Crime and the Law: Sociologico-Legal Observations

Wenceslas J. Wagner

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Lawbreaking is rampant and the authorities are unable to cope with the problem.\(^1\) Daily, the press publishes news items similar to the following:

The house [the police] were watching ... was the same they had "busted" a month before. It didn't have bars on the windows and doors then. Although they had found more than 50 weapons inside, $25,000 in stolen goods and a couple of dozen packets of heroin and cocaine, charges against the dealer were dropped on a legal technicality.

Four weeks later, the now-fortified dope pad was back in business. ...  

... [F]or every five successful raids they make, they say charges stick in only one.

... [T]here's a lot of loopholes in the law so you can't blame the courts all the time.\(^2\)

It is said that in the wealthiest country in the world, which justifiably boasts of its great tradition of liberty and fraternity, citizens are afraid to walk the streets of their towns or to leave their homes unoccupied when they vacation. The situation has become so disturbing that some Americans have emigrated from their country in order to settle elsewhere. Many others avoid living in towns. For example, a gifted prospect for a teaching

\(^{\dagger}\) This article was prompted by research done in connection with reform of the federal criminal laws. See Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess., pt. 3(c), at 2080 (1972).

\(^*\) Professor of Law, University of Detroit, L.L.M., University of Warsaw, 1939; Dr. en Droit, University of Paris, 1947; J.D. 1950, L.L.M., S.J.D. 1957, Northwestern University.

\(^1\) The total number of serious crimes reported in 1970 reached the staggering figure of more than 5.5 million. Detroit News, Aug. 31, 1971, at 17, col. 7. At the beginning of 1972, the Commerce Department estimated that crime was costing the nation's businesses $16 billion a year and was "increasing at an alarming rate." Detroit News, Feb. 11, 1972. As one commentator has noted "[t]he total annual price tag for all forms of lawlessness in the country has been estimated to exceed $51 billion." Inbau & Carrington, Crime is Caused by Criminals, Detroit News, Nov. 28, 1971, § E, at 1, col. 1 [hereinafter cited as Inbau & Carrington].


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position at our law school recently decided to decline our offer, stating that she liked the faculty and the University, but was reluctant to work in a community where her security would be impaired. Foreigners visiting the United States, foreign diplomats and members of the United Nations Secretariat are dismayed by the robberies and muggings to which they are subjected, and foreign tourists prefer to visit other countries.

The sight of downtown sections of most cities is dismal and discouraging: during the daytime, a policeman must be stationed in every room of commercial establishments—a phenomenon unseen in any other country of the world; at night, the streets are deserted. In New York a policeman must patrol every subway. In many places, exact fare is required in public transportation and service stations during late hours. Recent statistics seem to prove that in some places, particularly Detroit, the number of crimes has decreased slightly in recent months. This would be a happy development if its cause were not simply that there are ever less people on the streets which diminishes the opportunity for some crimes, and that ingenious and often costly precautions have been taken by businessmen and homeowners for their protection.

Among the problems that the United States has to solve, crime is the most important. It should be attacked on many fronts. Its causes are various, and there is no single answer to the questions it presents. Some of the most important factors which have contributed to the exceptionally high rate of crime in recent years are the breakdown of family life, the disrespect for authority and legal rules, the undermining of moral values, the tolerance of violence in the American mind, the incredible trend towards permissiveness, drug abuse, and the extremely poor television programs and movies. All these factors are a national concern, exceeding the boundaries of legal considerations. However, other causes are strictly connected with the law: obsolete procedure, unworkable rules of evidence, highly exaggerated emphasis on due process in utter disregard of substantial truth, an antiquated jury system, lax law enforcement, obstacles laid in the way of police action, helplessness against threats to witnesses, leniency of the judges, frequent inexcusable mistakes of the prosecution, a poor prison system, and lack of control over possession of dangerous weapons.

Other reasons sometimes cited as contributing to the high rate of crime in the United States cannot be considered as real factors. In particular, the purported difficulty in finding employment and the poverty of some segments of the population should not be considered as vital. The situation on both points is much worse in most other countries of the world; however, their crime situation is less critical than that of the United States. Artificial legal rules coupled with the lack of desire on the part of some judges to protect the interests of society have contributed to the problem. Dozens of technical obstacles to the administration of justice have been furnished to the advantage of the criminal. The result has been the citizenry's ever growing dissatisfaction with our legal system and its
enforcement, their disrespect for the law and lawyers, and their establishment of groups of "vigilantes" as a more efficient means of self-defense.

The situation is so bad that it calls for drastic measures. In the past, nations have devised cruel methods of punishment in order to deter crimes. As a result, law breaking in some of these countries was practically eliminated. Today, similar methods are still applied. Thus, in the Central African Republic it was announced in July of 1972, that the penalty for a first theft would be the loss of an ear; the next offense would be punished by the loss of the second ear; and the third, by the amputation of the right hand. Execution follows the fourth conviction. Apparently acting on his own initiative, President Bokassa appeared in the central prison of Bangui, the capital of the Republic, with a detachment of soldiers and ordered them to beat 46 prisoners jailed for theft. As a result, three convicts died and the others were injured. After the beatings, the prisoners were displayed on a platform in the center of the town. The President announced that the army will administer beatings every Saturday and added: "All the thieves must die. There will be no more theft in the Central African Republic."

Westerners abhor such drastic measures, even if they prove to be effective. But in a less extreme form, corporal punishment is still a legal remedy even in Western Europe. Thus, on the Isle of Man youngsters may be sentenced to be "caned" or "birched." The birch consists of several leafless branches about three feet long; twelve strokes is the maximum penalty imposed. In one recent case, four 15-year-old boys were sentenced to be birched for assaulting a prefect at their school. There is hardly any doubt that the effect of such measures is to discourage attacks on teachers, a recurrent problem in the United States.

Cruel and unusual punishment is banned by the eighth amendment to the American Constitution, and mere severity is not favored by American judges even though fear of severe punishment is an important deterrent to crime. The ranks of the legal profession should be particularly sensitive to violations of law, yet a strange philosophy pervades. All possible excuses are found to exculpate the accused. Society is blamed for the

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4 The beatings were for a duration of 10 minutes and were performed with clubs. Id.
5 Id.
7 Tough statements by judges are rare and go unheeded. A semi-retired judge of the United States Northern District of Texas, T. Whitfield Davidson, stated that he was "in despair and horror at the lawlessness of our land. . . ." He added, "We are not giving our police the support they ought to have to control the situation." According to the judge, in certain cases criminals "should be publicly hanged in county seats where their pals can see them." Chicago Tribune, Dec. 26, 1971, § 1a, at 17, col. 3. According to some, Judge Davidson "may have spoiled a promising political career by fighting the Ku Klux Klan as lieutenant governor of Texas." Id.
fact that some of its members become antisocial. We live in an era of erosion of responsibility, protection of the accused, disregard for the public interest, and the invention of procedural technicalities aimed at the obliteration of truth. Even respectable lawyers frequently believe that they should do everything to extricate their accused client from liability, including hushing up the true facts, raising procedural objections to relevant evidence, and obstructing the administration of justice. Among high officials charged with responsibility for protecting society, we find persons who do not understand their duties. We have too many "Ramsey Clarks." In the words of former Attorney General John N. Mitchell, we have reached the stage where the courtroom is "a place where fact is obscured and justice frustrated through the triumph of sophistry over common sense."

