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When the Cops Were Not "Handcuffed"

by Yale Kamisar

ARE WE LOSING the war against crime? Is the public getting a fair break? Has the pendulum swung too far to the left? Do the victims of crime have some rights, too? Are the courts handcuffing the police?

If there were a hit parade for newspaper and magazine articles, speeches and panel discussions, these questions would rank high on the list. Not only are they being raised with increasing frequency, but they are being debated with growing fury.

Last year, probably the most famous police chief in the United States, William H. Parker of Los Angeles, protested that American police work has been "tragically weakened" through a progressive "judicial takeover." These are strong words, but Boston District Attorney Garrett Byrne, then president of the National Association of District Attorneys, easily topped the chief with the cry that the Supreme Court is "destroying the nation." (Despite this rant, Mr. Byrne has since been appointed to the President's newly established National Crime Commission, which has been assigned the task of making a systematic study of the entire spectrum of the problems of crime.)

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This year, Michael J. Murphy, former Police Commissioner of New York, is the leading contender for anti–Supreme Court honors. Mr. Murphy's pet line is: "We [the police] are forced to fight by Marquis of Queensberry rules while the criminals are permitted to gouge and bite."

Not infrequently, one who dares to defend the Court, or simply to explain what the Court is doing and why, is asked which side he is on: the side of law and order—or the side of the robber, the dope peddler and the rapist. Any defense of the Court is an attack on the police. And any attack on the police (to quote Mayor Sam Yorty of Los Angeles, and he is not alone) is an "attack on our American system," perhaps even part of "a world-wide campaign by Communists, Communist dupes and sympathizers."

Today, the course of the Court is clear. Once concerned with property rights much more than with human liberty, it is now, as Anthony Lewis wrote several years ago, "the keeper, not of the nation's property, but of its conscience.". If that role constitutes lending aid and comfort to the criminal element, then the Court is guilty.

As Judge Walter Schaefer of the Illinois Supreme Court pointed out in his famous Holmes Lecture of a decade ago, however, many of those safeguards of criminal procedure which we now take for granted came surprisingly late. Whether a state had to appoint counsel for an indigent defendant was a question which did not confront the Court until 1932, and it held then that counsel had to be provided only when the defendant was facing possible death sentence. Whether the state could convict a defendant on the basis of a coerced confession was an issue first presented to the Court in 1936, and all the Court was asked to do then was ban confessions extracted by brutal beatings.

What was it like in 1910 and 1920 and 1930 when the effectuation and implementation of criminal procedural safeguards were pretty much left to the states themselves? What was it like in the days when, as Dean Erwin Griswold of the Harvard Law School recently pointed out, "some things that were rather clearly there" (in the Constitution) had not yet "been given the at-

tention and effect which they should have if our Constitution is to be a truly meaningful document"? Or, if you prefer, what was it like in the "good old days" before the Supreme Court began to mess up things?

In 1910, Curtis Lindley, president of the California Bar Association, declared the need for an "adjustment" in our criminal procedures "to meet the expanding social necessity." "Many of the difficulties," he continued, "are due to an exaggerated respect for the individual. . . ." He proposed (1) that a suspect be interrogated by a magistrate and, if he refused to answer the inquiries, that the state be permitted to comment on this fact at the trial; and (2) that the requirement of a unanimous verdict of guilty be reduced to three-fourths, "except possibly in cases where infliction of the death penalty is involved." This, he pointed out, would still "give the defendant three-fourths of the show."

The following year, 1911, in a hard-hitting Atlantic Monthly article entitled "Coddling the Criminal," New York prosecutor Charles Nott charged that "the appalling amount of crime in the United States compared with other civilized countries is due to the fact that it is generally known that the punishment for crime in America is uncertain and far from severe." Where lay the fault? According to Nott, the two law-enforcement obstacles which had to be cleared were the protection against double jeopardy and the privilege against self-incrimination.

Eight years later, Hugo Pam, president of the Institute of Criminal Law and Criminology, also addressed himself to the "crime problem," one which had been greatly aggravated by "the advent of the automobile." As he viewed the situation in 1919, "the boldness of the crimes and the apparent helplessness of the law have embittered the public to the extent that any advance in treatment of criminals save punishment is looked upon with disfavor." Law-enforcement officials, he noted, "have repeatedly charged that in the main these serious crimes have been committed by people on probation or parole." It followed, of course, that there was a strong movement afoot to curtail or completely repeal these provisions.

