which, in effect, is what the McNabb-Mallory rule does—means... that fewer crimes will be solved and successfully prosecuted. More criminals will remain, at large, to commit other offenses. At the same time the deterrent effect of apprehension and conviction will be lost insofar as other potential offenders are concerned. The crime rate is bound to be greater under such circumstances, and I do not feel the need of statistics to support that conclusion.115

Professor Inbau may be right—as far as he goes. Some would-be criminals may be emboldened by restrictive rules of evidence. Some may thereby be "freed" to commit another crime another day. Some may even be attracted to a jurisdiction which has such rules. But what of others? If, for example, many delinquents and young criminals act the way they do out of frustration,116 may not enlarged police powers only compound the problem? Is there any reason to doubt that here, as elsewhere, different people respond differently to the same type of treatment?

Chief Judge David Bazelon recently reminded us:

We should be aware that if the protections of the Bill of Rights are restricted we shall, in practice, be affecting directly the rights of only our more deprived population. When we talk about arrests for investigation, lengthy police interrogation prior to arraignment, and the like, the subject under discussion is not you or me. We don't get arrested without probable cause because, to put it plainly, we don't "look" as if we would commit acts of violence and we do look as if it might not pay to trifle with our rights. Nor would you or I be subjected to long interrogation by the police without the benefit of counsel. Nor do you and I live in neighborhoods where the police dragnet is used, and where suspects are subjected to wholesale arrest.

So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill-educated to defend themselves. Can we expect to induce a spirit of respect for law in the people who constitute

our crime problem by treating them as beyond the pale of the Constitution?\textsuperscript{117}

If, as Gunnar Myrdal reported two decades ago, "a not insignificant number of crimes of Negroes against whites are motivated by revenge for discriminatory or insulting treatment,"\textsuperscript{118} is granting the police increased powers—which in the past they have used disproportionately often against Negroes and other minorities—\textsuperscript{119} the way to reduce these crimes?

If "the average gang boy views the policeman as a kind of legalized gangster, a man whose badge makes him immune to ordinary rules,"\textsuperscript{120} will a return to pre-\textit{Mapp} and pre-\textit{McNabb-Mallory} days enhance his image of the symbol of the law?

If, as the slum-dwelling Puerto Ricans maintain, "the police . . . abuse innocent people by suspecting them of crimes and searching them in public, causing them embarrassment";\textsuperscript{121} and if, as a Citizens Advisory Committee of the Attorney General of California found, "conflict between teen-agers and police is often the result of police treatment that

\textsuperscript{117} Bazelon, "Law, Morality and Individual Rights," 9-10 (unpublished address of Aug. 20, 1963, to Juvenile Court Judges Institute and Juvenile Officers Institute, in Minneapolis, Minnesota, on file in the University of Minnesota Law Library).

\textsuperscript{118} Myrdal, \textit{An American Dilemma} 975 (1944).

\textsuperscript{119} See generally Deutsch, \textit{The Trouble With Cops} 63 (1955); President's Comm'n on Civil Rights, \textit{"To Secure These Rights,"} 25-27 (1947); United States Comm'n on Civil Rights, \textit{"Justice,"} 5-28 (1961).

A decade ago, what Captain G. Douglas Gourley of the Los Angeles Police Department describes as "an intensive study of citizens' attitudes toward the police" based on "a scientifically selected sample of 3,100 citizens" was conducted in Los Angeles. See Gourley, "Police Public Relations," \textit{Annals}, Jan. 1954, pp. 135, 138. This attitude survey disclosed, Gourley, \textit{Public Relations and the Police} 75 (1953):

31.8 per cent of the "white" respondents, 26.2 per cent of the Mexican respondents, and only 14.0 per cent of the Negro respondents are convinced that the Los Angeles Police-men are mostly men of unquestionable honesty; whereas, 2.0 per cent of the "whites," 5.0 per cent of the Mexicans, and 9.1 per cent of the Negroes state that the police are mostly men who are dishonest. Also, 34.8 per cent of the "whites" express a belief that the Los Angeles Police always respect the Constitutional Rights of suspected criminals; whereas, only 21.2 per cent of the Mexicans, and 12.1 per cent of the Negroes express the same opinion. Furthermore, 11.1 per cent of the "whites," 44.4 per cent of the Mexicans, and 38.2 per cent of the Negroes believe that the police are often conscienceless and brutal in performing their duties.

For the view that relations between the Los Angeles police and the city's Mexican-American population have "improved markedly" in recent years, but that "the Negro community grows more and more restive" as the result of continued "second-class citizen" treatment, see Cray, \textit{"The Police and Civil Rights,"} \textit{Frontier}, May 1962.

\textsuperscript{120} Salisbury, \textit{The Shook-up Generation} 223 (1958).

\textsuperscript{121} Padilla, \textit{Up From Puerto Rico} 268 (1938). See also Wakefield, \textit{Island in the City: The World of Spanish Harlem} 118, 121 (1959): "The cops in this neighborhood are not looked upon by its people as protectors of life to whom you run in time of trouble. Rather they are the enemies you run away from—and even that is dangerous. . . . In time of terror a citizen of East Harlem thinks twice before calling the police."

Since this article was written, the Puerto Rican-Americans in New York were said to be "reacting angrily to alleged prejudice and brutality on the part of the police"; one spokesman charged that the police were acting as if they were "running a plantation." See Samuels, "I Don't Think the Cop Is My Friend," \textit{N.Y. Times}, March 29, 1964, § 6 (Magazine), p. 28.
appears to youth to be arbitrary,"122 is removing the ban on “arrests for investigation,” winking at searches and seizures without “probable cause” and precommitment detention for twenty-four or forty-eight hours, or as long as “necessary,” likely to improve the situation?