Unfortunately, only a small percentage of the offenders are ever caught, still less are indicted, and a very insignificant number are found guilty and punished. The risk to the criminal is not great; he knows that his chances of escaping from the hands of the law are good. Furthermore, the possibilities of being sentenced to a serious prison term are very slim indeed. Thus, it was stated that police were able to solve only one out of five crimes through arrests in 1970, while in 1960 the solution rate was nearly one out of three. The National Commission on the Causes and Prevention of Violence estimated that in 1969 "only half of all serious crimes committed were reported to police, that 12 percent of the total resulted in arrest of a suspect, that convictions were obtained for 6 percent of all serious crimes and that suspects were imprisoned for 1.5 percent of the total." These statistics greatly help one to understand Chief Justice Burger's conclusion that the courts are "laboring under what has been called a crisis of confidence in the judicial system."

Instead of devising means to insulate criminals from the society they destroy, or attempting to demonstrate to offenders that the nation's patience has been abused too long and that every crime will be punished, the courts and some scholars continue on the path of an interpretation of the Constitution never dreamed of by the founding fathers. They construct beautiful abstract principles which may seem to some to be very idealistic and possibly could be applied in a society where crime is a rarity, but are absolutely unworkable in the United States of today.

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8 International Herald Tribune (Paris), June 11, 1971, at 5, col. 5.
10 International Herald Tribune (Paris), June 11, 1971, at 5, col. 5.
11 ABA REPORT ON THE PROBLEMS OF THE JUDICIARY (1972). Similar language has been used by some writers who have spoken about "the present public disenchantment with the Supreme Court." Little, The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on Police, INDEPENDENT LEGAL F. 375, 389 (1970) [hereinafter cited as Little]. Former Governor, now state Supreme Court Justice G. Mennen Williams of Michigan stated: "Public tolerance of the judicial system is running thin because of crime and long trial delays. . . . The judiciary must help itself if the public is not to lose confidence in our institutions." Detroit News, Dec. 20, 1971.
The due process clause is an excellent provision devised to protect the citizen against the arbitrariness of the government. However, its construction should be reasonable and appropriate to the conditions of the society in which it is in force. The way in which the courts, particularly the Supreme Court, have extended its scope renders a great disservice to the nation. This clause, along with other constitutional provisions such as the "bill of attainder" clause, was intended primarily to apply to political offenders rather than to common criminals. It was greatly justified in the light of the eighteenth century practice in some European countries for the king to imprison anyone he wanted for an indefinite period of time without reason or preliminary judicial proceedings.

In numerous opinions, the courts have laid down their own rules on due process and unlawful search and seizure absolutely unwarranted by the Constitution. Intertwined with the law of evidence, these interpretations frequently defy common sense. If evidence was unlawfully obtained, it will not be admitted in court; a conviction may be reversed even if there is other admissible evidence supporting the verdict; and, of course, a conviction may be had only if guilt is established beyond reasonable doubt. An overly restrictive interpretation of what constitutes probable cause deprives the jury of relevant evidence. The very fact that a search produced such evidence tends to indicate that there were valid grounds for suspecting criminal activity. Unfortunately the courts prefer to "punish" the police for not abiding by rules arbitrarily devised, rather than to render a service to the general public.

It has been argued that the suppression of unlawfully obtained evidence is a rule protecting the citizens. There is a clear fallacy in this argument. First, law abiding citizens do not object to a search. Most of them would welcome a search of their person or car even without any judicial warrant. They have nothing to be afraid of and would be glad to know that the police are trying to detect crime for the good of society. However, assuming that some persons may object, the remedy should not be to exclude the "unlawfully obtained" evidence. The purpose of the judicial process should be to elicit the truth, not to suppress it as is constantly being done. The criminal trial should not be a game between two parties to be won by the side which better knows the artificial rules. The tendency to make the prosecution's job as difficult as possible is deplorable.

Proof that the exclusionary rules of evidence work to protect the criminal rather than the general public is illustrated by cases arising every day. Recently, Edward A. Trudeau was convicted in Michigan of killing a synagogue guard, and sentenced to 40 years in prison. Instrumental in the conviction was evidence that the murderer's shoe matched the foot print found near the synagogue. The shoe was taken by the police while Trudeau was under arrest for questioning about a post office break-in. However, the conviction was overturned on the ground that the police examined the shoe
without obtaining a warrant. In obtaining a warrant, the police would have had to convince the judge that there was probable cause to connect Trudeau with the crime. Should we wonder that the public is at a loss in understanding how justice works?

In some states, an unfortunate extension of the exclusionary rules consists of the "vicarious rule," permitting the defendant to object to evidence illegally seized from a third person. The Supreme Court of California upheld this rule notwithstanding the state's Code of Evidence which provides that all relevant evidence is admissible.

It is significant to note that no technical rules of evidence existed in England in pre-Norman and early Norman years. Most scholars connect the exclusionary rules to the emergence of the jury in the post-Norman period. In the middle of the nineteenth century, an American court stated that in England "a system of excluding testimony grew up, more technical and artificial than any to be found in the world," because the juries "were composed of rude and illiterate men." The court further observed:

Judges both in England and in this country are struggling constantly to open the door as wide as possible . . . . Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury . . . which would assist them in coming to a satisfactory verdict.

A few years later, an English court stated:

People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight.

This is, indeed, the usual role in civilized legal systems.

Traditionally, the approach of the Supreme Court has been reasonable. Thus, in Wolf v. Colorado it said:

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13 Criticizing a ruling of the Supreme Court of the United States, an editorial under a title inspired by the dissenting Justices, An Exercise in Judicial Futility, remarked that "the courts sometimes resemble an ostrich. They bury their heads in the sand of abstract law and forget about the realities of life." Detroit News, Jan. 17, 1972, at 18a, col. 1. Another comment on legal technicalities reads as follows: "While our courts find legal loopholes for criminals and ignore justice for their victims, our police are scapegoats!" Letter of Warren Scott, Detroit News, Mar. 3, 1972, at 14a, col. 3.
17 14 Ga. at 61-62.
Of 10 jurisdictions within the United Kingdom and the British Commonwealth... which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible.

...[T]he exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford....