The following year, 1920, and again in 1922, Edwin W. Sims, the first head of the newly established Chicago Crime Commission, added his voice to the insistent demands "for action" that would reduce crime. He had the figures: "During 1919 there were more murders in Chicago (with a population of three million) than in the entire British Isles (with a population of 40 million)." Moreover, the prosecution had obtained only 44 convictions as against 336 murders. The situation called for strong words and Mr. Sims was equal to the occasion:

"We have kept on providing criminals with flowers, libraries, athletics, hot and cold running water, and probation and parole. The tender solicitude for the welfare of criminals publicly expressed by social workers conveys to 10,000 criminals plying their vocation in Chicago the mistaken impression that the community is more interested in them than it is in their victims. . . .

"There has been too much mollycoddling of the criminal population. . . . It is time for plain speaking. Murderers are turned loose. They have no fear of the police. They sneer at the law. It is not a time for promises. It is a time for action. The turning point has come. Decency wins or anarchy triumphs. There is no middle course."

If Edwin Sims were still in fine voice today, he would be much in demand. At home and on the road, he would probably outdraw even Messrs. Byrne, Murphy and Parker. About all Sims would have to do would be to strike "social workers," insert "Supreme Court," and maybe add a paragraph or two about recent Supreme Court decisions. But his era, I repeat, was 1920.

The nineteen-twenties were troubled times. In speaking of the need for a National Crime Commission, The New Republic of Aug. 26, 1925, declared: "It is no exaggeration to assert that the administration of criminal justice has broken down in the United States and that in this respect American state governments are failing to perform the most primitive and most essential function which society imposes on government." At about the same time, the great criminologist Edwin H. Sutherland reported: "Capital punishment has been restored in four states

since the war, and in many places there is a strenuous demand for the whipping post. . . . Crime commissions are recommending increased severity and certainty of punishment."

By 1933, the public had become so alarmed at an apparent increase in professional criminality that a U.S. Senate investigating committee, headed by Royal S. Copeland of New York, scoured the country for information which could lead to a national legislative solution.

The Detroit hearings brought out that the murder rate in the United States was nine times higher than in England and in Wales, "where they have basically the same Anglo-Saxon institutions," and even twice as high as Italy's, "the home of the Mafia, the 'Black Hand.' " In New York, a witness solemnly declared that "the crime situation in this country is so serious that it approaches a major crisis in our history, a crisis which will determine whether the nation is to belong to normal citizens or whether it is to be surrendered completely to gangster rule."

In Chicago, drawing upon his 20 years of experience as a lawyer, prosecutor and municipal judge, a witness concluded that "there is entirely too much worry, consideration and too many safeguards about the criminal's constitutional rights." He recommended for the Senate committee's consideration Illinois's new "reputation vagrancy law, which provides that all persons who are reputed to habitually violate the criminal laws and who are reputed to carry concealed weapons are vagrants." "Under this law," he reported, "we have harassed and convicted . . . numerous mad dogs of the West Side." (The following year, the Illinois Supreme Court struck down the law as unconstitutional.)

Senator Copeland told assembled witnesses of his desire for "a frank expression of opinion, no matter how critical you may be of existing institutions." Most of the witnesses were equal to the challenge.

A Maj. Homer Shockley urged that "constitutional and statutory guaranties, applicable to the average citizen, be suspended by special court procedure for the person who is known to be an habitual criminal . . . or who habitually consorts with criminals, to the end that the burden of proof of innocence of any fairly well

substantiated charge be squarely placed on the accused; that he be tried without the benefit of a jury; and that, if convicted, all of his property and wealth be confiscated except such portions as the accused can prove were honestly gained by honest effort." The presumption of innocence is "fair enough" for the normal person, but not "for the dirty rat whom everybody knows to be an incurably habitual crook."

(Lest the major be peremptorily dismissed as a nonlegally trained commentator, it should be noted that two years earlier the dean of a Middle Western law school was reported to have advocated the establishment of a commission empowered to convict persons as "public enemies" and fix terms of their removal from society without convicting them for any specific offense, as historically required.)

Citing Toronto, where whippings were said to have broken a wave of jewelry-store stick-ups, another witness at the 1933 hearings, New York Police Commissioner Edward Mulrooney, came out for 30 or 40 lashes to be applied at the time a criminal entered prison, others every six months thereafter.

Lewis E. Lawes, the famous warden of Sing Sing prison, exclaimed: "Strip our hysterical reaction in the present emergency and what have you? A confession that our agencies are not keeping step with crime, are falling short of their mark. Yesterday it was robbery, today it is kidnapping, tomorrow it will be something else. With every new crime racket will come a new hysteria." After delivering these refreshingly sober remarks, Warden Lawes proceeded to disregard his own advice:

"I think I am a liberal, but at the same time, in case of war I would fight for the country, and this is war. I believe if they do not have some form of martial law against this particular group [racketeers and kidnappers] that there will come in . . . lynch law and from lynch law they will have the martial law. . . . It seems to me that this is a war to be stamped out quickly and could be stopped in 60 days if all the authorities get together honestly and let the public know exactly what they are doing. . . . If I were Mussolini I could do it in 30 days."