Is Professor Inbau’s “simple logic” a sufficient answer to Captain Frederick Ludwig of the New York Police Department’s Juvenile Aid Bureau:

Why create crime? Why make young people avowed enemies of society? Dangerous people must be handled, true. But why create hostility toward the police? It would be much better for some police to simply stay inside their station houses rather than to come out and arrest everyone in sight.123

Or a sufficient answer to the Counsel to the National Council on Crime and Delinquency:

[T]he excesses of [police] authority have a damaging effect on community opinion, on the courts, and most important, on youths themselves—on all youths. The effect on those who are not motivated to crime is to encourage an attitude of distrust, suspicion, and resentment, not only of the police but of the courts and authority generally—an attitude that goes with the very criminal behavior the community wants to prevent.124

Chief Schrotel of Cincinnati recently observed 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.”125 He is not alone. Police Commissioner Murphy of New York reported that “attacks on the police were growing to unmanageable proportions.”126 Chief Cahill of San Francisco told of a “ridiculous situation”: by-standers “threw rocks and put one of our police officers out of commission for some time” when he and his brother officers tried to “take away” some people who were disturbing the peace.127 Another San Franciscan, a member of the city’s police commission, underscored this “new development”: “Time and time again a police officer making an arrest finds himself surrounded by a group of bystanders who assist the suspect resisting arrest. In some cases they have taken the suspect away from the officer, sometimes before his identification has been established . . . .”128

122 Quoted in Salisbury, supra note 120, at 219.
123 Id. at 222.
126 Ibid.
127 ABA, Summary of Proceedings of Section of Criminal Law 20 (1962).
128 “Terror in the Streets—Beyond the Rise in U.S. Crime,” U.S. News & World Report, Dec. 24, 1962, p. 54 (excerpt from an address by Harold R. McKinnon, Esq.). See also Cray, supra note 119, at 3:
Is it so plain that "relaxing" the standards of arrest, search and seizure, and precommitment detention will remedy, or even substantially improve, this alarming situation? Is it not possible that "relaxed" standards in the past have helped to bring about the present state of affairs? Is it so difficult to perceive at least two dimensions to the problem? If "simple logic" dictates that removing the "restrictions" on the police will prevent some crime, is much more complex logic needed to support the proposition that the resulting police conduct may stimulate other crime? That it may embitter and confirm in crime perhaps as many, perhaps more, than are deterred or lawfully incapacitated? I do not know the answer. I am not a criminologist or sociologist or psychologist. But then, neither is Professor Inbau. Nor most police-prosecution-minded critics of the courts. I think I know this much—"simple logic" does not carry us very far.

The "Numbers" Game

Not all police-prosecution-minded critics of restrictive rules of evidence rest on "simple logic." Charts, tables, and graphs are also thrown into the fray. Proponents of capital punishment may have to content themselves with logic, reason, and common sense—the statistics have not been kind to them. Not so opponents of the exclusionary rules. Chief Parker, for example, is fond of pointing to "the facts"—"the things they [presumably defenders of the courts] don't like to talk about." Chief Murray's "prize exhibit is a graph showing a steady decrease in crime in Washington from 1953 to 1957 [the year of the Mallory decision] and a steady rise thereafter." And Superintendent Wilson has trotted out the Uniform Crime Reports to support the proposition that "crime is overwhelming our society."

Superintendent Wilson's participation in the "numbers game" is

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129 See notes 119, 128 supra.
130 See, e.g., Sellin, supra note 113, at 34-63.
131 Hearings Before the Special Subcommittee to Study Decisions of the Supreme Court of the United States of the House Committee on the Judiciary, 85th Cong., 2d Sess., pt. 1, at 76 (1957) [hereinafter cited as 1957 House Hearings].
133 Wilson, "How Do We Live with Mallory, Mapp and Sun?" (unpublished comments of Aug. 13, 1963, pp. 2, 4 in the University of Minnesota Law Library).
perhaps the unkindest cut of all. A former dean of the University of California School of Criminology, he has, on other occasions, manifested an awareness of the treacherous nature of crime statistics. When, upon taking command of the Chicago Police Department in March 1960, he drastically revamped the department's method of reporting crime and maintaining records, he warned that the new system's more accurate reporting would create the impression of a "crime wave." Meaningful comparisons could not be made, he stressed, until the system had been in operation a full year.\(^3\) Common practices of the pre-Wilson era, it seems, were not to report stolen cars as stolen in statistical records if they were recovered within three days, and for a commander "to follow a practice of ignoring a lot of the little stuff to save work and make the district look better on paper."\(^4\)

When, more than a full year after his new system of reporting went into effect, Chicago crime continued to rise, the Superintendent had a ready explanation:

Wilson attributed the rise to an increase in reporting. A massive publicity campaign was conducted, urging the public to call Police 5-1313 when a crime occurred. The message was repeated on billboards, in newspapers and on radio and television. Wilson said that this campaign—and increased confidence in the police—encouraged people to report crimes they would not have reported in the past.\(^5\)

Superintendent Wilson's glib use of statistics to support his criticism of the courts is surprising for another reason. In 1963, a year-and-a-half after his new system of reporting had gone into effect, the tide began to turn in Chicago. The first four months of 1963 saw an overall decrease of 6.6 per cent in Part I offenses.\(^6\) A small increase in the larceny category had the effect, the press pointed out, of "obscuring the almost incredible subtotal that indicates a 21.7 per cent drop in crimes against persons."\(^7\)

The reduction in the latter categories was impressive: some 169 fewer rapes in the first four months of 1963 than in 1962; 843 fewer robberies; a thirty-three per cent drop in "serious assault"; a twenty-one per cent falling off in homicide.\(^8\) The Chicago-Sun Times reported in June of 1963:


\(^{135}\) Gowran, supra note 134, at 1, col. 1.

\(^{136}\) Ibid.

\(^{137}\) Ibid.

\(^{138}\) Ibid.

\(^{139}\) Ibid.
Wilson thinks it is fair to say that the average Chicagoan is in fact 21.7 per cent safer in his person. And the credit for this, Wilson believes, is the growing effectiveness of the preventive patrols—patrols that are now planned through scientific analysis and that are sent into action by a space-age communications system.\textsuperscript{140}

"I hope, and have a little reason to believe," Superintendent Wilson told the citizens of Chicago, "that we may wind up '63 with about twenty per cent less crime than in '62, which would be a remarkable thing. But beyond that, I hope that we'll be able to continue the same thing at a less steep decline into '64, '65, '66."\textsuperscript{141} Wilson, the police chief, was elated. He had a right to be. But Wilson, the courts' critic, was unperturbed.

\textit{Two short months later}, speaking at the American Bar Association meeting, he cited some \textit{Uniform Crime Report} figures and solemnly declared:

The basic freedom underlying all other freedoms is the right to be free from criminal attack . . . . No society can exist if crime overwhelms it and it seems to me that this prospect is not beyond possibility.

. . . .