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.2

At the time, Wigmore had stated that "it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has obtained the evidence."21

Unfortunately, Wolf was overruled in Mapp v. Ohio,22 an unfortunate case the facts of which should never have arisen. First, the statute prohibiting possession of obscene books or pictures should never have been enacted. Second, if enacted, it should have been ruled unconstitutional.23 As a result, the Supreme Court had to devise means to help the convicted defendant, who claimed lack of knowledge of possessing the incriminating materials. Hard cases make bad law, and the results of this one were disastrous. The Court held "that all evidence obtained by searches and seizures in violation of the Constitution is... inadmissible in a state court."24

2 Id. at 30-31, 33.
21 8 J. WIGMORE, EVIDENCE § 2183 (3d ed. 1940). The author objected to the "unfortunate rule" that records or chattels of a defendant needed by the government for their evidentiary value "have been held not to be subject to search and seizure" by virtue of the fourth amendment. He added that the rule, "taken together with the rule that a person is privileged not to produce self-incriminating articles... puts a whole class of essential evidence beyond the reach of the law." Id. at §§ 2184(a), 2184(b). Wigmore concludes that "there is no convincing evidence that the exclusionary rule significantly improves police practice." This view is concurred in by most observers. See, e.g., Little, supra note 11, at 389. A careful analysis by another commentator leads to the following result:

The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and frees the guilty. It creates the occasion and incentive for large scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience and irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free.

24 367 U.S. at 655.
The Supreme Court took a unique approach unknown in any other civilized legal system. It acknowledged that "in some cases" the result will be as stated by Justice Cardozo: "[U]nder our constitutional exclusionary doctrine . . . the criminal is to go free because the constable has blundered." The Mapp Court added two surprising statements: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws . . . ." It is the peak of nonchalance and carelessness about the protection of society against crime to refer to a "law" which never existed as the basis for the proposition that the criminal "must" go free! The second statement is incorrect both factually and historically. There is no question of the government's violation of its law, and the individual violating it should be prosecuted. But, past and present times proved that many governments disregarding their laws have survived for many years rather than being destroyed. A more enlightened view was expressed in a report by the research and policy committee of the Committee for Economic Development. It declared that "American society as we have known it cannot endure" if crime continues to soar. The committee called for a broad overhaul of the criminal justice system, including, among other things, the establishment of new courts, elimination of caseload congestion, appointment of judges and prosecutors on grounds of merit rather than politics, and the outlawing of handguns. The report stated that "only the strongest measures . . . can avert a worse disaster than the one we already see about us."

To prevent unreasonable searches and seizures, disciplinary control over the police and sanctions against those who proceed with unwarranted action should be applied at the request of aggrieved citizens. Perhaps, it would not be a strong weapon in certain cases because the supervisory police organs might prove unwilling to take the proper steps. A more efficient device would be the assurance to prospective plaintiffs of a cause of action against the offending police officer. Possibly, the best approach would be to grant recovery whenever the search does not produce evidence although it was contrary to technical rules. Such a cause of action would be sufficient, first, to act as a deterrent to the police from failing to abide by the rules of conduct, and second, to protect citizens against arbitrary action. The possibility of suing police officers was mentioned by the Su-

26 367 U.S. at 659.
27 Sir Reginald Sholl, a former justice of the Supreme Court of Victoria, Australia, has made a statement which seems to be particularly applicable to the passage of Mapp v. Ohio in question: "[In the United States] so many social and legal reformers exhibit more emotion and enthusiasm than they do historical knowledge or sound judgment." Address by Sir Reginald Sholl, Philadelphia Bar Association, Law and Order—American or Australian Model?, Mar. 7, 1968, reprinted in 118 Cong. Rec. 1332 (1972) [hereinafter cited as Sholl].
28 Detroit News, June 29, 1972, at 18a, col. 1.
29 Id.
An action could be brought for trespass, false imprisonment, battery, or invasion of privacy. Such a remedy can be made effective through garnishment of wages of the offending police officer. It has been said that citizens are unwilling to sue the police, particularly because most plaintiffs in such cases have poor reputations which will not help them to win the action. But such considerations do not detract from the fact that the right to sue does exist and may be pursued. In this situation, reputation should have no effect except with respect to the reasonableness of police action. In general, poor reputation does not help in life, and it is up to every citizen to establish good reputation. Moreover, there is a possibility of receiving an injunction against police action. Such steps have actually been taken. \(^3\)

More frequently than ever before, suits against police officers are being brought. Their number has increased from “a few hundred a year in the nation not long ago to many thousands last year.” \(^3\) While some are meritorious, the majority are frivolous; they are filed to harass the policemen, injure their reputation, and undermine their financial resources by imposing on them expenses of judicial proceedings. Congressman Ichord stated that “officers are increasingly more hesitant to perform their duties diligently because of the fear of such suits.” \(^3\) It is his opinion that remedial legislation is necessary, particularly a statute requiring the posting of a bond “for payment to the defendant of reasonable costs of investigation and legal fees if the officer prevails.” \(^3\)

Most cases are filed under section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. \(^4\)

In 1971, not less than 8,267 cases involving section 1983 were brought in the United States. In one of them, 16 officers were sued “by a Black Panther organization after their headquarters had been searched for weapons stolen from a National Guard Armory.” \(^3\) Each officer was required to file a long, rather personal interrogatory, including 99 questions most of which were irrelevant and some of which required multiple answers. In another groundless action, the Western Center on Law and Poverty, fi-

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\(^3\) 338 U.S. 25 (1948).
\(^3\) Little, supra note 11, at 407.
\(^3\) Ichord, Lawsuits That Handcuff Our Lawmen, NATION’S Bus., Nov. 1972, at 27, 28 [hereinafter cited as Ichord].
\(^3\) Id. at 27.
\(^3\) Id. at 29.
\(^3\) Ichord, supra note 32, at 28.
nanced with federal funds, sued the Los Angeles police chief and others on vague counts, and before the Center itself asked that the case be dismissed, an estimated amount of $117,000 of public funds had been spent. In a third case, a "drug pusher," caught in flagrante and sentenced to five years, sued two law enforcement officers "for conspiring to coerce him into pleading guilty!"  

In no case should the courts hush up the truth by excluding relevant evidence. The American system of excluding unlawfully obtained evidence is unique—it is contrary not only to the rule in civil law countries, but also in other common law countries such as England or Australia. And it may not be said that in Switzerland, France, Germany, or England the administration of justice is unfair to the accused. On the contrary, these countries have gained a reputation of having excellent legal systems. Nor was it ever said that in England the defendants do not have decent trials, even though there is no due process clause in that country. Perhaps it is better not to have such a clause, because then it cannot be misinterpreted and held to cover nearly all questions of criminal procedure. It has been rightfully stated:

Decisions couched in the language of due process permit no statutory adjustment. As a result, the imaginative and constructive legislation that could offer workable alternatives leading to the effective and fair operation of the criminal law is stifled by decisions which permit no legislative experimentation.

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Under the phrase "due process" the courts have steadily required the states to make adjustments in their criminal law and procedure.