Even renowned defense attorney Sam Liebowitz, honored "to

be called upon to speak from the viewpoint of the criminal lawyer," seemed to get into the swing of things. He proposed a "national vagrancy law," whereby if a well-dressed crook "cannot give a good account of himself" to a police officer who spots him on the street or in his Cadillac "you take him into the station house and question him, and then take him before a judge. The judge says, 'Prove you are earning an honest living.'

"No honest man need rebel against a thing like that," contended the great criminal lawyer. "If you are earning an honest dollar, you can show what you are doing. . . . It is the crook that sets up the cry of the Constitution, and the protection of the Constitution, when he is in trouble."

Detroit prosecutor Harry Toy agreed that "a national vagrancy act—we call it a public-enemy act—is a wonderful thing." Mr. Liebowitz had assumed that a national vagrancy act would require an amendment to the privilege against self-incrimination, but the Detroit prosecutor insisted that such an act "could be framed under the present Federal Constitution as it now stands." (His own state's "public-enemy" law was held unconstitutional by the Michigan Supreme Court a few months later. The following year New Jersey made it a felony, punishable by 20 years' imprisonment, to be a "gangster"; the U.S. Supreme Court struck the law down in 1939 on the grounds of vagueness and uncertainty.)

Chicago Municipal Court Judge Thomas Green plumped for an amendment to the Fourth Amendment permitting searches of persons "reputed" to be criminals and to be carrying firearms. The reason the framers of the Constitution stressed personal liberty, he explained, was that "there were no gangsters" then. "I think personal liberty is a wonderful thing," he hastened to add, "but today the man who takes advantage of personal liberty is the gangster, the gunman, the kidnapper."

Virtually every procedural safeguard caught heavy fire in the Senate hearings. One witness called "the right to the 'shield of silence' " (the privilege against self-incrimination) "the greatest stumbling block to justice and incentive to crime in all common-law countries." Another maintained that "the present provisions against self-incrimination were intended to protect the

citizen against the medieval methods of torture, and they have become obsolete in modern life."

A report of the International Association of Chiefs of Police listed as "contributing factors to our serious crime problem . . . the resort to injunctions, writs of habeas corpus, changes of venue, etc., all with a view of embarrassing and retarding the administration of justice." The "founders of the Republic," it was argued, "never intended that habeas corpus and bail should be granted to a thug or serious thief."

Judge William Skillman of Detroit Criminal Court, known as "the one-man grand jury," maintained that permitting the state to appeal an acquittal "would do much to insure to society, represented by the state, a fair break in the trial of a lawsuit" because "the so-called 'former jeopardy clause' . . . has many times been used as a shield by a weak or timid or even venal judge." Capt. A. B. Moore of the New York State Police proposed that an "expert adviser" or legally trained "technician" sit with and retire to the jury room with the jury "to advise them [on] those technicalities that had been implanted in their minds by a very clever attorney."

So much for the teens and twenties and thirties, the so-called golden era when the U.S. Supreme Court kept "hands off" local law enforcement.

When Chief Parker warns us in our time that "the police . . . 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," I wonder: When, if ever, weren't we supposedly losing the war against crime? When, if ever, weren't law enforcement personnel impatient with the checks and balances of our system? When, if ever, didn't they feel unduly "limited"? When, if ever, will they realize that our citizens are free *because* the police are "limited"?

When an official of the National District Attorney's Association insists in our time: "This country can no longer afford a 'civil-rights binge' that so restricts law-enforcement agencies that they become ineffective and organized crime flourishes," I wonder: When, if ever, in the opinion of law-enforcement personnel, could this country afford a "civil-rights binge"? When, if ever, wasn't there a "crime crisis"? When, if ever, weren't there procla-

mations of great emergencies and announcements of disbelief in the capacities of ordinary institutions and regular procedures to cope with them?

When Chicago's famous police chief, O. W. Wilson, stumps the country, pointing to the favorable crime picture in England, and other nations "unhampered" by restrictive court decisions, and exclaiming that "crime is overwhelming our society" (at the very time he is accepting credit in Chicago for a 20 per cent drop in crimes against the person), I am reminded of a story, apocryphal no doubt, about a certain aging promiscuous actress. When asked what she would do if she could live her life all over again she is said to have replied: "The same thing—with different people."

I venture to say that today too many law-enforcement spokesmen are doing "the same thing—with different people." They are using different crime statistics and they are concentrating on a different target—the Supreme Court rather than the state courts, parole boards, social workers and "shyster lawyers"—but they are reacting the same way they reacted in past generations.