It seems to me that our constitutional guarantees must be interpreted in the light of our ever-increasing crime rate . . . . In the name of protecting individual liberties, we are permitting so many technicalities to creep into our system of criminal justice that . . . crime is overwhelming our society.\textsuperscript{142}

Later the same year, when the Chairman of the Senate Committee on the District of Columbia asked him whether it was his "feeling" that court restrictions "have accounted for the increase in crime in your city," Superintendent Wilson replied in the affirmative; he had "this conviction."\textsuperscript{143}

Another aspect of Superintendent Wilson's contribution to the "numbers game" deserves attention. Both in his testimony before the Senate Committee and in his talk before the bar association, Wilson pointed to England and other common-law countries. These nations have not been handicapped by restrictive court decisions, he observed; they "have not permitted themselves to become overwhelmed by crime."\textsuperscript{144} The Su-
perintendent cited no authority for this proposition. Evidently, he simply assumed that, unlike America, these other countries were suffering little or no increase in crime. I must confess, so did I—until I came upon a recently completed "Enquiry by the Cambridge Institute of Criminology into Crimes of Violence against the Person." The following extracts should suffice:

The number of indictable offences against the person [in England and Wales] annually recorded by the police immediately before the Second World War was 7,739; by 1950 the number of such recorded offences had increased to 19,434, an increase of 151 per cent. Since 1950 the increase has gone on steadily and, in 1960, the corresponding figure was 35,796, representing a further increase of 84 per cent. Thus, comparing 1938 with 1960, it can be seen that during the last twenty years the number of offences against the person, recorded by the police, has increased by 363 per cent.

... Although sexual offences have increased at a greater rate than crimes of violence, and account for more than half the offences in this class [indictable offenses against the person], nevertheless crimes of violence have also shown a considerable increase, especially during the last ten years. In 1938 the number of indictable offences of violence against the person annually recorded was 2,721 and by 1950 the number had become 6,249, an increase of 130 per cent. During the past decade the number increased from 6,249 to 15,759 and this represents a further increase of 152 per cent. The overall increase during the past twenty years means that there are more than four times as many crimes of violence recorded by the police today as in the years immediately before the Second World War.

Crimes of violence against the person in England and Wales have shown a steep upward trend over the past decade.

When related to the size of the population crimes of violence increased between 1950 and 1960 from 14.3 to 34.4 per 100,000 persons. This means that the overall chance of a person being attacked rose from 3 to 7 in 20,000.

Meanwhile, back in America, Superintendent Wilson was asking:
"how long can we tolerate annual crime increases of 3 per cent or more?" 148

The sharp increase in reported crimes of violence on the other side of the Atlantic is instructive, but more illuminating, I think, is consideration of the extent to which "the increase in recorded crimes of violence indicates a real increase in violent behaviour": 149

It was ascertained that in recent years there has been a marked tendency towards greater uniformity and completeness in recording. This has undoubtedly led to an increase which is purely statistical in character.

There is strong evidence from interviews with older police officers, officials and residents in those neighbourhoods with a high incidence of violent crime, to suggest that in the past, a considerable amount of violent behaviour was taken for granted and not notified to or recorded by the police...

One of the main causes for an increase in the recording of violent crime appears to be a decrease in the toleration of aggressive and violent behaviour, even in those slum and poor tenement areas where violence has always been regarded as a normal and accepted way of settling quarrels, jealousies or even quite trivial arguments.

The views of the police and others with practical knowledge of the areas chiefly concerned suggest that there has been some real increase in violent sexual crime, racial antagonism resulting in violence, violent behaviour by Irish labourers and coloured immigrants as well as that form of violent behaviour by the young which is frequently referred to as "hooliganism." 150

We have seen, I trust, that any resemblance between a change in the crime data and a change in "the facts" may be faint indeed. But I think I can do better than that. I think I can show that taking the statistics for all they are worth, they do not establish that rules of evidence have produced a "crisis" in law enforcement.

As evidence of the severe blow the 1955 Cahan decision dealt California law enforcement, Chief Parker pointed to the reduction in narcotic arrests. 151 True, adult felony arrests for narcotic law violations in California did drop a bit in 1955, from 7,457 to 7,313 in absolute numbers; from 60 to 56 per 100,000 population. 152 But what happened in subsequent years? Narcotic arrests went over the 9,000 mark the first full year after Cahan and climbed above 14,000 by 1960. The rate in-

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149 McClintock, supra note 145, at 73.
150 Id. at 74.
152 Unless otherwise indicated, the documentation for the discussion of the Cahan aftermath is collected in Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" supra note 104, at 188-90.
creased significantly the first full year after Cahan and rose to 89.2 per 100,000 by 1960, a 50 per cent increase over the pre-Cahan year. If Chief Parker's reliance on the 1955 narcotic arrest data was well placed, what do the more recent figures establish?

J. F. Coakley, District Attorney for Alameda County, also sounded the alarm, announcing that Cahan "has broken the very backbone of narcotics enforcement." Mr. Coakley cited no data and the only statistical support I can find for his sweeping statement, aside from the aforementioned arrest figures, are (1) the rate of felony complaints per 100,000 filed in California superior court, which did fall from twenty-two to eighteen in 1955, and (2) the percentage of narcotic convictions in California Superior Courts, which dropped from 86.6 in 1954 almost ten full points to 76.8 in 1956.

In 1957, the rate of narcotic complaints passed the pre-Cahan rate, and climbed still higher in subsequent years. The percentage of narcotic convictions, however, while it has slowly climbed back over the seventy-seven per cent mark is still appreciably short of the pre-Cahan marks of 82.5 (1952), 84.4 (1953), and 86.6 (1954).