What we really need in the United States is a revolution in the way of thinking of judges and lawyers, rather than a change in substantive rules of the law. Of course, laws may be improved, but even a perfectly drafted text will not do if it is misinterpreted and misapplied. The judicial and legal professions must awaken and become dedicated to the eradication of crime and protection of society before progress will be achieved. Inefficient administration of justice and shocking leniency towards criminals encourage law breaking and undermine society. Unfortunately, young generations of lawyers, educated in the spirit of what is sometimes inaccurately called the "extreme liberalism" of the Supreme Court, are repeatedly told that these rules of law are the essence of freedom and democracy. They do not realize that the American system of criminal justice is an oddity which

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37 Id.  
38 Id. at 27.  
40 "Nothing—literally nothing—so undermines law and order as a weak and maudlin Bench." Sholl, supra note 27, at 1333.
renders the lives of its citizens ever more miserable and is totally unrelated to their civil rights. They are unaware that the situation is different in other Western countries.

In some fields, American law has gained respect and influenced developments in foreign legal systems. This is true, for example, with antitrust legislation. However, American criminal law puts the United States in disrepute and is frequently cited as an example which should not be followed. In the Atlantic Charter, the leaders of the Allies solemnly proclaimed that one of their goals in winning the war was to free humanity from fear. Unfortunately, the greatest country in the world is unable to secure this goal for its own citizens. What the United States needs, among other things, are good judges who understand the problems of society and the necessity for its protection. The leniency of a great many of the courts is a frequent topic of articles and cartoons ridiculing the judiciary and demeaning it in the public's opinion.41

Some of the most important purposes of the criminal law system are to render criminals harmless, to punish them and, if at all possible, to reform them. But the courts utterly disregard these responsibilities. They make every possible effort to render prosecution and conviction as difficult as possible.42 Instead of serving the community which entrusted them with a most important function, they purport to serve some fictitious, abstract ideas frequently termed "constitutional rights." Inability to convict or excessive leniency in sentencing encourages criminals to become ever bolder, more dangerous to law abiding citizens, and more skillful in perpetrating their deeds and evading the arm of the law. For example, the deplorable tendency to impose light penalties on drug pushers is disastrous to the society which these criminals undermine. Drug pushers frequently destroy the lives of our youngsters and turn them into criminals willing to commit any breach of the law in order to finance their drug needs. Likewise, especially severe treatment should be extended to organized crime. Unfortunately, big syndicate bosses either escape punishment or get light sentences. The courts show no deep desire to eliminate them from the American scene. Organized crime members can afford to retain skillful

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41 See, e.g., NEWSWEEK, Nov. 27, 1972, at 21, wherein a cartoon shows a judge with the following caption: "Skyjackers?? But they seemed such nice boys when I released them on bond. . . ." In the public opinion:

[T]he police manage very well, but the roadblock comes when the prosecutor tries to get a conviction.

There are so many ways to forestall justice at that point it's a wonder anyone ever gets convicted. Endless delays, witnesses either gone or intimidated, retrials, appeals and the slightest slip anywhere along the line and it's all over.

Letter from Wheeler, Miami Herald, Dec. 17, 1971, at 6a, col. 3.

42 "[R]ecently the burdens imposed on public prosecutors have increased to the extent that a genuine apprehension exists as to the ability of prosecutors adequately to protect the public against crime." Younger, supra note 39, at 695.
lawyers who know all the legal technicalities and possibilities of motions and delays.

A substantial possibility of being convicted would be an important deterrent preventing criminals from carrying out their activities. A change in the judicial atmosphere and constitutional interpretation is necessary before progress can be expected. Moreover, some rules of substantive and procedural law which have only secondary importance should be changed. A few may be mentioned without much elaboration. The term "American," as used in the following discussion is meant to include both the federal and state systems.

Sentences should be imposed for definite periods of time. This is the uniform European approach which works better than the American system of indefinite sentences.

The death penalty should be retained, but applied sparingly. There are extreme cases of hardened criminals who are absolutely incorrigible, whose crimes are so odious and revolting that the perpetrator should be completely eliminated once and for all from the society which he destroys. Such a person was not created to live in our world. Life imprisonment presents dangers that sooner or later he will escape and continue his activities; furthermore, there is the possibility that he will be a source of bad influence and terror for the other prisoners. Besides, it is questionable whether it is actually "charitable" to let a person "rot in prison" for the rest of his life.

Recently, the United States Supreme Court ruled that the death penalty, as applied in the instances under review, was barred by the Constitution. Two members of the Court based their opinion on the ground that it is inherently cruel and unusual punishment. For thousands of years, and particularly for the two hundred year life span of this country, nobody questioned the necessity and the power of the state to impose capital punishment. The framers of the Constitution were undoubtedly familiar with this practice and accepted it. Now we learn that our basic law meant something its drafters never intended it to mean. It may be said that constitutional provisions are flexible and should be interpreted in accordance with the needs of the times. But do we really need an ever-increasing leniency towards persons who destroy our society?

The controversy over the death penalty raged in recent years both on this continent and overseas. The frequent argument advanced in the United States against it was that purportedly the fear of such a punishment does not deter criminals from committing their deeds. This reason-

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Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
While Justices Douglas, Stewart, and White were concerned primarily with a state's discretionary imposition of the death penalty, id. at 240, 306, 310, Justices Brennan and Marshall found the death penalty per se unconstitutional. Id. at 257, 314.
Similar ideas have been expressed in other countries. In particular, Thorsten Sellin at-
ing is both theoretically unsound and contradicted by actual facts. It completely disregards other purposes of criminal sanctions. At least in this country, criminals are not illiterate. They read papers and, frequently, are intelligent. The assumption that they do not consider the risk they take in committing crimes is naive—it may only be made by persons eager to reach the conclusion they desire. Criminals know how much chance they have of being caught and what they may expect if arrested. They are familiar with judicial attitudes toward the accused. The law breakers’ way of thinking is well illustrated by the utterances of a gunman in a recent New York difficulty. He told newsmen that unless his demands were met, he would “shoot everyone in the bank.” Later, the gunman said he would let the police draw a hostage’s name out of a hat and would shoot the person selected and “send out the body.” According to a newspaper report, he said at one point:

The Supreme Court will let me get away with this . . . . There’s no death penalty. It’s ridiculous. I can shoot everyone here, then throw my gun down and walk out and they can’t put me in the electric chair. He said that he probably would not have staged the robbery if the Court had not recently ruled capital punishment unconstitutional. “This way you don’t have nothing to lose. It’s stupid,” he said.

True, the decision of the Supreme Court saves some lives—those of criminals—but at the expense of the lives of law-abiding citizens. Irrespective of the advantages and disadvantages of the death penalty, it should be a question of state law. Judicial legislation by the Supreme Court is an abuse of its powers and violates the principle of “self-restraint.” Yielding to an increasing wave of dissatisfaction and criticism of the way the Court exercised its functions, the Court established the principle of restraint in the late thirties, mostly through the influence of Mr. Justice Frankfurter. Discontent with the Supreme Court’s approach to the death penalty is growing. A statement by a distinguished former Australian Justice well characterizes the mentality of the criminals:

tempted to show that the death penalty does not tend to decrease the rate of serious crimes. See generally T. SELLIN, THE DEATH PENALTY (1959).