They are reconciling the delusion of our omnipotence with the experience of limited power to cope with the "crime crisis" by explaining failure in terms of betrayal. To borrow a phrase from Dean Acheson, they are letting a "mood of irritated frustration with complexity" find expression in "scapegoating."

Secretaries and ex–Secretaries of State know almost as much about scapegoating as Supreme Court justices. If the task of containing or controlling "change" in Africa or Asia is beyond our capabilities, to many people it means simply, or at least used to mean simply, that the State Department is full of incompetents or Communists or both. Here, as elsewhere, if things seem to be going wrong, but there is no simple and satisfactory reason why, it is tempting to think that "the way to stop the mischief is to root out the witches."

Crime is a baffling, complex, frustrating, defiant problem. And as James Reston once pointed out in explaining Barry Goldwater's appeal to millions of Americans: "The more complicated life becomes, the more people are attracted to simple solutions; the more irrational the world seems, the more they long for ra-

tional answers; and the more diverse everything is, the more they want it all reduced to identity."

As the Wickersham Report of 1931 disclosed, the prevailing "interrogation methods" of the nineteen-twenties and thirties included the application of the rubber hose to the back or the pit of the stomach, kicks in the shins and blows struck with a telephone book on the side of the victim's head.

These techniques did not stem the tide of crime. Nor did the use of illegally seized evidence, which most state courts permitted as late as the nineteen-forties and fifties. Nor, while they lasted, did the "public-enemy" laws, or the many criminal registration ordinances stimulated by the Copeland hearings.

If history does anything, it supports David Acheson, who, when U. S. Attorney for the District of Columbia (the jurisdiction which has borne the brunt of "restrictive" court rules), dismissed the suggestion that "the crime rate will go away if we give back to law-enforcement agencies 'power taken from them by Federal court decisions' " with the assurance that "the war against crime does not lie on this front. Prosecution procedure has, at most, only the most remote, casual connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."

Unfortunately this speech was not given the publicity it deserved. Nor were the refreshingly cool, thoughtful remarks of the new Deputy Attorney General, Ramsey Clark, who last August pointed out:

"Court rules do not cause crime. People do not commit crime because they know they cannot be questioned by police before presentment, or even because they feel they will not be convicted. We as a people commit crimes because we are capable of committing crimes. We choose to commit crimes. . . . In the long run, only the elimination of the causes of crime can make a significant and lasting difference in the incidence of crime.

"But the reduction of the causes of crime is a slow and arduous process and the need to protect persons and property is immediate. The present need for greater protection . . . can be filled not by . . . court rulings affirming convictions based on

confessions secured after hours of questioning, or evidence seized in searches made without warrants. The immediate need can be filled by more and better police protection."

Chief Parker has expressed the hope that in searching for answers to our crime problem the new National Crime Commission "not overlook the influencing factor of the judicial revolution." The greater danger is that too much attention will be paid to this "revolution."

Critics of the courts are well represented, but not a single criminologist or sociologist or psychologist sits on the 19-man commission. These are conspicuous omissions for a group asked "to be daring and creative and revolutionary" in its recommendations. These are incredible omissions for those of us who share the views of the Deputy Attorney General that "the first, the most pervasive and the most difficult" front in the war on crime "is the battle against the causes of crime: poverty, ignorance, unequal opportunity, social tension, moral erosion."

By a strange coincidence, the very day the President announced the formation of the Crime Commission, the F.B.I. released new figures on the crime rate—soaring as usual—and J. Edgar Hoover took a sideswipe at "restrictive court decisions affecting police prevention and enforcement activity." And at their very first meeting, last September, the commission members were told by Mr. Hoover that recent court decisions had "too often severely and unfairly shackled the police officer."

Probably the most eminently qualified member of the President's Commission is Columbia Law School's Herbert Wechsler, the director of the American Law Institute and chief draftsman of the recently completed Model Penal Code, a monumental work which has already had a tremendous impact throughout the nation. The commission would have gotten off to a more auspicious start if, instead of listening to a criticism of recent court decisions, its members had read (or reread) what Mr. Wechsler, then a young, obscure assistant law professor, once said of other crime conferences in another era of "crisis" (those called by the U. S. Attorney General and a number of states, including New York, in 1934–36):

"The most satisfactory method of crime prevention is the solu-

tion of the basic problems of government—the production and distribution of external goods, education and recreation. . . . That the problems of social reform present dilemmas of their own, I do not pretend to deny. I argue only that one can say for social reform as a means to the end of improved crime control what can also be said for better personnel but cannot be said for drastic tightening of the processes of the criminal law—that even if the end should not be achieved, the means is desirable for its own sake."