In appraising these figures, several additional factors should be taken into account: (1) although the current narcotics conviction percentage is lower than pre-Cahan years, there has been an increase in both the rate of arrests and felony complaints filed for these offenses. Thus, in 1959-1960 twenty per cent more persons were convicted of narcotic offenses in California superior courts than in the record conviction percentage years of 1953-1954. (2) Only possession cases have been significantly affected. For example, while the 1960 overall narcotics conviction percentage in California superior courts was 77.5, the percentage for both sales of marijuana and sales of narcotics other than marijuana were 88.2 and 88.7 respectively. Of the 460 narcotic cases dismissed in 1960, "there were only a total of 33 sale cases and 9 sale to minor cases dismissed." (3) Since 1955, the Cahan exclusionary rule has, of course, operated state-wide. But the post-Cahan conviction rate in narcotic offenses fell substantially only in Los Angeles; almost no change was recorded in other parts of the state. Ruling out the exclusionary rule factor, the felony conviction rate for narcotics offenses in Los Angeles

153 ABA, supra note 127, at 58.
154 According to a six-months study (Aug. 1, 1960, through Jan. 31, 1961) made by the District Attorney's Office, County of Los Angeles, to determine the effect of the exclusionary rule on narcotic cases, "approximately eight percent" were rejected by the prosecution or dismissed by the court for this reason. See Cal. Special Study Comm'n on Narcotics, "Final Report," 112 (1961). I have suggested elsewhere that the "true figure" may well be lower. See Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" supra note 104, at 189.
would still be lower than the rate of most other California areas—
\textit{taking into account} the exclusionary factor.

I am not sure what all this proves. I am confident that it does \textit{not} prove \textit{Cahan} "broke" the "very backbone" of California narcotics enforcement. Moreover, since narcotic offenses probably constitute \textit{the major category of crime most likely to be affected by the exclusionary rule}, this data constitutes even less impressive evidence of the exclusionary rule's adverse effect on law enforcement \textit{generally}. It hardly demonstrates that the rule is "catastrophic as far as efficient law enforcement is concerned";\textsuperscript{155} that "many states have adopted [it] \ldots to the joy of the criminal and the detriment of society";\textsuperscript{156} that it is "the 'Magna Carta' for the criminals."\textsuperscript{157}

Indeed, some "facts" seem to lean in the other direction. The post-\textit{Cahan} conviction percentages for murder, manslaughter, and felony assault all increased; variances in conviction rates relating to robbery and burglary were barely discernible. The overall felony conviction percentage averaged 85.4 for the three years immediately preceding \textit{Cahan}, registered 85.4 for the year of the \textit{Cahan} decision, and hit an average of 86.1 (\textit{including} the lower narcotic percentage) for the five years immediately succeeding \textit{Cahan}, only once dipping as low as 85.5.

In asking—and doubting—whether "we can live," \textit{inter alia}, with the exclusionary rule in search and seizure cases, Chief Wilson observed: "The effectiveness of a free society in controlling criminals may be measured in part by its success in convicting defendants."\textsuperscript{158} To this extent, there is reason to think that the people of California can live with \textit{Cahan} and \textit{Mapp}.

Perhaps because Chief Murray and his predecessors have lived with the exclusionary rule in search and seizure cases for some fifty years, this rule has caused no beating of breasts and gnashing of teeth in the District of Columbia. Murray's principal target has been the 1957 \textit{Mallory} decision and "the facts" he likes to talk about are (1) a substantial increase in District crime since 1957,\textsuperscript{159} and (2) a significant drop in the clearance rate since that time.\textsuperscript{160}

It is no great feat to come up with "crime waves." One easy way

\textsuperscript{155} Parker, Police, supra note 151, at 114.
\textsuperscript{156} ABA, supra note 127, at 54 (Chief Carl Hanson of the Dallas Police Department).
\textsuperscript{157} Ibid. (unidentified California assistant attorney general).
\textsuperscript{158} Wilson, supra note 133, at 3.
is to select a low-point year as the base year and take it from there. The year 1957 will do just fine, for it happens to be the all-time low for crime under the District's modern reporting system. ¹⁶¹

The "aggravated assault" category, the only crime category in which the District ranks number 1 for cities of its size, ¹⁶² has furnished Chief Murray with some of his most potent "facts." ¹⁶³ There were 470 more cases of aggravated assault in fiscal year 1963 than in fiscal year 1957. ¹⁶⁴ This increase is disturbing, but it does not, I submit, fulfill the Chief's dire prediction that "if the Mallory decision stands, it will result in complete breakdown in law enforcement in the District of Columbia." ¹⁶⁵ Even with this substantial increase, 1963 saw 1,583 fewer cases of aggravated assault than did 1952—the all-time high for crime in the District under the current reporting system. ¹⁶⁶ Moreover, it was not until two full years after the much-maligned Mallory case that the incidence of "aggravated assault" rose even perceptibly, and it has yet to approach the peak "aggravated assault" years of 1953-1955. ¹⁶⁷

The incidence of "aggravated assault" has always been high in the District. Why? Chief Murray suggested a reason in a recent interview:

Question. Can you give any reason for Washington being the No. 1 city in assaults?

Answer. . . . I'll say this: In this list of cities that I mentioned—16 cities of 500,000 to 1 million population—we'll run pretty close with the other cities in homicides. There's no doubt about a homicide—if a person's dead, he's dead—or about stolen cars—you can tabulate those. But in aggravated assault, the figures are way off balance; we're way ahead of the others. Now, whether there is a different system of reporting—

Question. Different definition, maybe?

Answer. Could be. ¹⁶⁸

¹⁶¹ See 1963 Joint Hearing 20; cf. Tunley, supra note 116, at 29-30 summarizing a study by Negley Teeters and David Matza made of Cuyahoga County, Ohio (which includes the Cleveland metropolitan area):

In 1919, when World War I ended, the figures showed a delinquency rate of children of 65.9 per 1,000. By 1920, the figure had dropped to 52, and by 1939, when the country was beginning to climb out of the Depression, the figure was down to 21. In 1957, however, the figure had swelled to 33.5. This represents an increase of 70 percent over the 1939 one, a period when our current statistics also began to soar. But compared with the post-World War I era, they show an over-all drop. Unfortunately, such figures do not exist for the country as a whole. If they did, we might easily find that all our comparisons are made with periods of low delinquency.

Since this article was written, the Director of the Federal Bureau of Prisons has pointed out that although 1962 saw a substantial increase in bank robberies over 1961, many more banks were held up for a much greater aggregate loss in 1932 than in 1962. He also observed that the present homicide rate is about half what it was in 1930. See Bennett, "A Cool Look at 'The Crime Crisis,'" Harper's, April 1964, pp. 123-25.

¹⁶² See 1963 Joint Hearing 7, 20. This category, according to the Chief, presents his men with their "greatest problems," 1963 Senate Hearings 469.


¹⁶⁵ 1957 House Hearings 42.

¹⁶⁶ See note 164 supra.

¹⁶⁷ See 1963 Joint Hearing 16.