Id. at col. 3.

Id.

Id. at col. 7.


See, e.g., Detroit News, Oct. 20, 1972. A resolution was adopted by a conference of the International Association of Chiefs of Police, attended by 5,000 police leaders in October of 1972. They went on record as “favoring the death penalty for premeditated murder, murder committed during the perpetration of a felony and for the killing of law enforcement and correctional officials.” Id. Again, the National Association of Attorneys General has recommended that the death penalty be restored for certain crimes. Evening Star (Wash. D.C.), Dec. 7, 1972, at 5, col. 3.
Many years of experience in the criminal jurisdiction have convinced me of two things—that the deliberate wrongdoer (who is responsible for most of the crime statistics) will go on planning and committing crimes so long as he thinks the law is weak and yielding enough to give him a chance to evade it, and that he will have no respect for a legal system which is marked by feebleness in the application of its sanctions,—i.e., of its punishments for proven crime.52

The grand jury should be abolished and replaced by investigating judges. This is the uniform European system which works much better. A body of laymen is incapable of dealing with the problem of whether the suspect may be successfully prosecuted, as the American experience clearly establishes. The fact findings by the jurors during the trial is a quite sufficient, frequently exaggerated, participation of men from the community in judicial proceedings. Endeavors to put the United States in line with the rest of the world, even at the expense of constitutional amendment, should be initiated as soon as possible. In England grand juries were abolished in 1933.53

Peremptory challenges in jury selection should be strictly limited to a small number. Even in other common law countries, the whole process takes just a few hours, e.g., at most half a day in Australia.54 The American spectacle in which this simple step may take weeks, at the expense of taxpayers, wastes time and delays the administration of justice.55 In the

Early in 1973, then Attorney General Kleindienst announced that the administration "will ask Congress this year to institute a mandatory death penalty for several categories of 'cold blooded, premeditated' federal crimes," such as kidnapping, skyjacking, killing a prison guard or destruction of a public building. Washington Post, Jan. 5, 1973, at 1, col. 6. A bill introduced by Senator McClellan on Jan. 4, 1973, would reinstate the death penalty and include standards for its application. S. 1, 93d Cong., 1st Sess. (1973).

In Maryland, Governor Mandel is considering asking the General Assembly to introduce the death penalty for certain crimes. He described an incident in which a prison guard was held by some prisoners. One of the prisoners, who was serving a life sentence, is reported to have said that he intended to kill the guard because "all they can do is give me another life sentence, so what difference does it make?" Washington Post, Jan. 5, 1973, at 1, col. 7.

It may be added that the abolition of the death penalty may tend to tempt hardened criminals, committing serious crimes, to kill witnesses who could testify against them. Whether such an accused does so or not, he could not be sentenced to capital punishment. The elimination of witnesses could diminish the chances for conviction.

The first state to reinstate the death penalty after the decision of the Supreme Court was Florida. The bill was passed in December, 1972. See Fla. Stat. Ann. § 927.41 (Cum. Supp. 1974). It should be mentioned that on November 7, 1972, the California voters approved the death penalty initiative by a substantial margin. See N.Y. Times, Nov. 8, 1972, at 28, col. 1. California's new death penalty provisions are codified in CAL. PENAL CODE §§ 189, 190.1-3, 209 (West Supp. 1974).

52 Sholl, supra note 27, at 1333.
54 In Victoria, Australia, eight challenges are permitted, except in capital cases where the number is twenty. Sholl, supra note 27, at 1333.
55 Thus, for example, after four months of questioning prospective jurors in the kidnap-
public opinion of foreign nations, the situation is scandalous; "[t]he liberty...of questioning jurors...to ascertain possible bias or disqualification...is totally unknown in England and Australia."

Particularly revolting are cases in which charges against the defendant are dismissed on the ground that it was impossible to select an unbiased jury "without superhuman efforts." Even with the American understanding and permissiveness it cannot be expected that the "reasonable men" of the community will be overly sympathetic toward a criminal. Again, it could not be desired that the general public stop listening to radio news, watching television, and reading papers in order to be kept in complete ignorance of crimes which have been committed and their suspected perpetrators. As Professor Uviller stated, to insist on selecting jurors who have never heard about some well known crimes "might mean selecting a jury only of morons and illiterates." The approach of some judges, if pushed just a little bit further, would benefit the most hardened criminals against whom there was adverse publicity since they could not be tried in an unsympathetic atmosphere.

In less extreme cases, a new trial is ordered by the court often in another community. A recent Indianapolis trial resulted in the conviction of the defendants. New proceedings were granted on the ground that there was possible prejudice of the community against the "torture murderers." The evidence was clear and the facts were not denied. A second trial was held elsewhere and the result was the same. What an example of "judicial futility," how much delay and waste of judicial energy in overcrowded courts where justice is already too slow, and how great a waste of the taxpayers' money!

There is no reason for having twelve persons on the jury. In some states, this number has been decreased. By all means, this trend should be followed. There is no reason to think that there is magic in the number twelve. Six persons can do the job well enough. There would be less time wasted, less possibility for a mistrial, less public money expended, and less possibility of bribing a juror. Fortunately, the Supreme Court does not

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murder trial of Bobby Seale and Erika Huggins, the jury was selected from among 1,550 persons who were called. In the selection process 1,035 persons were actually examined. Time, Mar. 22, 1971, at 52.

54 Sholl, supra note 27, at 1333.

55 In particular, this happened in 1971 in the Connecticut case against Bobby Seale and Erika Huggins. See note 55 supra.

56 Herald-Telephone (Bloomington, Ind.), May 26, 1971.


58 See, e.g., Fla. STAT. ANN. § 913.10 (1973) (six-man jury for all criminal cases except capital cases); S.C. CODE ANN. § 15-618 (1962) (six-man jury in civil and criminal cases in the county court); Tex. CODE CRIM. PROC. ANN. § 37.02 (1966) (only nine jurors required to return a verdict in misdemeanor cases); Utah CODE ANN. § 78-46-5 (1953) (eight-man jury in noncapital criminal cases).
consider twelve jurors a constitutional requirement. 61

Jury verdicts should be reached by a qualified majority rather than by unanimity. 62 This is the rule even in England which is the cradle of the jury system. The stubbornness, stupidity or bribing of one juror has prevented the reaching of verdicts in more than one case. In many states, a qualified majority is sufficient in civil cases. This prevents the possibility of a mistrial in the cases where a juror is either corrupt or too stubborn to see the problems the same way as the others. A qualified majority should also be sufficient in criminal trials.