¹⁶⁸ "Why So Much Crime in the Nation's Capital," supra note 160, at 97. Ronald Beattie,
Comparative figures, whatever they are worth, also disclose that the District is faring badly in the robbery category. The capital city now ranks third out of sixteen comparable cities in this category, and the post-Mallory change does seem astounding—an overall increase of 115 per cent from fiscal years 1957 to 1962.

A closer look at these figures, however, reveals that they are somewhat misleading. The incidence of robbery did not increase very substantially until 1959-1960 and the sharp increase—which accounts for the great bulk of the 115 per cent figure—did not begin until 1960-1961. There were fewer than one hundred more robberies in 1959 than in 1957; indeed in 1959 there were forty-three fewer robberies than in 1958 and only thirty-six more than in 1956. Moreover there were fewer robberies in 1958 than in 1954 or 1955. But 1960 saw an annual increase of more than two hundred and fifty and the next two years an additional increase of more than seven hundred.

It would seem more precise, therefore, to talk about the sharp rise in robberies since 1960, or at the earliest, since 1959. But precision is not everything. There are other values. There is, for example, the need to underscore the relationship between the increase in crime and the 1957 Mallory decision.

Nowhere is this need more evident, I think, than in the police officers' use of clearance rate data. “Under the hampering effect of the Mallory decision, the much-respected Chief of the California Bureau of Criminal Statistics, has made an impressive showing that various cities are using such disparate methods in crime reporting that “the differences observed in Uniform Crime Reports simply cannot be accepted as possessing any degree of reliability for showing true differences in crime rates.” Beattie, “Criminal Statistics in the United States,” 51 J. Crim. L., C. & P.S. 49, 54 (1960); cf. Tunley, supra note 116, at 28.

One of the interesting sidelights of the so-called American tendency to “promote delinquency by statute” was evident at a recent United Nations conference in London. The Americans found that in order to make any sort of valid comparison with the European representatives it was necessary to take out of our statistics those youngsters picked up for things a European would not be picked up for. The American delinquency rate automatically dropped 50 percent!

The “clearance rate” reflects the percentage of reported offenses “cleared by arrest,” whether or not the arrestee is later convicted or even indicted. I assume for purposes of this discussion that the rate is—as police officials obviously regard it—a significant index of a police department’s “efficiency.” But I share the doubts raised in Foote, “Safeguards in the Law of Arrest,” 52 Nw. U.L. Rev. 16, 23-24 (1957).

Since a man arrested for one burglary may confess to 29 others and thus “clear” 30 at one sitting—even though he is not prosecuted for any of them—the recent drop in the District’s “clearance rate” could conceivably stem largely from the inability of the District police to hold a suspect long enough to get him to confess to crimes other than, or in addition to, the one for which he has been arrested. In any event, when Senator Alan Bible
ruling and corollary decisions," maintains Chief Murray, "our rate of offense clearance has decreased"; \textsuperscript{174} it "started down," he insists, "when the Mallory decision was handed down." \textsuperscript{175} Joins in Deputy Chief John Layton: "Our overall rate of clearance from 1957 to 1962 has dropped about eight [actually nine] per cent." \textsuperscript{176}

The "facts" are that the District's clearance rate dropped seven full points in the two fiscal years immediately preceding Mallory; rose three points in the two years immediately following that decision—to 60.7, the highest in four years and the second highest in ten—and only then began to drop. \textsuperscript{177}

To say that the drop in the clearance rate "started" with Mallory is to misrepresent. To say that the rate has dropped nine points since Mallory is to mislead. The rate rose three points in 1957-1959, then dropped twelve points in 1960-1962. For police spokesmen to break it down this way would be more accurate, but no doubt less "effective." For it would loosen "the link" between Mallory and the reduced clearance rates.

That link is a strong one, to hear the Chief talk about it: "We feel kind of bad," he reveals, "because our clearance rate is not 58 per cent as it has been." \textsuperscript{178} It would be "back to 58 per cent," he vows, "if the Mallory decision is corrected by enacting legislation." \textsuperscript{179} I wonder how many who heard or read that statement had any notion that two years after Mallory—and without any "correcting" legislation—the District clearance rate was "back" to 60.7 per cent.

So far, I have been talking about "facts" opponents of the McNabb-Mallory rule like to talk about. But there are other facts. The "forcible rape" category for example.

That Mallory freed a "rapist" to roam the streets and alleys in search of new victims was well publicized. Were rapists attracted to the District? Were local rapists emboldened? A few months after the decision, the incidence of rape began to drop. And it continued to drop—over 30 per cent from 1957-1962, setting all-time lows in 1961 and 1962. \textsuperscript{180}

Deputy Chief John Winters supplied the House and Senate District

\textsuperscript{174} Id. at 452.
\textsuperscript{175} Id. at 455.
\textsuperscript{176} 1963 Joint Hearing 136.
\textsuperscript{177} Id. at 21.
\textsuperscript{178} 1963 Senate Hearings 474.
\textsuperscript{179} Ibid.
\textsuperscript{180} 1963 Joint Hearing 14, 20.
of Columbia Committees with some unwieldy "facts" concerning juvenile crime in the district:

The total crime picture in the District of Columbia for fiscal year 1962 reflected a 1.2 per cent decrease as compared to fiscal 1961. Juvenile delinquency increased 17.7 per cent during the same year as compared to the year before. . . . A noteworthy decrease in crime in the District of Columbia would have occurred in fiscal 1962 if it had not been for the increase in offenses committed by juveniles.\(^{181}\)

Nowhere, so far as I can tell, does Chief Murray come to grips with these figures. What is his theory? That the \textit{Mallory} decision attracted juvenile offenders to the Capital, but not adult criminals? That juvenile perpetrators of crime calculate nicely the length of time during which they may be interrogated by the police before deciding whether to beat up somebody or snatch a purse, but adult offenders do not?

The most fundamental difficulty with the use of post-1957 "facts" to attack the \textit{Mallory} decision remains to be considered. It is the underlying premise that the holding was something new, something astonishing. It was not. Even Professor Inbau—perhaps the harshest critic of the \textit{Mallory} decision—recognizes that the 1957 case reaffirmed the 1948 \textit{Upshaw} case, which, in turn, reaffirmed the 1943 \textit{McNabb} case.\(^{182}\) Indeed, sixteen years ago, Professor Inbau attacked \textit{McNabb} on the very grounds he criticized \textit{Mallory} last year.\(^{183}\) And twenty-one years ago, Major Edward J. Kelly, then head of the District of Columbia Police Department, manifested no less horror at the \textit{McNabb} rule than does Chief Murray today. Said Major Kelly in 1943:

\begin{quote}
I feel . . . that the ruling in the \textit{McNabb} case is one of the greatest handicaps that has ever confronted law enforcement officers.
\end{quote}

\begin{quote}
I say that we should be granted a reasonable time for the police and investigating officers to conduct a proper investigation, so that all cases where a crime has been committed should be brought to a proper conclusion
\end{quote}

\(^{181}\) Id. at 105, 121.


\(^{183}\) Id. at 105, 121.
without any doubt whatsoever. It is drastically hard enough in these
critical days, with the added population we now have in the District of
Columbia and the many, many other handicaps occurring on account of
the national emergency.

... 

[1]ou will have a greater number of murders and other serious crimes
committed here that will not be brought to proper justice or definite con-
clusions, and frankly I do not know whom they are going to hold responsi-
b... If this great handicap to investigating officers and policemen ... is
allowed to continue ... I do not know, and I am frank to say, who is
going to be responsible for the solving of said cases.184

If the impact of the McNabb-Mallory rule on law enforcement and
the crime rate is at issue, is not 1943 as deserving of the “base year”
designation as 1957? Or 1948, the year McNabb was reaffirmed? Is it
fair to ask whether these earlier dates were rejected as “base years”
because since then, the District’s crime and clearance rates have fluctu-
ated up and down and up again? Because since then, notwithstanding
Major Kelly’s gloomy prophesy if McNabb were to stand—and it did
—District police achieved some of their greatest gains in the “war”
against the “criminal army”? Because in the 1950-1960 decade, al-
though the national crime rate soared 98 per cent the District’s rate
barely rose at all, and its incidence of rapes, aggravated assaults, and
grand larceny actually decreased? Because, though neither Virginia nor
Maryland were “handcuffed” by the McNabb-Mallory rule or the fed-
eral exclusionary rule during this ten year period, the overall felony
rate per 100,000 population increased much more in the three Virginia
and Maryland suburbs of the District for which generally complete
figures are available than it did in the District itself?185

Since 1960, alarming crime reports have been coming out of the
Nation’s Capital. But there is no need to blame the bad news on the
Supreme Court—or the police—or the Congress. Somebody has blamed
it on the Congress, by the way. The “primary fault” for the sorry
conditions in the Capital, it has been said, “lies with the District
Committee in Congress, whose Southern membership for many years
deliberately starved all community needs of the city out of sheer
hostility to a population of 800,000 which is now 54 per cent Negro and
which has an 84 per cent Negro school population”; thereby creating
a “backlog of social, educational and economical problems of such a

184 Hearings on H.R. 3690, Serial No. 12 Before Subcommittee No. 2 of the House Com-
mittee on the Judiciary, 78th Cong., 1st Sess. 1, 57 (1943).
185 The documentation for this paragraph is collected in Kamisar, “Public Safety v. In-
serious nature that they have become insoluble without speedy federal intervention."[186]

There is no shortage of candidates. In the space of one week in March of 1960, for example, when the recent trend was becoming apparent, the following occurred: (1) the United States Attorney pointed the finger of blame at the "woefully and demonstratively understaffed" Juvenile Court, ill-equipped to "win away from a life of crime those border-line juvenile delinquents";[187] (2) one District Commissioner found the "main reason" in "more probations" "earlier paroles" and the fact that "drunks are sometimes sent home rather than to jail";[188] and (3) another Commissioner disputed this, but suggested that "the cutback in the activities of the Metropolitan Police Boys Club"[189] was a factor.

In the Washington, D.C. public schools, "discipline is a mocked word. The drop-out rate, 39 per cent, runs above the national average .... It is a city where illiteracy increased slightly in the last decade, while declining in all the states .... One principal reported that only 13 per cent of her kindergarten, first and second grade pupils have any one at home when they return from school."[190]

The Nation's Capital leads all other large cities in the rate of illegitimate births—twenty per cent of all live births in 1961. Few other cities show a rate even half that high. Girls in the city's public schools, ages twelve to fifteen, gave birth to 265 illegitimate babies during the last school year.[191] In the age group 15-19, the venereal disease rate is more than ten times the national average.[192]

For the past 15 years, "unemployed, penniless, and desperate young Negroes ... have been swarming into the city from the urban and rural slums of the South"; "it is estimated that at least 10,000 and probably some 13,000 young Negroes between the ages of 16 and 21 have nothing to do but roam the streets."[193] Conversely, there has been an exodus to the suburbs by the more stable well-to-do white families.[194]

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[189] Ibid. (Commissioner David Karrick).
[192] Ibid.
[194] Id. at 90.
What is more surprising? That crime has increased as much as it has in the District? Or that it has not increased more? That the city ranks first out of sixteen comparable cities in aggravated assaults? Or that it only stands ninth in housebreaking, tenth in forcible rape, eleventh in larceny? And that it only ranks eighth—just "about average"—in overall crime index offenses per capita? 195

Perhaps the Cohens, father and son, said all that can be said about these matters. The older Cohen pointed out that the decline of Rome "can be attributed by equally conscientious and intelligent historians working from a common fund of historical data to such diverse factors as the exhaustion of soil, the corruption of rulers, the rise of Christianity, spots on the sun, and population movements in Central Asia." 196

Why? Different value judgments, he suggested. 197 If anything, such factors play a greater role in contemporary criticism. As son Felix put it:

When one man finds the cause of high prices in high profits, another in high wages, and a third in high taxes, we recognize that three different value patterns are being applied to the same set of facts. That, perhaps, is why statistical facts and figures seldom sway anybody's viewpoint in such a controversy. 198

THE "POPULISTIC MENTALITY" AND THE "RULE OF THE LAW"

Although he does not specifically consider the problem at hand, Professor Edward Shils' penetrating discussion of "populism" and the "rule of law" illuminates police-prosecution-minded criticism of the judiciary:

Populism proclaims that the will of the people as such is supreme over every other standard, over the standards of traditional institutions, over the autonomy of institutions and over the will of other strata. Populism identifies the will of the people with justice and morality.

Populism seeks substantive justice. It cares not at all for the traditional rules in spheres of life outside its own immediate sphere. It regards the legal system as a snare for the guileless, a system of outdoor relief for lawyers and judges.