Thus, Huey P. Newton, charged with first-degree murder of an Oakland policeman, was found guilty of voluntary manslaughter by the jury. However, the verdict was overturned and another trial was held. It resulted in a “hung jury” of 11 to 1. Some jurors “were near tears as the judge dismissed them and directed Newton to appear before the criminal calendar court” for setting a date of a third trial. 63

Appeals should be permitted by both the defense and the prosecution. In some respects, both parties are treated equally, but on the problem of appeals, the usual American rule is to give preferential treatment to the accused. In Europe, the prosecutor may appeal both from the dismissal of the case and from the imposition of a sentence considered by him to be too lenient.

Judicial delays should be eliminated. Short periods of time should be set for motions and appeals by the parties, and they should be decided with all possible speed. The lapse of many years from the commencing of an action until the final determination on appeal is undesirable, frustrating, and an impediment to the administration of justice unparalleled in other civilized countries. The case of In re Chessman 64 shocked the world and earned, in the world’s legal history, an outstanding place among the many examples of inefficient judicial procedure. One foreign jurist stated that the American delays “seem inexplicable to the rest of the world . . . .” 65

In Australia, final judgment in the highest court is reached in 12 or, at most, 18 months from the time of conviction in unusual cases, and in

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62 Cf. Apodaca v. Oregon, 406 U.S. 404 (1972), wherein the Court upheld convictions under an Oregon statute permitting guilty verdicts by a vote of 10 out of 12 members of the jury. The majority reasoned that the sixth amendment does not mandate unanimous jury votes.
63 Herald-Telephone (Bloomington, Ind.), Aug. 9, 1971.
64 219 F.2d 162 (9th Cir. 1955).
65 Sholl, supra note 27, at 1333. The author notes that in the United States, so many cases go on for years,—with appeals, injunctions, stays of execution, rehearings, reconsiderations, etc., etc.,—that the rest of the world marvels, and wonders why you allow it, and what real benefit society, or even the individual, gets from it all.

Id.
ordinary cases this period is much shorter. Dilatory tactics of the lawyers should be curbed. Otherwise, a lawyer skillfully manipulating delays may succeed in postponing trials indefinitely.

In cases of juveniles, the accused should be treated in accordance with the rules applicable to their age bracket at the time of the commission of the crime rather than at the time of trial.

The unreasonably broad interpretation of the right against self-incrimination should be stopped. The privilege should extend only to oral statements, not to written records, blood tests, photographs, etc. As Dean Wigmore stated, the privilege “should be kept within limits the strictest possible.”

Again, the idea of double jeopardy should be kept in proper limits so as not to hamper the administration of justice. The dangerously broad interpretation given the double jeopardy clause by some courts encourages defendants to attempt to extend it still further.

Other foreign approaches should be accepted in the United States and earlier American rules reinstated. Third degree police methods should be eliminated by all possible means, but voluntary confessions should be admitted as relevant evidence whether made after consultation with a lawyer or not. The duty of the police is to prevent crime, arrest suspects, and collect evidence against them. In other countries of the world the police have no duty to act as lawyers for suspects. Here in the United States, they are required to teach the law to suspects by instructing them about their right to remain silent before retaining a lawyer. The reason often given for this obligation is that it provides the same opportunities to the poor as are available to the rich. There is an obvious fallacy in this reasoning. The artificial rules of evidence are well known to skilled lawyers specializing in defending organized crime bosses who are in a financial position to retain them. Therefore, they primarily protect the rich criminal rather than the poor. But even assuming that this is not so, crime should be fought against on every level, by whomsoever it may be perpetrated. The law should not provide a possible way out to one criminal only because another is able to escape punishment. If one violator has a car and drives away from the scene of the crime, it is not a reason to require the police to furnish a car to another suspect so that he may have the same chance of escaping as did the wealthier one. As a moderate scholar and judge recently stated: “Police interrogation seems... a useful and desirable technique of law enforcement; yet interrogation seems threatened by constitutional developments...”

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66 Id.
68 Schaefer, supra note 67, at 36.
In Europe, the essential duty of the judge is to find the truth, and the whole judicial process is geared in this direction. Witnesses are not limited to answering questions put by attorneys. When called on the witness stand and sworn, they are told by the judge to tell everything they know about the case. Their free narration is uninterrupted unless they engage in irrelevant statements. After they finish, the judge himself asks questions before permitting examination and cross-examination by the parties. Persons who testify are witnesses of the court itself rather than of the parties, and therefore there is no problem of impeaching one's "own" witness. Again, the experts are selected primarily from a panel of well-qualified persons, the names of whom are kept in every judicial district. The shocking sight of a "battle of the experts," as presented by the two parties, is eliminated.

In one recent publication, the role of a judge in a communist state is outlined. The author, who was commissioned to be a judge in Czechoslovakia after graduation from a law school at the age of 23, gives a most lively presentation of all the pressures and influences under which the judiciary must work in a corrupt system. He deplores the miscarriages of justice and the subjugation of the judicial process to political goals and interests of the new ruling class. Nevertheless, even in such a system some features of the continental law have been maintained and are in sharp contrast with the situation in the United States:

The trial is focused not on the procedural refinements, but on the substance of the case. The question before the court is not whether the evidence is admissible, but rather what actually happened. A testimony cannot be torpedoed by the crippling "Objection, Your Honor." Nothing can be stricken from the record. . . . The judge himself may call for the introduction of evidence or the hearing of witnesses . . . .

One important impediment in the establishment of the prosecution's case is the fear of witnesses to testify against a criminal who may take vengeance, either against him personally or against his family or friends. How many cases were lost because of a refusal to testify, or of a sudden "loss of memory" of the witnesses! This is not surprising because citizens do not dare to take the risk. As one individual expressed his fear of revenge: "You talk and you got to face the 'pay back.'" The device of anonymous witnesses, with masked faces, is resorted to in only an extremely few cases in the United States. It should be applied in hundreds of trials. Informers should be protected by all possible means. How can we expect citizens to reveal information about crime if their names will be disclosed to criminals in all cases, subjecting them and their families to threats, reprisals, and possibly murders? Still, some judges show an amazing misunderstanding.
of this problem. Thus, in a recent case involving a planned truck robbery, which ended in the death of one of the youths involved, the Municipal Judge of Oak Park, Michigan, ordered the prosecution to name the informant who had tipped off the police. The assistant prosecutor stated that "the tipster was assured of his anonymity and if police break the confidence future informants would be reluctant to come forward." He added that the informant would be in danger of being murdered if he were identified. Closed in his ivory tower, oblivious to the realities of life, such a judge is a threat to the community not much less than the criminals themselves.