Populism acclaims the demagogue who, breaking through the formalistic barriers erected by lawyers, pedants and bureaucrats, renews the righteousness of government and society. Populism is impatient of checks and

195 1963 Joint Hearings 20; I am discussing rankings in terms of offenses per capita, not "actual number" of offenses; the rankings vary slightly. 1963 Senate Hearings 461.
197 Ibid.
balances, it is restive under the restraints imposed by the separation of powers.

The rule of law is a delicately balanced affair and it must withstand battering from many sides. The populistic mentality, when it has full sway, denies the claims to autonomy... of the judiciary which it views as the resistant custodian of a law which sets itself above the will of the people.199

If the popular will were completely unfettered in a "democracy," if there were no "rules of the game"—if "democracy" were really so simple—then, as Professor Charles L. Black, Jr. has remarked:

Our Bill of Rights is a thoroughly undemocratic document... One need read no further than the first five words of the First Amendment: "Congress shall make no law..." Since Congress could be presumed never to make a law which its majorities did not believe to be desirable, the only possible force of such a prohibition is to forbid laws which the elected representatives of the people believe to be desirable. If the Bill of Rights does not operate to thwart the temporary will of the majority, then it does not operate at all.200

The "populistic mentality" crops up in much of the criticism of the exclusionary rule and other "liberal" decisions. Listen to the head of the Los Angeles Police Department:

Lincoln referred to a government "of the people, for the people and by the people." The police are the servants of the people and it is contrary to public welfare to... hamper the police in the conscientious performance of their duties, through the gratuitous imposition of the exclusionary rule. ...201

An official of the National Sheriffs' Association, quoting Jefferson with approval: "It is a very dangerous doctrine to consider the judges as the ultimate arbitrators of all constitutional questions. It is one which would place us under the despotism of an oligarchy."202

A law professor who has attacked the exclusionary rules for decades:

How are we to halt this travesty on justice, make the guilty pay for their crimes, and bolster the public safety? One way would be for the informed and incensed public... to cry out against each and every criminal turned loose on a mere flyspeck of technicality.

An outpouring of indignation sooner or later would be heard by the courts despite their paper buttresses of precedent, and they would cease to encourage criminals and criminality at the expense of the public safety, public decency and public good.203

201 Parker, Police, supra note 151, at 118.
202 1963 Senate Hearings 303 (Sheriff Michael Canlis of San Joaquin County, California).
The Director of the Chicago Crime Commission:

Judicial abuses [unlike police abuses, according to the Director] . . . for the most part go unnoticed. Decisions based solely on political or other outside influences are usually reviewable by no one. . . . An arbitrary decision that wrongfully turns loose a dangerous criminal is couched in "language of compelling mechanical logic." Because of the complexities of the law, the virtual impossibility of determining the true motives that prompted the decision, and the wide latitude properly given judicial discretion, judicial abuses are seldom publicly aired in the press. As a result, judicial abuses are not subjected to any measure of effective popular control.

The objective is to protect real constitutional rights—not the highly technical and unrealistic theories of reasonableness that have characterized so many judicial decisions in applying the exclusionary rule of evidence. . . . If abuses arise that are not covered by existing laws, the legislature is the proper body to consider, draft, and enact new legislation. This procedure would be fair to our law enforcement officials. Police officers are also people—people with rights that are certainly entitled to as much protection as the courts extend to criminals.204

The head of the Chicago Police Department,205 voicing sentiments adopted verbatim by the Chief of the Cincinnati Police Department in his recent testimony before a Senate Committee:

The [appellate] court ponders the alleged infringement of the rights of the convicted person as a legal abstraction and feels obliged to consider the question as it would apply were the individual innocent . . . . [T]he desires of the general public for some reasonable measure of security and for a redress of the wrong done to the innocent victim of the criminal are not made known nor are they readily available to the court. . . . Statesmen representative of the people seem better qualified to make fair appraisals of public needs than appellate judges who, by virtue of their positions, are not so responsive to the desires of the public.206

Is it not one of the distinct advantages of judicial review that an appellate court is better able than the trial judge to withstand "outpourings of indignation"? Public demands "for a redress of the wrong done"?207 Is not a court supposed to resist such pressures when it considers an alleged violation of a constitutional or statutory right? What else are procedural rights all about?

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206 1963 Senate Hearings 287 (Chief Stanley Schrotel, immediate past president of the International Association of Chiefs of Police). Although, so far as the record shows, Chief Schrotel is presenting his own views, a comparison of his testimony with Wilson, supra note 205 reveals that much of his testimony consists of verbatim extracts from the Wilson article.
In his thoughtful book, Professor Alexander Bickel reminds us of a "truism":

It is that many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law.

Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. This is what Justice Stone called the opportunity for "the sober second thought." Hence it is that the courts, although they may somewhat dampen the people's and the legislatures' efforts to educate themselves, are also a great and highly effective educational institution.208

But Professor Bickel also reminds us of something else, something which goes a long way toward explaining why police chiefs are making so much noise of late and, I might add, why those approving of recent decisions are making some noise too: "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed."209

Although Bickel made this next point in connection with the School Segregation Cases and their aftermath, his point has general application:

The Supreme Court's law, the southern leaders realized, 'could not in our system prevail...if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only.210

THE "SPECIALIST" VERSUS THE "AMATEUR" OR "OUTSIDER"

Critics of recent decisions contend that judges are so lacking in first-hand knowledge of police problems that they have no business "policing the police"211 (I prefer to call it enforcing the Constitution); these

208 Bickel, The Least Dangerous Branch 24, 26 (1962).
209 Id. at 239.
210 Id. at 258.
critics feel, in effect, that the courts’ “absentee management” is destroying law enforcement’s effective freedom of action.\(^\text{212}\)

Thus, prosecutor J. F. Coakley insists that we seek the answer to the question whether “the emphasis on civil rights and privileges has been distorted”\(^\text{213}\)—whether “the pendulum has swung too far to the left”\(^\text{214}\)—from those engaged in law enforcement work, from “those on the firing line.”\(^\text{215}\) Thus, Deputy Chief Edgar Scott suggests that “we recognize that each branch of the government is the proper authority to regiment its ‘own troops’ and to enforce its own ground rules.”\(^\text{216}\) Thus, Professor Rex Collings protests:

It is fine to have decisions which bring a roar of applause from the galleries at the “joint” [San Quentin]. . . . But what of the wife and five children of that policeman who was murdered a few weeks ago? What of that girl who was waylaid and brutally raped by four men in turn? . . . I understand that one Supreme Court Justice has been known to spend a night in a police prowl car. Perhaps there are a few other judges, and even a law professor or two, who might profit by a similar experience.\(^\text{217}\)

Such critics overlook that—to quote from the recent Horsky Report:

“[E]fficiency” [in the narrow sense] cannot be the touchstone for criminal procedure. The proudest traditions of common-law criminal procedure hamper efficiency to some extent—because we wish to protect the innocent as well as convict the guilty, and because we wish to treat all prisoners, innocent or guilty, in ways that fit in with the kind of society we want.\(^\text{218}\)

“Communism,” as Herbert J. Muller has observed, “has been efficient enough—it has made Russia a great power in a single generation . . . . The reason why the rest of us are not simply dazzled by the Russian achievement is its human costs. The major issue between democracy and Communism is a moral issue. It comes down to the ideal of freedom—freedom not as expediency, but as justice.”\(^\text{219}\)

“Communism,” historian Muller continues, “looks like the speediest, most effective way of developing and organizing modern technology, at least for backward countries starting from scratch. Having made Russia a world power in one generation, it bids fair to make another such power of China.”\(^\text{220}\) But—happily—we do not distinguish the

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\(^{213}\) ABA, Summary of Proceedings of Section of Criminal Law 58 (1956).

\(^{214}\) Ibid.

\(^{215}\) Id. at 57.


\(^{218}\) The Horsky Report 49.


\(^{220}\) Id. at 161.
ways of Mao Tse-tung and Nehru in terms of their technical achievements alone.\textsuperscript{221}

That many police officers resent the control or influence of judges, to say nothing of the “interference” worked by citizens’ committees and law professors, is understandable. As psychologist Hans Toch recently observed:

Since the police officer obtains his rewards and satisfactions from the successful identification of persons responsible for misconduct, and since such success is “confirmed” through prosecution, conviction and sentencing, any interference with this sequence may be experienced as terribly frustrating. In instances where the law itself blocks the road from suspicion to disposition, the law becomes an enemy of its ostensible servants. . . . Police can no more be expected to subscribe to the premise that persons whom they perceive as violators must be protected, than decided hunters are likely to grant the immunity of deer.\textsuperscript{222}

No doubt similar unhappiness about the control or influence of “outsiders” and “amateurs” led delegates to the Air Force Association’s Fifteenth Anniversary National Meeting to adopt a ringing Statement of Policy, proclaiming, \textit{inter alia}, that “national policy must prescribe that the choice between nuclear and nonnuclear weapons is neither moral nor political but is essentially a military consideration.”\textsuperscript{223} No doubt similar frustration over “outside interference” caused the resigning coach of a losing University of Iowa basketball team to protest: “Recruiting has become tougher and tougher. We can’t get a lot of good kids in school . . . because the entrance requirements seem to get higher each year. Every time you turn around there is another rule staring you in the face.”\textsuperscript{224}

Too often the specialist—be he police chief, army general, or college coach—who bristles at “outsiders” or “amateurs” only manages to manifest his indifference to values and goals he was \textit{supposed to be} taking into account all along. We should welcome the specialization which furnishes a man with “the skill and knowledge as well as the motive for doing a task up to a moderate level of efficiency.”\textsuperscript{225} We


\textsuperscript{222} Toch, “Psychological Consequences of the Police Role,” 6-7, (unpublished symposium presentation delivered at Annual Meeting of the American Psychological Association, Sept. 1, 1963, on file in the University of Minnesota Law Library).

\textsuperscript{223} The immediately preceding paragraph urged—“should the military situation dictate” it—the unhesitating use of nuclear weapons in response to Soviet aggression “whether that aggression take the form of nuclear attack, nonnuclear attack, nuclear blackmail, aggression by Soviet satellite nations, infiltration, or subversion.” The full text of the Statement of Policy appears in Air Force & Space Digest, Nov. 1961, pp. 8-9.

\textsuperscript{224} Minneapolis Tribune, March 2, 1964, p. 24, col. 1. How conference leader Michigan, whose entrance requirements are presumably no lower, managed to achieve national ranking was not explained.

\textsuperscript{225} Shils, The Torment of Secrecy 156 (1956).
should resist the specialization which reaches the point "where understanding and sympathy for the other realms with which collaboration and a sense of affinity are necessary are obstructed." 226

From the vantage point of many a police-prosecution-minded critic, no doubt, courts are manned by "amateurs." But "we have a legal system which entrusts its case-law-making to a body who are specialists only in being unspecialized." 227 To a body designed "to reach a judgment which adds balance not only . . . against the passing flurries of public passion, but no less against the often deep but too often juggled contributions of any technicians." 228

Chiefs Schrotel and Wilson are right. The law is abstract. And often it is "cold comfort in the face of the individual human crises which are the stuff of police work." 229 But these crises are "not conducive to reflection about what the general rules ought to be. This is why the law has wisely insisted that other functionaries do the judging." 230

If I may be permitted to make still another analogy to the military—with a tip of the hat to Clemenceau—law enforcement is too important a business to be left to the police and the prosecutor.

226 Ibid. Of course, within a specialty, the zealousness of one subspeciality may obstruct collaboration and a sense of affinity with another. As the Executive Assistant to the Superintendent of the Chicago Police Department has pointed out: "A group of officers intent on solving a homicide, for example, will complain bitterly of the lack of prostitutes on the streets from whom they may obtain information." H. Goldstein, "Police Discretion: The Ideal Versus the Real," 23 Pub. Admin. Rev. 140-41 (1963). Similarly, although military men may bristle at control by "civilian academic types," see Newsweek, May 29, 1961, p. 24, and advocate a "hot line" between the Joint Chiefs of Staff and Congress, see U.S. News & World Report, Sept. 23, 1963, p. 70, "too often," according to a former Deputy Defense Secretary, "the President and his other policy advisers are confronted with a fractured military position reflecting divergent service views rather than differing military judgments." Gilpatric, "An Expert Looks at the Joint Chiefs," N.Y. Times, March 29, 1964, § 6 (Magazine), pp. 11, 72.


228 Ibid.


230 Ibid.