The Law Enforcement Assistance Administration, an arm of the Justice Department, made a survey which indicated that "the actual amount of crime in the United States is 'several times' that listed in the FBI's annual crime report." Professor Miller, deputy director of the Institute of Criminal Law at the Georgetown University Law Center, stated that there is "a fantastic amount of unreported crime" and that "we do not really know the full explanation for it." He suggested that "[i]t may be that people distrust the police or simply do not think they are capable of doing anything about their problem . . . [o]r . . . people do not want to testify in court and perhaps lose a day or two in wages." But one of the most important reasons is simply the fear of retaliation by criminal elements when complaints are made to the authorities.

The emphasis on cross-examination is much exaggerated in the United States. In Europe, if evidence is relevant, it is admitted. When no cross-examination is possible, the weight of the evidence may be questionable, but it is not excluded. In American trials, how much excellent evidence is not admitted on the ground of an extensive view of hearsay. Typical examples are treatises by famous physicians. It is against common sense to exclude observations of a well known authority on some disease just because he cannot personally appear in court. The adversary would always be free to introduce evidence to the contrary. Happily, there is a trend away from this extreme approach, but many other aspects of the unfortunate hearsay rule are still permitted to obscure the issues at trial. We constantly hear of new examples. In one instance, a judge in Oakland County, Michigan, ruled out key evidence in the ten-year-old fraud case against a "self-styled Mafia moneyman." Business records of two furni-

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77 Detroit News, Sept. 28, 1973, at 1b, col. 1. At the end of 1972, two prosecution witnesses in a Virginia burglary case were found murdered one day before they were to testify at the trial. Norfolk Commonwealth's attorney called for legislation providing for a mandatory death sentence for the murder of witnesses. Washington Post, Jan. 6, 1973.
74 Id.
75 Id.
76 Id.
ture stores, which included loan applications for allegedly fictitious customers, were ruled inadmissible, despite their importance to the prosecution, on the ground the defendant would be denied "the right to confront his accusers and cross-examine them, since it [was] unknown who prepared the documents." Of course, in other countries there would be no question of the admissibility of the records; the defendant would have the right to give full explanation and comments.

While abolition of the privilege against self-incrimination should not be advocated, the privilege should be reasonably interpreted. The obstacles placed in the path of the prosecution lead to devices whose propriety is questionable. Unable to get a conviction in any other way, the prosecutor enters into "plea bargaining" with the suspect or guarantees immunity from prosecution in exchange for testimony against other suspects.

It is also difficult to see the wisdom of the rules requiring the state to furnish a lawyer to the indigent accused in all criminal and juvenile delinquency proceedings. Traditionally, the lawyer was a person who helped the court by facilitating the judge's elicitation of all aspects of the case and by pointing out the arguments available to his client. In simple criminal cases and juvenile delinquency problems, there is no reason for the defendants to have lawyers. Unless difficult problems are presented and the help of an attorney is desirable, the court should handle the case alone. The recent imposition of the obligation to provide lawyers at public expense to all indigent defendants, beginning at the stage of police interrogation, is unwarranted, and like many other American rules, imposes an additional financial burden on the community. In a recent extension of the Miranda rule, the Supreme Court of California reversed the conviction and held the confession of a 16-year-old murderer who had been sentenced to a life term in prison inadmissible because the suspect was questioned in spite of his request to see his father. The fact that the police advised the suspect of his right to remain silent and to consult an attorney did not save the conviction.

The situation has gotten out of hand in the United States. Citizens feel insecure, frustrated, and have no confidence in the ability of the authorities to protect them. While strict arms' control should be effective everywhere, self-defense and defense of others as well as property should be freely permitted and encouraged. We are shocked when we learn about instances of public passiveness while a crime is being committed because nobody wants to "get involved." Much has been written on the Kitty Genovese incident where a woman was assaulted and murdered while none of the witnesses attempted to defend her or even to call the police. Respect...
for the law, protecting fellow-citizens against violence, and helping authorities to combat crime, is everybody's business. But the authorities, particularly judges, must show that they appreciate behavior which in good faith goes along these lines. Persons who defend others under the same conditions as if they were defending themselves, should be excused from liability even though they are reasonably mistaken that intervention is necessary.\textsuperscript{81}

Particularly revolting is a New York case, \textit{People v. Young},\textsuperscript{82} where the Court of Appeals affirmed the conviction of a defendant by a five-to-two majority for a third degree assault for beating a plainclothes policeman in the good faith belief that the officer was assaulting a black. Such a judicial attitude tends to discourage the citizens' intervention in defending the public order. Their sense of public duty will be counterbalanced by the fear of the consequences if they should be mistaken, as well as the high risk of being injured by the party they turn against.

A few other points should be made. First, some jurists say that the exclusionary rules of evidence are necessary in the United States because of the poor quality of the police. There is more than one fallacy in such a statement. Of course, the quality of the police should be upgraded as much as possible. Undeniably, much may be done in this respect. Certainly, there are some rude, dishonest, corrupt, and incompetent policemen. But it does not follow that society should be punished for their shortcomings. It is natural that in an imperfect society there are imperfect policemen, physicians, lawyers, and politicians. We may be proud that at least one American law enforcement agency, the FBI, merits fame all around the world for its efficiency and integrity.\textsuperscript{83} As for the American police, with all their shortcomings, it seems that they are no worse than in other countries in their attempts to maintain law and order and to protect law-abiding citizens. An interesting experience was initiated by Indiana University and other universities for their law students: an opportunity to accompany policemen on their rounds and in their routine work. The devotion and courage of many of the police was an eye-opener to many future lawyers.\textsuperscript{84}

\textsuperscript{81} \textit{Restatement (Second) of Torts} § 76 (1965).
\textsuperscript{83} This view has been expressed by law breakers as well. A radical who was sentenced to a two and one-half to five year prison term for blowing up police cars wrote about his first contact with the FBI in connection with his interrogation by the agents: "The two agents weren't just policemen. They were a sparkling reflection of J. Edgar's own dedication, integrity and intelligence." \textit{Valler, An Ex-Radical's Eulogy to J. Edgar Hoover}, Detroit News, July 9, 1972 (Magazine), at 26, 27.
\textsuperscript{84} After describing a night spent with a police officer on his routine work and responses to various calls, one of them wrote:

\begin{quote}
My companion seemed to be used to such escapades—danger is nothing new for a cop—they live with it. And sometimes they die with it.... As a future attorney, I wanted first-hand to see how these men operated.... The [policemen] of the United States are doing us an immense service. The sooner we as citizens realize how im-
Again, prison reform is greatly overdue in the United States. It appears certain that one of the most important goals of confinement of criminals—their reform—is hardly ever achieved. It is preferable to lock them up than to permit them to continue their lives of crime. Will they learn still worse things from fellow prisoners? In some instances, possibly yes. But even if this may happen, it does not mean that they should be freed. Naturally, all efforts should be made to establish different categories of inmates, to protect some of them from others, and to eliminate the possibility of exposing petty offenders to the influence of hardened criminals. As for robbers and muggers, what else may they learn from their fellow inmates? Persons who endanger the lives of citizens, who beat and injure them in order to satisfy their desires to get easy money, may hardly learn worse things.

Which classes are hit hardest because of the crime rate? Certainly not the millionaires who usually live out of town and who travel escorted by a driver. Crime is directed particularly against the poor man, living on modest wages in an old neighborhood. Frequently, the victim is a person belonging to a minority group. As daily reports indicate, the average robber would not hesitate to steal from an old or crippled person, a blind man walking with the help of a white cane, or a newspaper boy. In any urban black area the answer to the question of what is the number one problem is invariably "crime." Thus, it was reported that "[a] large majority of Detroit's black adults want more police protection in their neighborhoods and stiffer penalties for convicted criminals." According to one source, "street crime victimizes ghetto dwellers at least 100 times more than it afflicts the affluent citizens who live in the suburbs."

It is easy to simply recommend more judges and more police. In many places judges should be required to spend more time in the courtroom. More police in certain neighborhoods would enhance the security of the population. But how far do we have to go? Have we reached the stage where it is necessary to place a policeman on every block, at every corner, in every apartment building, in front of every home?

All possible means should be used in order to curb crime and destroy organized law breaking groups. Unfortunately, from the Mafia to various...
“gangs,” organized crime thrives while the police are helpless because of the "constitutional rights" of free speech, assembly, or due process. Groups of criminals are permitted to terrorize all segments of society, from neighborhood business establishments to school pupils.

A few well-established myths among American jurists should be eliminated. First, the idea that wire-tapping is inherently unfair and should be used only in exceptional cases should be abandoned. As a matter of fact, it is an efficient device which frequently provides important data to law enforcement authorities and should be freely used. Second, the defense of entrapment by the police as a bar to conviction should be discarded. A person willing to commit a crime in front of an undercover agent would do the same in the presence of others and should be considered as guilty as if he were acting in other circumstances. The theory of entrapment does not exist in Europe.

For good reasons, England is considered the most conservative country in the world. But the English knew how to reform their law in the right direction when the need arose. Why are we so reluctant to see straight? Why should the American legal profession close its eyes to reality, perpetrate errors, and even expand the “protection” of law breakers at the expense of the general public? Is it because the Constitution is sacrosanct? First of all, with due respect to the Constitution, it is a document which should serve the people, not vice-versa. If it should prove to be detrimental to the best interests of the nation, it should be amended forthwith. The so-called “constitutional rights” of the accused have little to do with the mandates of this remarkable basic law. They are purely abstract creations. Under the guise of “fairness” in the courts, their creators are willing to

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88 Wiretapping is “in this day and age essential to effective police work . . . to combat espionage, racketeering, extortion, gambling, narcotic peddling and other criminal activities. . . . A statute which prescribes wiretapping altogether is seriously defective.” 8 J. WIGMORE, EVIDENCE § 2184b (3d ed. 1940).

Sir Reginald Sholl stated:

We have no restrictions on eavesdropping or bugging, and we have never found it necessary to invent a ‘right of privacy’ to justify any such laws. Such bugging as may be used does not prevent 12 million Australians leading reasonably comfortable lives without, apparently, any of the evil consequences contemplated by so many American writers . . . and . . . 50 million people in Great Britain exist well enough without any such restrictions.

Sholl, supra note 27, at 1334.

The absurdity of the American approach to wiretapping is demonstrated in a few recent cases. On May 6, 1971, more than 400 FBI agents and local police arrested 151 persons, including 16 Detroit police officers, and charged them with operating a $15 million-a-year gambling enterprise. A federal district court judge threw out some vital portions of the wiretap evidence submitted to support one of the indictments on the ground that the extension of the wiretap (which the court may originally grant for only 30 days) was granted on a request signed by a subordinate of the Attorney General, other than the Attorney General or an assistant Attorney General. Detroit News, Jan. 18, 1972, at 30, col. 1.
substitute anarchy for necessary restraints and control over antisocial elements of the people.

Abandonment of the American "narcissistic provincialism" regarding criminal procedure, is absolutely necessary.\(^8\) One of the foremost judges has stated that the frequent American "undue emphasis upon the accusatorial aspects of our system has an embarrassingly parochial quality."\(^9\) For some foreign observers, the situation in the United States is hopeless, and they just shrug their shoulders. The attitude of the courts and lawyers is not conducive to improvement. The shortcomings of the American criminal law and procedure are obvious. However, it is often most difficult to prove the obvious to a person, or, for that matter, to a nation which does not want to change its established ideas and customs.\(^10\) The application of the American "constitutional freedoms" has resulted in a society where "one's neighbour can rob one, or rape one's daughter, with a better chance of escaping justice than in other civilized countries."\(^11\) Freedom in the United States is "an empty freedom . . . which is accompanied by a significantly increased risk . . . of being the victim of crime."\(^12\)

It is to be hoped that we have reached the bottom and that future developments will go in the right direction. Those responsible for law should realize that the trial must result in finding the truth, not in obscuring it by the use of legal technicalities. "[T]he criminal process should be rational. . . . [I]ts goals should be the conviction of the guilty and the prompt acquittal of the innocent. . . ."\(^13\) Maybe the low tide is over. Some


\(^9\) Schaefer, supra note 67, at 70-71. The author adds:

Most nations of the world do not rely upon a system that is wholly accusatorial, nor do they go to the other extreme. Instead they require that the silence of an accused be noted for consideration in the ultimate determination of guilt or innocence.

\(^10\) Id.

\(^11\) Thus, it was just about impossible to convince the French, who love to drive fast, that there is a relationship between speeding and the rate of accidents. Some attempts to impose speed limits met with so much resistance that they had to be abandoned. At last, the speed of 110 km./hr. (about 68 mph) was established.

In the United States, where television programs are possibly the worst in the world, any governmental control is branded as an unconstitutional invasion of the first amendment, and it is argued that there is no connection between programs showing violence, cruelty or too much sex and the behavior of the audience, particularly youth. In the last century, Gian Battista Vico, an Italian sociologist, established that the humans belong to one of two typical groups: a small number of them invent new things and introduce new customs and ways of behavior, and the great majority just imitate and repeat what they see. But for some television producers and American psychologists, there is no evidence. A young child may be continually exposed to scandalous television shows, but there will be no influence on him and he will continue to be an "angel."

\(^12\) Sholl, supra note 27, at 1334.

\(^13\) Id.

\(^14\) Schaefer, supra note 67, at 5.
of the more enlightened scholars see that the time is ripe for a new approach.\textsuperscript{85}

\textsuperscript{85} One scholar recently noted:

These needs . . . change with civilization, and the nature of evidence, until now dependent on the constricting law of evidentiary procedure, should be liberalized and recast in the light of present needs so as to eradicate the outmoded rules of past centuries. . . . It is the substance of justice, not its nice or refined details, that should ordinarily control, absent constitutional protections. . . . Relevancy should thus initially determine admissibility.

Forkosch, \textit{supra} note 15, at 1381-82.